RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN DEVELOPED AND DEVELOPING COUNTRIES: A COMPARISON OF THE UNITED STATES AND INDONESIA

By

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Enforcement of Foreign Arbitral Awards in the US and Indonesia

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LL.M Thesis November 1993
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To my wife, Vita Triwahyuningsih, and my daughter,
Camilla Vinanda Ramadhani.

ABSTRACT

Foreign arbitral awards should be recognizable and enforceable. However, this is not always the case; they are recognizable and enforceable in some countries but not in others. Those countries that recognize and enforce awards are mostly developed countries, whereas those which do not are mainly developing countries.

This study compares and contrasts the recognition and enforcement of foreign arbitral awards in developed and developing contries with a view to discovering why they are recognizable and enforceable in some countries but not in others. In this study, the United States is representative of the developed countries, while Indonesia represents the developing countries.

Three factors determining whether or not foreign arbitral awards are recognizable and enforceable are identified in this study. They are the availability and adequacy of the legal framework, the attitude of the business community, and the attitude of the courts. The inquiry, accordingly, focuses on an examination of those factors in both countries. The examination reveals that the third factor is the determining element regarding the recognition and enforcement of foreign arbitral awards.

SOMMAIRE

Les sentences arbitrales étrangères devraient être susceptibles d'homologation et d'exécution dans toutes les juridictions. Mais, ceci n'est pas le cas. S'il est possible d'homologuer et d'exécuter les sentences arbitrales dans certains pays, en particulier les pays développés, il est par contre difficile, voire impossible de le réaliser dans d'autres, surtout les pays en voie de développement.

La présente étude, qui porte sur une analyse de la divergence entre les pays développés et les pays en voie de développement en matière d'homologation et d'exécution des sentences arbitrales étrangères, vise à découvrir les raisons de cette divergence. À cet effet, nous avons étudié deux pays, à savoir, les États Unis et l'Indonésie, ce dernier servant d'exemple des pays en voie de développement, et le premier, comme representant des pays développés.

En outre, nous avons identifié et analysé trois facteurs pour leur rôle déterminant en matière d'homologation et d'exécution des sentences arbitrales. Il s'agit de l'existence d'un cadre juridique efficace, l'attitude de la communauté commerciale et enfin, l'attitude des tribunaux. L'analyse de ces facteurs dans les deux pays montre que le troisième facteur constitue l'élément clé en ce qui concerne l'homologation et l'exécution des sentences arbitrales.

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LIST OF ABBREVIATIONS

AAA	American Arbitration Association.
AB	Algemeene Bepalingen van Wetgeving (the Code containing the provision of Private International Law).
Am. J. Comp. L.	American Journal of Comparative Law.
Arb. Int'l	Arbitration International.
Arb. J.	Arbitration Journal.
BANI	Badan Arbitrase Nasional Indonesia (Indonesian National Arbitration Board).
Canada-U.S. L.J.	Canada United States Law Journal.
CC	Civil Code.
CCP	Civil Code of Procedure.
Cir.	Circuit
Com. J. Int'l L.	Commercial Journal of International Law.
Com. L. Y.B. Int'l L.	Commercial Law Year Book of International Law.
Com. L.Y.B. Int'l Bus.	Commercial Law Year Book of International Business.
C.D. Cal.	United States District Court for the Central District of California.
D.C. Ga.	United States District Court for the District of Georgia.
D.D.C.	District Court, District of Columbia.
D.Del.	United States District Court for the District of

	Delaware.
FAA	Federal Arbitration Act.
FARA	Foreign Agents Registration Act.
FCI	Fertilizer Corporation of India.
FCN	Friendship Commerce and Navigation.
FDC	Fisheries Development Corporation.
F.Supp.	Federal Supplement.
F.2d	Federal Reporter, Second Series.
Ga. J. Int'l Comp. L.	Georgia Journal of International and Comparative Law.
Harv. Int'l L.J.	Harvard International Law Journal.
HIR	Herziene Inlands Reglement (the Code of Procedure).
ICC	International Chamber of Commerce.
ICSID	International Convention on the Settlement ofInvestment Disputes.
Int'l Tax Bus Lawyer	International Tax and Business Lawyer.
Int'l Comp. L.Q.	International Comparative Law Quarterly.
Int'l L. Pol.	International Law and Politics.
JCAA	Japan Commercial Arbitration Association.
J. Int'l Arb.	Journal of International Arbitration.
J. Mar. L. Com.	Journal of Maritime Law and Commerce.
KCAB	Korean Commercial Arbitration Board.
LCIA	London Court of International Arbitration.

L/C	Letter of Credit.
L.Ed.2d	Lawyers' Edition, United States Supreme Court Reports, Second Series.
LIAMCO	Libyan American Oil Co.
L.N.	Lembaran Negara (State Gazette).
Northwestern J. Int'l L. Bus.	Northwestern Journal of International Law and Business.
NMB	Navigation Maritime Bulgare.
N.Y.	New York.
N.Y.S.2d.	New York Supplement Second Series.
Rv	Reglement op de Burgerlijke Rechtsvordering (the Code of Civil Procedure).
S.Ct.	Supreme Court Reporter.
S.D.N.Y.	United States District Court for the Southern District of New York.
TCPL	Trading Corporation of Pakistan Limited.
Texas L.R.	Texas Law Review.
UNCITRAL	United Nation Commission on Trade Law.
U.S.	United States Supreme Court Reports.
Virginia J. Int'l L.	Virginia Journal of International Law.
Yale J. W. Pub. Order	Yale Journal of World Public Order.
Yale L.J.	Yale Law Journal.

TABLE OF CASES

	Page
American Safety Equipment Corp. v. *J.V. Maguire & Co., Inc.*, 391 F.2d 821, 826 (2d Cir. 1968).	55, 60
Beckman Instruments, Inc. v. *Technical Dev. Corp.*, 433 F.2d 55 (7th Cir. 1970).	60
Bremen v. *Zapata Offshore Co.*, 407 U.S.1,12(1972).	47, 49, 61, 62
E.D. & F. MAN (Sugar) Limited v. *Yani Haryanto*, The Supreme Court Decision No. 1 Pen. Ex'r/Arb. Int./Pdt/1991.	69, 97, 105
Fertilizer Corporation of India (FCI)v. *IDI Management, Inc.*(IDI), 517 F.Supp. 948 (1981).	52, 53
Gilbert v. *Burnstine*, 255 N.Y.348(1931).	43
Gotaverken v. *G.N.M.T.C* (1979) VI Yearbook Comm. Arb. 237.	58
Harvey Aluminium, Inc. v. *United Steelworkers of America*, 263 F. Supp. 488 (C.D. Cal. 1967).	57
Imperial Ethiopian Gov't v. *Baruch-Foster Corp.*, 535 F. 2d 334 (5th Cir. 1976).	58
International Produce, Inc. v. *A/S Rosshavet*, 638 F.2d 548 (1981).	58
Island Territory of Curacao v. *Solitron Devices,Inc.*, 489 F.2d 1313, 1319(2d Cir. 1973), 416 U.S.986(1974).	41, 43
Kulkundis Shipping Co. v. *Amtorg Trading Corp.*, 126 F.2d 978,983(2d Cir.1942).	47
Laminoirs Trefileries-Cableries des Lens v. *Southwire*, F. Supp. 1063 (D.C. Ga. 1980).	49, 55, 56
Landegger v. *Bayerische Hypotheken und Wechsel Bank*, 357 F. Supp. 692 (S.D.N.Y. 1972).	59

Libyan American Oil Co. (LIAMCO) v. *Socialist People's Libyan Arab Jamahirya* (Libya), 482 F. Supp. 1175 (D.D.C. 1980). 62

Michele Amoruso E. Figli (the Amosruso) v. *Fisheries Development Corporation* (FDC), 499 F. Supp. 1074, 1080 (S.D.N.Y.1980). 54

Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth*, Inc., 473 U.S.614,631(1985). 19, 47, 60

Murray Oil Products Co. v. *Mitsui Co.*, 146 F.2d 381 (2d Cir. 1944). 37

Navigation Maritime Bulgare v. *PT. Nizwar*, Supreme Court Decision No. 2944 K/Pdt/1983. 36, 75, 97

Orion Shipping & Trading Co. v. *Eastern States Petroleum Corp. of Panama*, 312 F. 2d. 299, 300 (2d Cir. 1963), 373 U.S. 949, 83 S.Ct. 1679, 10 L. Ed. 2d 705). 57

Parson & Whittemore Overseas Co. Inc. v. *Societe Generale de l'Industrie da Papier* (RAKTA), 508 F.2d.969,973(2d Cir.1974). 48, 56, 58, 61

Petroleum Transport Ltd. v. *Yacimientos Petroliferos Fiscales*, 419 F. Supp. 1233, 1235 (S.D.N.Y. 1976). 57

Petroleum Cargo Carriers, Ltd. v. *Unitas, Inc.*, Misc.2d 222, 220 N.Y.S.2d 724 (Supp.Ct.N.Y.Co. 1961). 51

Prima Paint v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). 55

PT UJ v *PT MU*, Supreme Court Decision No. 1840 K/Pdt/1986, dated 23 October 1991 and published in May 1992. 106

Robert Lawrence Co. v. *Deveonshire Fabrics, Inc.*, 271 F.2d 402, 408 (2d Cir. 1959). 38

Scherk v. *Alberto Culver*, 417 U.S.506,41 L.Ed.2d 270 (1974). 31, 33, 49, 62

Sumitom v. *Parakopi Compania Maritima*, 477 F.Supp. 737 (S.D.N.Y. 1979). 50, 51

Trading Corporation of Pakistan Limited (TCPL) v. *PT. Bakrie Brothers*, The South Jakarta District Court Decision No. 64/Pdt/G/1984. 68, 97, 106,107, 108

Transmarine Seaway Corp. of Monrovia v. *Marc Rich*, 480 F. Supp. 352, 358 (S.D.N.Y. 1979). 55

Wilko v. *Swan*, 346 U.S. 427 (1953). 60, 62

Zip Mfg., Co. et al. v. *Pep Mfg., Co.*, 44 F.2d 184 (D.Del. 1930). 60

TABLE OF CONTENTS

		Page
ABSTRACT		iii
SOMMAIRE		iv
ACKNOWLEDGMENTS		v
LIST OF ABREVIATIONS		vi
TABLE OF CASES		ix
TABLE OF CONTENTS		xii
I.	INTRODUCTION	1
	A. The Concept of Arbitration	1
	1. International Arbitration	2
	2. Foreign Arbitration	5
	3. Definition of "Commercial"	6
	B. The Scope of the Study	7
	C. The Disposition	9
II.	INTERNATIONAL COMMERCIAL ARBITRATION	11
	A. International Commercial Arbitration as a Form of Alternative Dispute Resolution	11
	B. International Commercial Arbitration in Developed and Developing Countries	15
	C. The New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards	24
	1. General Review	24
	2. Application	26
	3. Recognition and Enforcement: Definition	27
	4. Reservations	28
	5. Defenses	29

III. RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THE UNITED STATES 32
A. Introduction 32
B. Legal Bases 32
1. The New York Convention of 1958 33
2. Implementing Legislation 34
3. Other Bases 42
C. The Attitude of Business Community: Voluntary Enforcement 43
D. The Attitude of the United States' Courts towards International Commercial Arbitration 46
1. General Attitude: Pro-enforcement Policy 46
2. The Courts' Attitude towards Public Policy Defense 48
3. The Courts' Attitude towards the Limited Coverage of the New York Convention 50
4. The Courts' Attitude towards Article V Defenses 54

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN INDONESIA 65
A. Introduction 65
B. Problems of Recognition and Enforcement of Foreign Arbitration Awards in Indonesia 66
1. Before 1981: New York Convention of 1958 Had Not Been Ratified 66
2. Between 1981-1990: Lack of Implementing Legislation 67
3. Between 1990 - 1991: A New Development 68

4. After 1991: A Historical Milestone 69
C. Legal Bases 71
1. International Convention 72
2. Implementing Regulation 75
3. Other Legal Bases prior to 1990 88
D. The Attitude of Business Community 92
E. The Attitude of Indonesian' Courts 98
1. General Attitude: Non-enforcement Policy 98
2. The Attitude towards Public Policy Defense 103
3. The Attitude towards the Limited Coverage of the New York Convention 106
4. The Attitude towards Article V Defenses 107

V. CONCLUSIONS AND RECOMMENDATIONS 109
A. Conclusions 109
B. Recommendations 121

BIBLIOGRAPHY 124

CHAPTER I

INTRODUCTION

A. The Concept of Arbitration

The word "arbitration" originates the Latin word "arbitrare," which literally means an authority to handle something based on wisdom.[1] The term arbitration is defined by Lawrance and William as a method of settling disputes and differences between two or more persons, nominated for the purpose, for determination after a hearing in a quasi-judicial manner, either instead of having recourse to an action at law, or, by order of the Court, after such action has been commenced.[2] Another expert defines it as a contractual proceeding, whereby the parties to any controversy or dispute, in order to obtain an inexpensive and speedy final disposition of the matter involved, select judges of their own choice and by consent submit their controversy to such judges for determination, in the place of the tribunals provided by the ordinary process of law.[3] Based on these definitions, it can be said that arbitration is a means of dispute settlement by a third party, whose decision is final and legally binding. It is used as an alternative to court adjudication.

The use of the words "international" and "commercial" in connection with

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[1]Subekti, *Arbitrase Perdagangan* (Commercial Arbitration)(Jakarta: Binacipta, 1981) at 1.

[2]D.M. Lawrance, *A Treatise on the Law and Practice of Arbitrations & Awards for Surveyors, Valuers, Actioneers and Estate Agents* (London: The Estates Gazette Limited, 1959) at 1.

[3]M. Domke, *The Law and Practice of Commercial Arbitration* (Illinois: Callaghan & Company, 1968) at 1.

arbitration has certain connotations. The word "international" is used to distinguish arbitration from that which is purely "national" or "domestic," and "commercial" functions to differ it from that which is not commercial. Nevertheless, when an arbitration is called "international" and when it is said to be "commercial" the meaning is still ambiguous. There is no a single definition: one definition differs from another.

1. "International" Arbitration

Alan Redfern and Martin Hunter use two criteria in order to define arbitration as international: the nature of the dispute, and the nationality and habitual residence or seat of the parties.[4] With regard to the first criterion, an arbitration is treated as international if it involves the interests of international trade. A similar definition is used in Article 1492 of the New Code of Civil Procedure of France.[5] The code itself does not give further explanation about what is meant by the interests of international trade. However, as the article is adopted from previous case laws, in which the concept of international trade is understood in a broad sense,[6] it should be conceived as such. International trade in this sense embraces the movement of goods or money from one country to another. Using the second criterion, an

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[4]A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 1991) at 19-20.

[5]Decree No. 81 - 500 of 12 May 1981.

[6]See J.L. Delvolve, *Arbitration in France: The French Law of National and International Arbitration* (Deventer: Kluwer Law and Taxation Publishers, 1982) at 83.

arbitration is international if it involves parties having different nationalities, habitual places of residence or seats. This approach has been followed in the European Convention of 1961 and in the English legislation.[7] The European Convention places emphasis on the difference between habitual place of residence and the seat of the parties, whereas the English legislation focuses on both the difference of the nationality and habitual place of residence or the seat of the parties.

The UNCITRAL Model Law (hereinafter the Model Law) sets out a more detailed definition, which embraces the two criteria mentioned above, as follows.

An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; 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.[8]

The recurring definition of international arbitration which is based on all the above-mentioned criteria does not always seem to be strong enough to grant real internationality. There will still be loopholes in the international field of arbitration. Linking arbitration to the subjective criterion to identify it as international arbitration

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[7]A. Redfern & M. Hunter, *supra* note 4 at 12.

[8]Art. I(3) of the UNCITRAL Model Law on International Commercial Arbitration.

does not seem to be satisfactory, since there can in fact be national procedural arbitration, and a simultaneous international difference under the subjective profile because the parties to the proceedings belong to different states. Accordingly, the national nature of the arbitration can still exist. A similar result will occur when the internationality of arbitration is linked to international trade, since trade is often called international because the parties to the transaction belong to different states. This means that such a criterion does not differ from the subjective criterion.

As an alternative to the subjective and the nature of the disputes criteria, Mauro Rubino-Samartano suggests that one can take into account the procedure to be applied by the arbitrators, which seems appropriate since arbitration constitutes legal proceedings.[9] Nevertheless, concerning this criterion one can immediately object that under the applicable procedural law, the arbitration will be either national or foreign, but not international. Using this approach international arbitration would only be an arbitration which takes place abroad between parties with different nationalities.

Even though there is no a single definition, it has been an on going practice that the internationality of arbitration is eventually determined by national law. Every country may have its own definition which varies from one to another. Each country may apply either partial or the entire criteria mentioned above.

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[9]M. Rubino-Sammartano, "International and Foreign Arbitration,"(1989) 6 J.Int'l Arb. 86.

2. "Foreign" Arbitration

In addition to the ambiguity evident in its definition, "international" arbitration is also frequently confused with "foreign" arbitration. It is questioned whether "foreign" is a synonym for "international," or if it has its own meaning.

Like "international" arbitration, "foreign" arbitration is also used to distinguish it from "national" or "domestic" arbitration. Such a distinction is important to avoid problems which may arise in practice. In most countries, foreign arbitrations (hereinafter including foreign arbitral awards) are treated differently from domestic ones, and the statutory provisions governing such arbitrations are mostly different as well. However, concerning what is called foreign arbitration, every country may have its own definition, which may vary from one to another. Swedish law defines foreign arbitration as an arbitration which takes place in a foreign country, or in Sweden, but in which one of the parties is not Swedish.[10] The United States considers "foreign" to mean an arbitration which concerns assets located in foreign countries, or services to be performed in foreign countries, or which may have another reasonable link with one or more foreign states, though it takes place in the United States and involves United States citizens.[11] The term "foreign" is also used in international conventions concerning arbitration. The Geneva Convention of 1927 is entitled "The Convention on the Enforcement of Foreign Arbitral Awards,"[12] and the New York Convention

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[10]*Ibid.* at 85.

[11]S. 202 of the United States Arbitration Act.

[12]Geneva Convention of 1927.

of 1958 is known by the title, "Convention on the Recognition and Enforcement of Foreign Arbitral Awards."[13] In the New York Convention, foreign arbitral awards are considered to be awards made in a state other than the state where the recognition and enforcement of such awards are sought.[14] From this criterion, it seems that foreign arbitration may be a national or domestic arbitration which is viewed from another state, and accordingly there is no substantial difference between national and foreign arbitration.

Mario Rubino-Sammartano uses geographic and procedural criteria.[15] The first criterion refers to the place where the award is made, whereas the second indicates the applicable procedural law. According to these criteria, an award made in France is considered a French award, and an award made in accordance with the applicable procedural law of Canada is a Canadian award, even if it is made in Switzerland. Similar to the criteria mentioned earlier, these criteria cannot also substantially be detached from the national or domestic nature of arbitration.

3. Definition of "Commercial"[16]

International commercial arbitration is a convenient term more accepted in international trade practice than simply that of international arbitration. Even though

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[13]The New York Convention of 1958 on Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958 [hereinafter *the New York Convention*].

[14]Art. I(1) of *the New York Convention*.

[15]M. Rubino-Sammartano, *supra* note 9 at 86.

[16]See Ch. III for further discussion.

there is no universally accepted definition of the term "commercial," it has now become a convenient part of the language. The functions of the word "commercial" are to distinguish international commercial arbitrations from international arbitrations between states concerned with boundary disputes and other political issues, and to distinguish them from arbitrations concerned with such matters as property tenure, employment and family law.[17] Such a distinction is very important especially when recognition and enforcement of an arbitral award is concerned. In a state which has adopted the New York Convention and has declared the commercial reservation, an arbitral award which is not concerned with commercial disputes cannot be recognized and enforced. It is suggested that whether or not a dispute is "commercial" should be interpreted as broadly as possible, which includes all types of trade.

No matter what the criteria used and how it is defined, the last stage to determine whether or not an arbitration is international or foreign or commercial is left to the national laws, which may vary from one country to another.

B. The Scope of the Study

There is no doubt that international commercial arbitration is one of the ways most favored by the parties involved in international commercial disputes. This is largely due to the values of quickness, cheapness, flexibility and confidentiality which have become associated with arbitration and are universally recognized.

Recognition and enforcement of foreign arbitral awards is a very, if not the

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[17]A. Redfern & M. Hunter, *supra* note 4 at 15.

most, important and crucial part of the whole process of international commercial arbitration. The reason is that the success and failure of international commercial arbitration are eventually measured by this stage. An international commercial arbitration cannot be said to be successful if the award rendered cannot be recognized and enforced. The possible advantages of arbitration become meaningless if the decision rendered in arbitration is unenforceable.

For most countries, especially developed countries, recognition and enforcement of foreign arbitral awards is not a big problem. This means that they generally recognize and enforce foreign arbitral awards. However, for several countries, especially developing countries, recognition and enforcement of foreign arbitral awards remains problematic. In these countries, foreign arbitral awards have not been recognized and enforced as they should be.

Hypothetically, there are at least three factors encouraging and discouraging the successful recognition and enforcement of foreign arbitral awards: the legal framework, the attitude of the business community, and the attitude of the courts. Adequate legal framework, positive attitude of the business community, and hospitability of the courts have all together become factors promoting the success. On the other hand, inadequate legal bases, recalcitrance of the business community, and hostility of the courts, have been the constraints preventing a country from achieving effective recognition and enforcement of foreign arbitral awards.

This thesis proposes to elaborate on the encouraging and discouraging aspects of the recognition and enforcement of arbitral awards. The study will focus on the

following questions: how available and adequate are the legal bases concerning international commercial arbitration in both the United States and Indonesia? what is the attitude of the business community in both countries towards foreign arbitral awards? and, how do these countries' courts respond to problems relating to the recognition and enforcement of foreign arbitral awards? From this analysis, it is hoped some basic answers to a classic question, "Why are foreign arbitral awards enforceable in some countries and not in others?" will be found. Although this thesis takes the form of comparative study between the developed and developing countries, it is not proposed to provide a pure comparison, since it has to be conceded that those countries are not fairly comparable. Rather it is intended to use the former as a model for the latter.

C. The Disposition

Following this introduction, this thesis will first briefly review the international commercial arbitration as a form of alternative dispute resolution, its acceptance in developed and developing countries , and the position of the New York Convention as a basis for recognition and enforcement of foreign arbitral awards. Secondly, it will examine the recognition and enforcement of foreign arbitral awards in the United States as a case representing developed countries. As might be expected, the United States is one of the countries which generally recognizes and enforces foreign arbitral awards. Thirdly, it will discuss recognition and enforcement of foreign arbitral awards in Indonesia. This country will be used as a case to represent developing countries,

where the recognition and enforcement is still facing many problems, despite its ratification of the New York Convention in 1981. In this section all the discouraging factors together with the latest encouraging developments will be explained. Finally some conclusions will be drawn, and recommendations will be made. The conclusions will show the similarities and differences between the experience of the United States and Indonesia in recognizing and enforcing foreign arbitral awards. Based on these, the most influential aspect that is considered in determining the effectiveness of the recognition and enforcement of foreign arbitral awards will be seen. The recommendations may, hopefully, be applicable in showing how Indonesia as well as the other countries, which have not recognized and enforced foreign arbitral awards, can more effectively promote international commercial arbitration.

CHAPTER II

INTERNATIONAL COMMERCIAL ARBITRATION

A. International Commercial Arbitration as a Form of Alternative Dispute Resolution

Economic globalization has boosted international trade not only among the major trading countries but also among many other parts of the world. Consequently, parallel to this, commercial disputes have increased tremendously in recent years. There are several means that can be chosen by businessmen to settle their disputes, such as negotiation, mediation, conciliation, and arbitration as well as court adjudication.

In many cases, international commercial disputes can be very complex; the facts are frequently difficult to identify, and the legal issues involve not only matters of substance but also international procedures. As well, such disputes frequently cannot be resolved by non-binding means. For businessmen who want their dispute settlement to be legally binding, arbitration and judicial settlement are the only appropriate choices. Nevertheless, it has become a trend that international businessmen often prefer arbitration because they perceive it as having more comparative advantages than judicial settlement.

The first advantage is that arbitration proceedings are generally faster and cheaper than court adjudications. It is believed that resolution of a trade dispute through courts will inevitably be time-consuming and costly. In the 18th Century,

Voltaire wrote, "I was ruined but twice - once when I gained a lawsuit, and once when I lost one."[1] In regard to the disadvantages of the judicial process, in the 19th Century, Abraham Lincoln advised: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a loser - in fees, expenses, and waste of time."[2]

There are several factors that make court adjudication lengthy and costly. In most countries, courts are divided into three categories: the District Court, the High Court and the Supreme Court. The availability of these courts encourages disatisfied parties - usually the losers - to employ all levels of court either as a means of seeking a truly fair solution or solely as a dilatory tactic. Besides, the court congestion, rigidity of courts in applying legal norms and lack of expertise of court' judges in facing disputes which are too technical, are causing the judicial process to become longer and longer. Consequently, high costs are inevitable.

In contrast to the courts, even though in certain countries there is a possibility to appeal an arbitration decision, in most countries, such a possibility is generally not known - an arbitral award is final and binding. Congestion is also not known in arbitration, because the parties have many choices, either to arbitrate in ad hoc or institutional tribunals, which are not bound by any particular territorial jurisdiction. In arbitration, legal norms, either substantial or procedural, may be applied in a

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[1]See R.A. Schiffer & M. Gifkins, "The Use of Alternative Dispute Resolution in International Trade," (1990) 12 Com. L. Y.B. Int'l Bus. 143 at 144.

[2]*Ibid.*

flexible manner. As well, the arbitrators are usually those who are experts in certain fields, and usually know the matter in dispute better than court judges. These are factors which encourage arbitration to be faster as well as cheaper.

However, such expeditiousness and inexpensiveness should not be exaggerated, as arbitrations may also be slower and more expensive than court proceedings. Arbitrators usually come from different places, and have primary occupations other than acting as arbitrators. Therefore, it can be difficult and hence time-consuming to fix an appropriate schedule and coordination. Flexibility in the application of laws may raise uncertainty, and accordingly it may be disadvantageous as this permits the parties to argue about the applicable law applicable instead of the substance of the disputes alone. Arbitration costs may also be higher than court costs. As George T. Yates III describes:

> Typically, court costs are not substantial since courts generally are established and maintained by the State as a service for the benefit and well-being of the general public. The administrative costs of arbitration tend to be more substantial; arbitrators require fees, and if the arbitration is conducted under the auspices of an arbitration institution - fees also are payable to the institution.[3]

In response to the criticisms about the cost, the International Chamber of Commerce (ICC), one of several arbitral institutions, recently lowered its fees.

The second advantage of arbitration is that arbitral proceedings are confidential, even if conducted under the auspices of an institution. In contrast, court

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[3]G.T. Yates III, "Arbitration or Court Litigation for Private International Dispute Resolution: The Lesser of Two Evils," in E. Carbonneau ed., *Resolving Transnational Disputes Through International Arbitration* (Charlottesville: University Press of Virginia, 1984) at 226.

proceedings are not confidential; they are usually held in a public setting, and often lead to a published written decision, with the effect of giving the public access to otherwise secret information.[4] However, the advantage of privacy in arbitrations tends to be less significant since the currency of an arbitration is in any event likely to become known.

Another advantage of arbitration, which may be the most important, is that arbitration is considered as a means of international dispute resolution which is more fair and acceptable by all parties. In international commercial contracts, the parties usually prefer to have disputes settled by their own national courts applying their domestic laws. The obvious reason is that each one doubts the other's courts and legal systems, and will be afraid of encountering judges predisposed to find in favor of the party of their own country. Neither party wishes to compromise. It is true that they could have recourse in their disputes to a neutral third country, but the courts there could refuse to hear the dispute if the foreign defendant has no connection with the country concerned. In such situations, recourse to international arbitration is a logical solution and a realistic choice for the parties, as the arbitration usually takes place in an agreed convenient and neutral forum and before impartial adjudicators. Such an advantage of arbitration is especially evident in international commercial contracts involving parties from developed and developing countries, especially in "contracts between a private company located in a Western nation and a government agency or government-controlled company in a developing State and in the

[4]*Ibid.* at 232.

framework of East-West trade agreements."[5]

A review of the strengths and weaknesses of arbitration leads to the conclusion that there is no definitive list of factors that can be established to choose between court litigation and arbitration; the choice depends on the means and desires of the parties involved. However, since arbitration has gained great popularity in commercial circles recently, the advantages of this kind of alternative dispute resolution must still be seen to outweigh its disadvantages.[6] The fact that most countries enforce foreign arbitral awards far more readily than foreign court judgments is itself a very good reason for choosing the arbitration route.

B. International Commercial Arbitration in Developed and Developing Countries

Despite the above-mentioned values of arbitration the trend of businessmen to favor it, the level of acceptance of developed and developing countries, towards such an alternative dispute resolution is to some extent different. Their attitudes as well as general policies and laws of the countries concerning international commercial arbitration are different. Parties from developed countries generally are strong proponents of arbitration clauses in commercial contracts, in contrast with the parties from developing countries who are still reluctant to submit to binding international arbitration.

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[5]*Ibid.* at 225. See *infra* par. B for further discussion.

[6]J.M. Lookofsky, *Transnational Litigation and Commercial Arbitration: A Comparative Analysis of American, European, and International Law* (New York: Transnational Juris Publications, Inc., 1992) at 560.

In developed countries, it has become common practice that parties to international commercial contracts may submit their disputes to international commercial arbitration. In international contracts that they enter into with parties from developing nations, such a tendency is more evident. There is an underlying attitude of distrust on the part of developed countries regarding the settlement of disputes in the courts of developing states. As Mary Kathryn Lynch describes:

> The laws of developing countries are considered to be radically different from Western concepts of procedural and substantive due process. Local judges are believed to be prejudiced against foreign economic interests and ignorant of the technical, specialized knowledge held by an arbitrator having expertise with the subject matter in dispute. Investors fear the frequent exercise of executive and legislative fiat, which the local courts, even if they so desired, are powerless to affect. Moreover, investors cannot ignore the fact that host state courts often are unwilling to pay compensation for expropriation of foreign assets.[7]

Parties from developed countries believe that such a bias can be avoided in arbitration proceedings. This is due largely to the view held of arbitration by most foreign investors of arbitration as a relatively neutral process.[8]

The tendency of the parties from developed countries to arbitrate their commercial disputes is supported by the attitude and general policy of their governments as well as laws, which are altogether in favor of arbitration. All of the developed countries, including the United States, have arbitration statutes that require recognition of the validity and nonvalidity of arbitration agreements. They are

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[7]M.K. Lynch, "Conflict of Laws in Arbitration Agreements Between Developed and Developing Countries," (1981) 11 Ga. J. Int'l & Comp. L. 669 at 670.

[8]*Ibid.*

also signatories to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereinafter the New York Convention), and other conventions and treaties regarding arbitration. It is not surprising that arbitrations in these countries have developed into an industry. Even such an alternative dispute resolution has become a part of modern business of these countries. They have their own arbitral tribunals, which are recognized internationally, such as the American Arbitration Association (AAA) in the United States, the International Chamber of Commerce (ICC) in France, and the London Court of International Arbitration (LCIA) in England. Their business society and governments promote arbitration. They compete one with the other to attract investors to use their arbitral tribunals, either institutional or ad hoc.

Among developed countries, Canada and Japan are countries in which international commercial arbitration is not yet as developed as in other developed countries. Canada ratified the New York Convention of 1958 in 1986. Among developed countries, Canada is the last country acceding to the Convention. Before the accession, Edward C. Chiasson stated that, "Our domestic laws have been unfriendly to international arbitration. Our businessmen and practitioners cool and inexperienced. We have been a peculiar No Man's Land with enormous potential."[9] Nevertheless, since the accession Canada has become a promising forum for international commercial arbitrations and a potentially major player in that arena. It

[9]E.C. Chiasson, "Canada: No Man's Land No More," (1986) 3 J.Int'l Arb. 67 at 67.

is now even said that, it is "an excellent choice as a neutral situs for North-South or Euro-American arbitrations."[10] Those statements are based on the fact that since the accession, international commercial arbitrations are highly accommodated by broad legislative reform across Canada both federally and provincially. This is also supported by the fact that most Canadian jurisdictions will soon implement the New York Convention. Canadian courts have a positive attitude which tends to support international commercial arbitrations. Because of this, despite the fact that the instruments to challenge international commercial arbitral awards are always available, a party seeking to delay arbitration in a Canadian jurisdiction through judicial intervention will likely fail.

In Japan, though it ratified the Geneva Convention of 1927 in 1952 and the New York Convention of 1958 in 1961, arbitration is not widely practised by Japanese businessmen,[11] and some lawyers do not recommend an arbitration clause at all or if so, a certain type and only in certain types of situations.[12] The unpopularity of international commercial arbitration in this country may be influenced by several factors which make domestic arbitrations unfavored as follows:

> First of all, it is simply unknown among most people including merchants.... Secondly, courts and judges have won the faith of the people, who feel little

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[10]E.P. Mendes, "Canada: A New Forum to Develop the Cultural Psichology of International Commercial Arbitration," (1986) 3 J. Int'l Arb. 71 at 80.

[11]Y. Taniguchi, "Commercial Arbitration in Japan," in P. Sanders ed., *Arbitration in Settlement of International Commercial Disputes Involving the Far East and Arbitration in Combined Trnasportation* (Deventer: Kluwer Law and Taxation Publishers, 1989) at 37.

[12]*Ibid.* at 31.

> incentive to seek an alternative forum for an adjudicatory decision. This results in the existence of fewer and fewer eligible arbitrators available and this, in itself, creates another vicious circle. People would not place trust in inexperienced arbitrators. Thirdly, an arbitral award is final and normally no appeal can be taken to a superior organ for review. This is a crucial difference from litigation in court where two levels of review are guaranteed.[13]

Nevertheless, recently there has been an increase in the recognition of arbitration, so far as international commercial disputes are concerned, as a useful means of dispute resolution. This was stimulated by two cases: *the Mitsubishi*, which was heard before the United States Supreme Court, and *IBM-Fujitsu*. Both have attracted much attention not only within legal circles but also from the general public.[14] The use of arbitration clauses pursuant to the Japan Commercial Arbitration Association (JCAA) is becoming more and more common.[15]

Unlike developed countries, many developing countries have expressed a general objection to arbitrations. They feel the system of arbitration favors developed countries,[16] they fear that arbitration is designed to evade the local laws , and they are concerned that the arbitration process may be used solely for the investor's benefit.[17] Suspicious of what they perceive as a pro-Western bias in the rules which

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[13]*Ibid.* at 30.

[14]*Ibid.* at 31.

[15]*Ibid.*

[16]G.M. Wilner, "Acceptance of Arbitration by Developing Countries," in T.E. Carbonneau, *Resolving Transnational Disputes Through International Arbitration* (Charlottesville: University Press of Virginia, 1984) at 286.

[17]J.T. McLaughlin, "Arbitration and Developing Countries," (1979) 13 Int'l Lawyer 211 at 216.

regulate the arbitral process, some such countries take the position that disputes arising from international contracts - especially contracts relating to foreign investment, natural resources, technology transfers, etc. - should be settled only by domestic courts applying domestic law.[18]

Many Latin American countries, for example, have long viewed arbitration with misgivings; they continue to adhere to the Calvo doctrine[19] which severely restrains the creation of third-party adjudicative devices for resolving disputes. Foreign investors in many Latin American countries have generally been required to agree to resort to national courts in the event of any dispute.[20] The unfamiliarity of arbitration systems to Latin American countries is also a factor that leads to such a suspicion. Citing D. Straus, McLaughlin describes:

> When an arbitration is suggested its principal office is more than likely in a foreign country and the individuals who staff the institution are both foreign and unknown to one or both parties. This is often the case for the Latin American businessman and lawyers. Or if the suggestion is made for ad hoc arbitration, additional uncertainties present themselves. There are no familiar rules or procedures, there is no effective way to resolve procedural disputes, to determine where the arbitration hearings should be held or to appoint the arbitrators if the parties cannot choose them by agreement. In addition, at least two of arbitrators will probably be total strangers to one or both parties. In Europe, North America, and a few other parts of the world where arbitration is more common, there is familiarity with and confidence in the

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[18]Lookofsky, *supra* note 26.

[19]Calvo Doctrine holds that a state will not be subject to foreign law or international law formulated along lines alien to its own economic and philosophic concepts. In Latin American countries, most investment contracts between states and foreign nationals contain a Calvo Clause in which the foreign party agrees, when submitting to local law, not to use diplomatic intervention by its own government to attempt to resolve the dispute. See Lynch, *supra* note 7 at 676.

[20]McLaughlin, *supra* note 17 at 215.

> institutions and the arbitrators. But, in Latin America these uncertainties can and often do lead to suspicion and rejection of the procedure. Under these suspicions and resulting prejudice (sometimes enacted into law), the growth of arbitration is severely impeded.[21]

This is also supported by the fact that the Latin American experience with arbitration has been frustrating. Although these countries have participated in a substantial number of arbitrations in the past, few of the decisions were in their favor.[22] It would not be strange, therefore, if the belief arose that the arbitrators, far from being a neutral force, were biased and the outcome was predetermined in favor of the developed state.[23] As a manifestation of the attitude of the Latin American countries towards arbitration, these countries have consistently refused to ratify the various international arbitration conventions. No countries except Brazil signed The Geneva Protocol of 1923 on Arbitration Clauses, and no country signed the World Bank Convention of 1965 on the Settlement of Investment Disputes between States and Nationals of Other States. Neither have the Latin nations supported the previous Draft Inter-American Convention of 1967 nor recognized the Inter-American Convention of 1975 on International Commercial Arbitration.[24] As well, until 1979, only four countries - Chile, Cuba, Ecuador and Mexico - ratified the New York Convention.

Nevertheless, Latin America is now showing clear signals in favor of

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[21]*Ibid.* at 216-217.

[22]Lynch, *supra* note 7 at 674.

[23]*Ibid.*

[24]*Ibid.* at 674-675.

arbitration and is attempting to strike an adequate balance between a reasonable protection of certain state interests and the promoting of international economic and commercial exchanges and cooperation.[25] This is shown by the fact that until 1989 nine Latin American countries have ratified the New York Convention, and eleven countries have ratified the Inter-American Convention on International Commercial Arbitration.[26]

In African states where, apart from heavy workloads, the judicial system suffers from inadequate technical expertise as well as from anachronistic colonial relics, arbitration has been well-known as an alternative advantageous means of resolving commercial disputes. Most countries in Africa have adopted relatively modern arbitration statutes and signed the Treaties of Friendship, Commerce and Navigation.[27] All these African arbitration statutes contain adequate provisions for dealing with a recalcitrant party, which principally states that a party cannot derogate from its obligation to arbitrate by running to the courts.[28]

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[25]H.A. Grigera Naon, "Mandatory Provisions of Law Regarding Arbitration Agreements in Latin America," in P. Sanders ed., *Arbitration in Settlement of International Commercial Disputes Involving the Far East and Arbitration in Combined Transportation* (Deventer: Kluwer Law and Taxation Publishers, 1989) at 130.

[26]R.E. Echeverria & J.L. Siqueiros, "Arbitration in Latin American Countries," in P. Sanders ed., *Arbitration in Settlement of International Commercial Disputes Involving the Far East and Arbitration in Combined Transportation* (Deventer - Boston: Kluwer Law and Taxation Publishers, 1989) at 96.

[27]S.A. Tiewul & F.A. Tsegah, "Arbitration and Settlement of Commercial Disputes: A Selective Survey of African Practice," (1975) 24 Int'l Comp. L.Q. 393, 395.

[28]*Ibid.*

In the domestic context, arbitration as a means of dispute settlement for developing countries in Asia has been used for a long time. However, in the international context, arbitration is a comparatively recent development in this region. Prof. Sang Hyun Song says, for example, that the practice of commercial arbitration in Korea is only a recent phenomenon.[29] This development is as a consequence of increasing international trade and commercial activities in the post-War period. It is not surprising that the laws of arbitration in this region are still conceived in the context of domestic arbitration. They are outdated and have not been adapted to reflect the needs of modern arbitration practice, particularly in the context of international trade and commerce.[30] Nevertheless, due the rapid expansion of international trade and commerce which are accompanied by large investments in this region, developing countries now have come to accept and adopt arbitration as the norm. Most of the countries have now ratified international conventions on arbitration, and have progressively amended or even created laws concerning international commercial arbitration. Korea signed the International Convention on the Settlement of Investment Disputes (ICSID) of 1965 in 1967, ratified the New York Convention Of 1958 in 1973, amended the Arbitration Act of 1966 in 1973, and

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[29]S.H. Song, "Recent Trends in Commercial Arbitration in Korea," in P. Sanders ed., *Arbitration in Settlement of International Commercial Disputes Involving the Far East and Arbitration in Combined Transportation* (Deventer: Kluwer Law and Taxation Publishers, 1989) at 63.

[30]P.G. Lim, "Commercial Arbitration and the Kuala Lumpur Regional Centre for Arbitration," in P. Sanders ed., *Arbitration in Settlement of International Commercial Disputes Involving the Far East and Arbitration in Combined Transportation* (Deventer: Kluwer Law and Taxation Publishers, 1989) at 57.

amended the Commercial Arbitration Rules of 1973 of the Korean Commercial Arbitration Board (KCAB) in 1983.[31] Malaysia has ratified the New York Convention of 1958 and the ICSID as well as amended the Malaysian Arbitration Act.[32] Hongkong has ratified the New York Convention of 1958, adopted the UNCITRAL Rules, and improved upon the 1979 United Kingdom Act on arbitration.[33] Indonesia has had some provisions dealing with arbitration for a long time, acceded to the New York Convention of 1958, and issued the implementing legislation for the Convention.

Despite acceptance by developing countries of international commercial arbitration, these countries to some extent still show hesitation to enforce awards of foreign arbitral tribunals or to accept the application of foreign laws to the resolution of disputes involving their citizens and especially state entities. Indonesia is representative of developing countries showing this attitude.

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

1. General Review

Recognition and enforcement of foreign arbitral awards is a very, if not the

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[31]Song, *supra* note 29 at 63-64.

[32]Lim, *supra* note 30 at 60.

[33]D. Hunter, "Arbitration in Hongkong," in P. Sanders ed., *Arbitration in Settlement of International Commercial Disputes Involving the Far East and Arbitration in Combined Transportation* (Deventer: Kluwer Law and Taxation Publishers, 1989) at 73-74.

most, important and crucial part in the whole process of international commercial arbitration. The reason is that the successes and failures of international commercial arbitration are eventually measured at this stage. An international commercial arbitration cannot be said to be successful if the award rendered cannot be recognized and enforced. For many countries, especially developing countries, this stage has been the most difficult and problematic one.

The legal basis for the recognition and enforcement of most international commercial arbitral awards today is the New York Convention. The Convention was formulated through the work of the ICC, and signed in New York on 10 June 1958 under the auspices of the United Nations. More than 80 countries have now ratified the Convention. They are comprised of the all major countries of the Western World, all of the Eastern European countries, and many Third World countries.

The Convention is described by Hans Harnik as "one of the more spectacular success stories in the slowly moving area of creating judicial order and uniformity in the field of private international law."[34] This is based on the fact that the Convention has given an enormous boost to international arbitration. Other commentators note the real increase in recourse to international commercial arbitration since the presence of the Convention, especially since the United States ratified it in 1970.[35] It is not an exaggeration, therefore, that the Convention is

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[34]H. Harnik, "Recognition and Enforcement of Foreign Arbitral Awards," (1983) 31 Am. J. Comp. L. 703 at 703.

[35]J.T. Hiramoto, "A Path to Resources on International Commercial Arbitration 1980 - 1986," (1986) 4 Int. Tax and Bus. Lawyer 297 at 300.

regarded as one of the most significant factors in the considerable development of international commercial arbitration as an instrument of resolving international commercial disputes.

2. Application

As stated in Article I(1), the Convention shall apply to foreign arbitral awards. Foreign awards are considered: first, awards made in a State other than the State where the recognition and enforcement of such awards are sought; and second, those not considered domestic[36] in the State where their recognition and enforcement are sought.

In addition to the above-mentioned awards, the Convention also applies to arbitration agreements as described in Article II of the Convention. That is why in view of the presence of this Article, it can be said that the title of the Convention is a misnomer. However, the existence of this Article should be considered in light of its history. The Article was not originally meant for the Convention but for a separate protocol which would have concerned itself only with recognizable arbitration agreements.[37] Yet, at the last moment the protocol idea was dropped and it was incorporated into the Convention.

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[36]*Cf.* S.J. Toope, *Mixed International Arbitration: Arbitration Between States and Private Persons* (Cambridge: Grotius, 1990) at 124. Toope considers the official title of the 1958 Convention is misleading. It is based on Article I interpreted to mean that the Convention is not only concerned with *foreign* awards, but with awards considered to be *not domestic* as well.

[37]Harnik, *supra* note 34 at 707.

3. Recognition and Enforcement: Definition

The New York Convention intentionally uses the terms "recognition" and "enforcement"[38] of foreign arbitral awards. Recognition on its own is the process of acceptance or respect of the legal force and effect of the foreign arbitral award, whereas enforcement is the process of applying or carrying out what has been decided by arbitrators. It can thus be said that enforcement goes one step further than recognition. Nevertheless, the distinction mentioned above is not entirely appropriate. It is based on the fact that an award may be recognized without being enforced; however, once it is enforced it means that the award has been recognized by the court ordering the enforcement. The more precise distinction, therefore, should be between "recognition" and "recognition and enforcement."[39]

According to Article III, it is the obligation of each Contracting State to recognize foreign arbitral awards as binding and to enforce them in accordance with the rules of procedure of the territory where the award is relied upon.

In order for an arbitral award to be recognized and enforced, it is necessary that it fulfill formal requirements. At the time of application, the party applying for recognition and enforcement must supply two documents: the duly authenticated original award or a duly certified copy thereof, and the original agreement or a duly certified copy thereof.[40]

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[38] See the title and Art. I(1) of *the New York Convention*.

[39] *Cf.* A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 1991) at 448.

[40] Art. IV(1).

4. Reservations

Even though it is the obligation of Contracting States to recognize and enforce foreign awards, the states are allowed, by the Convention, to make two reservations: the reciprocity reservation and the commercial reservation.[41] The first reservation means that the Convention will not apply to all foreign arbitral awards which are sought to be enforced in a Contracting State but that the application will be limited to awards made in other Contracting States. Thus, if the awards are rendered in a state other than the Member States, the Convention will not necessarily apply. It should be noted that the reciprocity principle here does not refer, as it does in international law, to "a special treatment."[42] For example, in the relationship between two countries, one country will give special treatment to the other country's citizens on the condition that the latter will also give the same treatment to the first country's citizens. The reciprocity reservation here merely means that the enforcement of foreign arbitral awards is grounded on a mutual principle. It also means that applications for recognition and enforcement of foreign arbitral awards can be rejected if the applicants' countries are not prepared to recognize and enforce arbitral awards in a rendering country.

The second reservation sets the condition that a state which has ratified the New York Convention will solely apply the Convention to *commercial disputes*.

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[41]Art. I(3) of *the New York Convention*.

[42]Setiawan, "Eksekusi Putusan Arbitrase Asing: Peraturan Mahkamah Agung No. 1 Tahun 1990" (Execution of Foreign Arbitral Awards: Supreme Court Regulation of 1990 No. 1) (1990) 6 Varia Peradilan 143 at 146.

Whether or not a dispute is *commercial* is determined by national laws. Hence, the content of this reservation will vary from country to country and will also create problems. In certain countries there is a distinction between commercial and civil matters. For instance, in Indonesia what is meant by commercial basically involves every agreement or legal relationship subject to the Code of Commerce. Any other agreements or legal relationships which are not governed by the Code of Commerce are classified as civil matters and are governed by the Civil Code.

Hans Harnik offers the guideline that commercial here refers to any legal relationship which in terms of the English language has a business purpose.[43] If we refer to this statement and to general understanding, there will be in Indonesia, for example, some agreements or legal relationships which actually contain business purposes but are not considered commercial. On the contrary, there will be particular legal relationships or agreements which do not have any business purpose and yet will be considered commercial. Great care is required for whoever faces this problem. Lack of knowledge of the legal system of either a rendering or an enforcing country may lead to refusal of the award.

5. Defenses

Besides the reservations, the Member States are also given grounds to refuse recognition and enforcement at the request of the party against whom it is sought if the conditions set in Article V are met. They are: invalidity of arbitration agreement,

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[43]Harnik, *supra* note 34 at 706.

lack of procedural due process, arbitrators' exceeding authority, irregularities in composition or procedure of tribunal, and the award not being binding.[44]

Furthermore, 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.[45]

Of the defenses detailed above, public policy is the most common. The Convention does not provide any explanation of this concept. Thus, in practice it frequently poses problems, especially in its interpretation and application which may vary according to country. What is meant by *public policy* is interpreted by the United States as *the most basic notions of morality and justice*, whereas in Indonesia it is interpreted as *the basic principles of the entire legal system and society*.[46]

Considering these interpretations, it seems that public policy is a very broad and abstract concept, perhaps it can even be said unlimited, and hence its application is very flexible. Its application is also frequently undetachable from political interest, so that it is frequently used as a tool to reject foreign law. Public policy may be used as a sword to stab to death foreign law rather than as a shield to protect a State's

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[44]Art. V(1) of *the New York Convention.*

[45]Art. V(2) of *the New York Convention.*

[46]See Harnik, *supra* note 34 at 704. See also Art. 3(3) of the Indonesian Supreme Court Regulation of 1990 No. 1.

legal system and its values. Even though it is frequently invoked, it seems to have been universally unsuccessful in most cases. In approximately 100 cases reported internationally, enforcement has been refused only three or four times for public policy reasons.[47] This is because many countries, in their effort to make the Convention work, have built a bastion against the public policy defense. Some courts, as in the United States, have shown a more liberal attitude favoring international commercial arbitration by limiting the exemption from enforcement for public policy reasons.[48] Nevertheless, it is still very important to protect public policy, and accordingly, to control it. However, it is very difficult for a country to control whether or not enforcement of an arbitral award has contravened public policy in cases of voluntary enforcement by the parties involved. The confidential nature of international commercial arbitration enables the parties involved to enforce an arbitral award without any court intervention.

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[47]Harnik, *supra* note 34 at 704.

[48]See e.g. *Scherk* v. *Alberto Culver*, 417 U.S. 506, 41 L.Ed.2d 270(1974)[hereinafter *Scherk*]. In *Scherk*, the United States Supreme Court permitted the arbitration to preempt federal securities law which are actually prohibited from being violated due to public policy reasons.

CHAPTER III

RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THE UNITED STATES

A. Introduction

The United States is representative of developed countries in which international commercial arbitration has enjoyed full acceptance. International commercial arbitration is a means of resolving international commercial disputes favored by businessmen in the country. Most arbitration agreements and arbitral awards are enforced voluntarily and immediately without facing any serious problems.

Three major factors can be identified as encouraging the smoothness of the recognition and enforcement of foreign arbitral awards in the United States: first, adequate legal bases; second, positive businessmen's attitude; and third, supportive courts' role. These are supported by the legislation favoring arbitration as an enforceable method for resolving both existing and future disputes, the businessmen enforcing arbitral awards voluntarily, and courts' decisions supporting and respecting arbitral process and awards.

B. Legal Bases

The recognition and enforcement of foreign arbitral awards in the United States is mainly based on the New York Convention, the United States Arbitration Act, and the Federal Arbitration Act of 1925. The other bases are enforcement

without a treaty or statute, enforcement according to bilateral treaties, and enforcement through the recognition of a foreign judgement.[1]

1. The New York Convention of 1958[2]

Even though the Convention was formulated and signed in New York, the United States did not sign it until 1970. Its delegation opposed the ratification at the time of signing. The Convention was finally ratified, and entered into force, as federal law,[3] in that country on 29 December 1970. The accession of the United States to the Convention has been noted by commentators as one of the remarkable[4] events furthering the development of international commercial arbitration not only in that country but also at the international level as a whole.

The main purpose of the United States' accession, as the *Scherk* case showed, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory

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[1] J.S. McClendon, "Enforcement of Foreign Arbitral Awards in the United States," (1982) 4 Northwestern J. Int'l L. & Bus. 58 at 59.

[2]See Ch. II for further discussion.

[3]U.S. Const. Art. VI.

[4]See T. Hiramoto, "A Path to Resources on International Commercial Arbitration 1980 - 1986," (1986) 4 Int'l Tax Bus. Lawyer 297 at 300.

countries.[5]

When adopting the Convention, the United States declared both reciprocity and commercial reservations. The United States applies the New York Convention based on the reciprocity principle which means that it only recognizes and enforces awards rendered in another state which has acceded to the Convention. The United States also applies the Convention only to those awards involving commercial disputes according to American law.

Someone wishing to enforce an award in the United States under the Convention need only supply the authenticated original award or a certified copy thereof, the original or certified copy of the arbitration agreement, and official or sworn translations, if appropriate, within three years of the award.[6]

2. Implementing Legislation

Besides the New York Convention, there are two other legal bases for the recognition and enforcement of foreign arbitral awards in the United States: Chapter 2 (Sections 201-208) of the United States Arbitration Act and the Federal Arbitration Act (FAA) which is codified as Chapter 1 of the United States Arbitration Act.[7] The

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[5]J.T. McLaughlin & L. Genevro, "Enforcement of Arbitral Awards Under the New York Convention-Practice in U.S. Courts," (1986) 3 Int'l Tax Bus. Lawyer 249 at 251.

[6]*Ibid.* at 60.

[7]Title 9, U.S. Code sections 1-14, first enacted 12 February 1925 (43 Stat.883), codified July 1947 (61 Stat.669), and amended 3 September 1954 (68 Stat.1233); Chapter 2 added 31 July 1970 (84 Stat.692).

latter is intergrated by reference into Chapter 2 on the condition that it does not contravene Chapter 2 or the Convention. In addition, even though Chapter 1 was utilized prior to 1970, it can still be used if the Convention does not apply because the award was rendered in a Non-Contracting State.

The United States Arbitration Act, like the New York Convention, is federal law superior in the federal sphere to state law, procedural and substantive,[8] and pre-empts inconsistent state statutes.[9] Thus although all states have some form of arbitration law,[10] international commercial arbitration is not governed by state law. Nevertheless, state law may be applied either where the parties have agreed to its application, or where its provisions do not contravene federal law.[11]

As is strongly stressed by Section 201, Chapter 2 enforces the Convention in the United States courts. Thus it functions as an implementing legislation. Even though the implementing legislation of the Convention has played a role in the United States as well as in any other Contracting State, its existence is somewhat questioned. Does the Convention need implementing legislation or does it have a

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[8]J.D. Becker, "Attachments and International Arbitration - An Addendum," (1986) 2:4 Arb. Int'l 365 at 366.

[9]W.L. Craig, W.W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* (New York, London, Rome: Oceana Publications, Inc.; Paris: ICC Publishing S.A., 1990) at 567.

[10]*Ibid.* at 572.

[11]*Ibid.* at 568.

self-executing nature?[12] The question is based on the fact that the United States Constitution (Article III(2)) provides that a treaty provision is the supreme law of the land if it is self-executing. A self-executing provision may nonetheless be superseded by an implementing statute if the latter is enacted after the treaty enters into force, and a treaty provision which is not self-executing must be executed via implementing legislation.[13] Determining whether or not a treaty is self-executing, theoretically depends on the mandatory nature of the provision's language. The use of the word "shall" in most parts of the Convention presumes that the Convention is self-executing. The United States has interpreted it in this way and has accordingly declared, in ratifying a treaty, that the treaty is self-executing and shall become, without further action, the domestic law of the United States.[14] Therefore, the implementing regulation is presumably superfluous. Furthermore, because the date of ratification was after the date of the implementing legislation (Chapter 2), the presence of the legislation does not supersede the self-executing nature of the

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[12]The question had also arisen in Indonesia when the Supreme Court refused to enforce a foreign arbitral award on the ground that the implementing regulation for the New York Convention had not been issued yet. See the Supreme Court Decision No. 2944 K/Pdt/1983 in the case of *Navigation Maritime Bulgare* v. *PT. Nizwar.*

[13]D.D. Reichert, "Provisional Remedies in the Context of International Commercial Arbitration," (1986) 3 Int'l Tax Bus. Lawyer 368 at 376.

[14]L.V. Quigley, "Accession by the United States to the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards," (1961) 70 Yale L. J. 1048 at 1079.

Convention. For practical purposes,[15] the implementing legislation is also useful as far as it does not impose substantially more onerous conditions or higher fees or charges than are imposed by the recognition and enforcement of domestic awards in accordance with Article III of the Convention. In fact, the implementing legislation does not impose and even supports the application of the Convention. Chapter 2 incorporates the New York Convention into the United States law. In general this Chapter, together wih Chapter 1, established the United States policy that favors both the recognition and enforcement of international commercial arbitration agreements and that of foreign commercial arbitral awards. Furthermore, such a policy results in a *presumption of arbitrability* by which the court should decide in favor of arbitration in case the scope of an arbitration clause is fairly debatable or reasonably in doubt.[16] This presumption is based on a belief in the values of arbitration: quickness, cheapness and confidentiality. As well, there is a strong policy argument that the intent of the parties should be given effect.[17]

As stated in Section 202, Chapter 2 applies to both arbitration agreements and arbitral awards which fall under the Convention. They are agreements or arbitral awards arising out of legal relationships, whether contractual or not, which are considered to be commercial. These include transactions, contracts, or agreements

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[15]In *Murray Oil Products Co.* v. *Mitsui Co.*, the court concluded that the purpose of the New York Convention's implementing statute was to "prevent the vagaries of state law from impeding its full implemenation. See Reichert, *supra* note 7 at 382.

[16]J.T. McDermott, "Significant Developments in the United States Law Governing International Commercial Arbitration," (1985) 1 Comm. J. Int'l L. 111 at 113.

[17]*Ibid.*

as described in Section 2. The Section governs validity, irrevocability, and enforcement of agreements to arbitrate in any maritime transaction or a contract involving commerce. The meaning of these transactions or contracts is specified in Section 1. "Maritime transactions" here means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies, furnished vessels or repairs of vessels, collisions, or any other matters in foreign commerce which, if subject to controversy, would be embraced within admiralty jurisdiction. "Commerce" is defined to mean business among the several states or with foreign nations, or in any territory of the United States or in the District of Columbia, or between any such territory and another, or between any state or territory of a foreign nation.

Section 1 seems to apply to both foreign and national agreements or relationships, but it excludes contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. However, the Federal Arbitration Act is generally thought not to be a basis for original jurisdiction in the federal courts, and even in the *Lawrence* case the court admitted these limitations.[18] Moreover, the term "commerce" has been given a broad definition in cases arising under the New York Convention.

Even though Section 202 applies the New York Convention to practically all commercial arbitration agreements or awards, it excludes those arising out of relationships which are entirely between citizens of the United States except those involving property located abroad, envisaging performance or enforcement abroad,

[18]See Quigley, *supra* note 14 at 1077.

or having some other reasonable relationship with one or more foreign states.

Section 203 provides subject matter jurisdiction for any action or proceeding falling under the Convention. Federal district courts shall have original jurisdiction over such an action or proceeding. However, the jurisdiction is not exclusive; state courts may hear such an action or proceeding.[19] Pursuant to Section 205, the defendants may, at any time before the trial thereof, move such actions to the federal district court. The purpose of the removaljurisdiction provision is to prevent vagaries of state law from impeding the Convention's full implementation.[20] The removal itself does not mean to eliminate reference to state law, because the federal courts must employ the procedural law of the state where they sit.

Another section of Chapter 2 provides for an order to compel arbitration or the appointment of arbitrators.[21] This section dictates that any court having jurisdiction under Chapter 2 may direct the parties to comply with their arbitration agreement. Such a court may also appoint arbitrators in accordance with the provisions of the agreement. This provision seems to contradict Article II(3) of the New York Convention providing that:

> The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, refer the parties to arbiration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

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[19]McLaughlin & Genevro, *supra* note 5 at 253.

[20]R.B. von Mehren, "The Enforcement of Arbitral Awards under Conventions and United States Law," (1983) 9 Yale J. W. Pub. Order 343 at 365.

[21]S. 206.

With regards to such a difference, some United States courts have interpreted it to require the dismissal of any action on an agreement pursuant to the New York Convention instead of allowing a stay of judicial proceedings pending arbitration of the dispute.[22] In contrast, based on the interpretation of the meaning of the words "shall...refer" in Article II(3), commentators have interpreted this consistently to permit a stay rather than to compel dismissal.[23]

Section 207 provides for confirmation of any award falling under the Convention unless one of the specified grounds for refusal or deferal of recognition and enforcement of the award exists. Pursuant to this section, a party must, within three years of obtaining an arbitral award, seek confirmation of the award under the New York Convention. Compared to Section 9, which imposes a one year limit on a party seeking confirmation of a domestic award, this time limit is in favor of foreign awards. Based on the provisions of this section, it is clear that the grounds for refusing enforcement of an award specified in Article V of the Convention will be considered exhaustive under the United States law.[24]

Finally, Section 208 provides for a residual application stating that Chapter 1 is incorporated by reference to Chapter 2 in as far as the former is not in conflict with the latter as well as with the Convention. There has been an inconsistency between Section 208 and Article III of the New York Convention, and it has posed

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[22]Reichert, *supra* note 13 at 376.

[23]*Id.*

[24]See McLaughlin & Genevro, *supra* note 5 at 253.

some problems under the United States law. Article III provides that each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon. The problem is that domestic law requires that arbitration agreements must include an entry of judgment clause in which the parties consent that a judgment of a court with jurisdiction over the matter shall be entered into the award. Such a requirement does not exist under the New York Convention.

According to van den Berg and Aksen,[25] this provision should not be granted into the Convention's procedural requirements because it would impose additional obstacles to enforcement. Besides, the Convention itself applies only to the enforcement of foreign arbitral awards and not to the enforcement of foreign judgments confirming foreign arbitral awards.[26] This is meant to avoid duplication.

In general the United States law, whether a federal or state law, concerning recognition and enforcement of foreign arbitral awards has been synchronized with the New York Convention. That is to say that the final result will be the same whether the New York Convention or the United States' laws applies. The result will be the enforcement of foreign arbitral awards in the United States.

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[25]*Ibid.* at 254.

[26]*Island Territory of Curacao* v. *Solitron Devices, Inc.*, 489 F. 2d 1313, 1319 (2d Cir. 1973), 416 U.S. 986 (1974).

3. Other Bases

Other bases for recognition and enforcement of foreign arbitral awards in the United States are recognition and enforcement according to bilateral treaties, those without any treaty or statute and those through recognition and enforcement of a foreign judgment.

The United States has signed some bilateral treaties with other countries which contain provisions permitting recognition and enforcement of foreign arbitral awards. No less than eighteen bilateral treaties comprising of Friendship, Commerce and Navigation (FCN) treaties were signed before 1970,[27] when the United States ratified the New York Convention. The conditions set in those treaties vary from one treaty to another. Nevertheless, the party seeking enforcement has to meet the three conditions which follow: first, the opposing party must be a citizen of a signatory country; second, the award must be final and enforceable in accordance with the laws of the rendering country; and third, enforcement proceedings must be brought before the proper court.[28] These conditions led the FCN treaty to favor enforcement of foreign arbitral awards unless the awards violate the public policy of the forum.

The basis for recognition and enforcement without a treaty has developed through case law in the United States courts. The courts, both federal and state, have not been reluctant to recognize and enforce foreign arbitral awards immediately, even

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[27]McClendon, *supra* note 1 at 70.

[28]L. Kennedy, "Enforcing International Commercial Arbitration Agreements and Awards Not Subject to the New York Convention," (1982) 23 Virginia J. Int'l L. 75 at 85, 98.

if there was no bilateral or multilateral treaty.

In case of the absence of a treaty, *Gilbert* v. *Burnstine*[29] clearly shows the enforcement policy of the United States courts. The Court of Appeals of New York in that case held that contracts relating to settlements of disputes by arbitration are valid, enforceable and irrevocable except on the grounds existing for revocation of any contract.[30] Contracts to arbitrate in a foreign country, in accordance with foreign arbitration law, were not void as against public policy.[31]

Finally, it is possible for a foreign arbitral award to have been converted into a judgment in another country, to be enforced in the United States, especially in a state which has ratified the Uniform Foreign Money Judgments Recognition Act or a similar statute. In this case state laws will govern;[32] the federal law implementing the New York Convention does not apply, and accordingly it does not supersede the state law.

C. The Attitude of Business Community: Voluntary Enforcement

Speaking about the success of the United States in enforcing foreign arbitral awards is unfair without considering the involvement of its businessmen in the success. They have, in fact, usually enforced foreign arbitral awards voluntarily. There

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[29]255 N.Y. 348 (1931).

[30]*Ibid.*

[31]*Ibid.*

[32]*Island Territory of Curacao* v. *Solitron Devices, Inc.*, 489 F. 2d 313 (2d Cir. 1973), 416 U.S. 986 (1974).

were very few arbitral awards that needed court intervention for enforcement. Does this mean that they have a high standard of law consciousness which they abide by? To answer this question, the following reasons should be taken into consideration as motivating businessmen to comply with international commercial arbitration.

First of all, they are attracted by a number of advantages characterizing arbitration. The values of quickness, cheapness, confidentiality, flexibility,and the like, have motivated them to choose arbitration in resolving their disputes instead of court adjudication. Most of these values are actually those of business alone. They abide by foreign arbitral awards, though in favor of their opposing parties, as a consequence of their choices. Besides, they also obey the awards as a kind of reciprocity among businessmen. It means that they need to make arbitration effective and to give them adequate security when they enter into contracts in which they obligate themselves to arbitrate disputes and to obey decisions rendered. A businessman needs to be secure that the other party to the contract, who has voluntarily agreed to arbitration by way of an arbitration clause in a contract, cannot afterwards refuse to arbitrate, ignore an arbitration proceeding if it is called, take a dispute to court or disregard the entire situation.[33] In addition, he needs an arbitral award made in one country, pursuant to contractual agreement of the parties and pursuant to an arbitration conducted as agreed by the parties, to be enforceable in the country of the losing

[33]M. Domke, *International Trade Arbitration: A Road to World-Wide Cooperation* (New York: American Arbitration Association, 1958) at 29.

party.[34] The failure to comply with an arbitral award will invite other parties to do the same in the future.

Secondly, businessmen comply with arbitral awards in order to preserve their *good will*, which is an invaluable asset for their companies. *Good will* is an intangible asset of a company by which a company gets trust from other businessmen and from society in general. This asset enables a company to make and broaden its business relationships with other companies and society. Challenging the enforcement of an arbitral award may lead other parties, other companies and society to consider the company, against whom the enforcement is sought, as an unreliable business partner. This may lead it to lose its good reputation.

Thirdly, businessmen need to maintain their business relationships with the parties to whom arbitral awards are in favor. Disputes between them and the winning parties do not mean the end of their business relationships. The relationships, as far as possible, should be secured while the disputes are being resolved by arbitration. Failure to obey the arbitral awards may cause them to lose their relationships. This further means that they may lose profit for their business at a future date.

Finally, entrepreneurs' compliance with arbitral awards is caused by the attitude of the court which applies pro-enforcement policies. The courts will not accommodate the parties challenging the enforcement. Such a policy may discourage parties from invoking defenses against the enforcement of arbitral awards. This final reason is the most important in the United States, especially after the United States

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[34] *Ibid.*

acceded to the New York Convention.

D. The Attitude of the United States' Court towards International Commercial Arbitration

1. General Attitude: Pro-enforcement Policy

As stated earlier, the United States courts, together with the Swiss, Dutch and French courts, have been well-known as proponents of international commercial arbitration. These courts have established the so-called *pro-enforcement policy* for both domestic and foreign arbitral awards. The policy is parallel to the famous view of arbitration as a venue most favored to resolve disputes arising out of international commercial transactions. Such a policy is proven by the fact that there is no case yet arising under the New York Convention in which a United States court has declined to enforce the award.[35]

Such a policy was reached after passing the evolution period of American judicial perceptions from hostility toward the arbitral process to acceptance and enforcement of foreign arbitral awards.

Historically, the hostility of the United States courts was initiated by the presence of the so-called *ouster doctrine*[36] which originated in Anglo-Saxon courts. The Anglo-Saxon courts, in the early part of their history, opposed the arbitral

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[35]McClendon, *supra* note 1 at 74.

[36]See M.H. Strub, Jr., "Resisting Enforcement of Foreign Arbiral Awards Under Article V(1)(e) and Article VI of the New York Convention: A Proposal for Effective," (1990) 68 Texas L. R. 1031 at 1039.

process based on the fact that arbitration agreements *oust* the courts of jurisdiction.[37] The United States subsumed the doctrine.

However, the ouster doctrine was then rejected in the United States by the enactment of the United States Arbitration Act in 1925. The doctrine has been replaced by an *emphatic federal policy* in favor of arbitral dispute resolution, and nowadays it is nothing more than *a vestigial legal fiction.*[38]

The accession of the United States to the New York Convention was proposed to promote businessmen to submit disputes to arbitration. The courts were asked to give particular weight to the federal policy in favor of arbitration as a means of settling international commercial disputes. Considering the advantages of arbitration, the Supreme Court has noted that parties' interests are best served by *streamlined proceedings and expeditious results*, and accordingly courts should do what they can to keep the parties' effort and expense to a minimum.[39]

The pro-enforcement attitude of the United States courts was manifested in their decisions of cases involving international commercial arbitrations. Several leading cases will be mentioned later. A consistent line which can be drawn from those cases is that the United States courts broadly interpreted the "commercial"

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[37]The more likely reason was that English judges, who collected a salary based on litigation fees, were seeking to preserve their income. See *Kulkundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F. 2d 978, 983 & n. 14 (2d Cir. 1942).

[38]See Domke, *supra* note 33.(Domke cites *the Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) and *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)[*hereinafter Mitsubishi*].

[39]*Ibid.* at 1040.

reservation and narrowly defined other defenses to permit enforcement of foreign arbitral awards.

2. The Courts' Attitude towards Public Policy Defense

Public policy is a commonly used as a defense by losing parties in challenging enforcement of foreign arbitral awards. The United States courts have consistently proven that public policy in favor of international arbitration is strong.

This pro-enforcement policy can be seen in *Parsons & Whittemore Overseas Co. Inc.* v. *Societe Generale de l'Industrie da Papier* (RAKTA).[40] In this case the United States of Appeals has obviously shown its pro-enforcement policy by rejecting all defenses invoked by the losing party (Parsons & Whittemore). The court construed the public policy defense very narrowly, stating that such a defense could be justified only where enforcement would violate the forum State's most basic notions of morality and justice.[41]

In considering the public policy defense in *Parsons & Whittemore*, the court referred to the history of the New York Convention as a whole and the aim of the United States' accession to the Convention. The court held that an expansive construction of the public policy defense would vitiate the Convention's most basic efforts to remove pre-existing obstacles to enforcement.[42] Parsons & Whittemore'

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[40]508 F. 2d. 969, 973 (2d Cir.1974)[hereinafter *Parsons & Whittemore*].

[41]*Ibid.* at 974.

[42]*Ibid.* at 973.

assertion equating *national* policy with the *public* policy of the United States was rejected based on grounds that, to interpret the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. The court stated:[43]

> This provision was not meant to enshrine the vagaries of international politics under the rubric of "public policy."Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis.

Apart from the case above, the strength of the public policy defense in favor of international arbitration can also be seen in the *Bremen*[44] and *Scherk* cases. In the *Bremen* case, the Supreme Court rejected the age-old doctrine stating that a forum selection clause in a contract which would force an American company to litigate abroad would violate public policy whereas in *Scherk*, the court apparently ascertained its policy favoring arbitration by granting enforcement despite the possibly applicable federal securities law.

The pro-enforcement policy has been fruitful. The United States courts have rejected enforcement in very few cases for public policy reasons. One of these cases is the *Laminoirs Trefileries-Cableries des Lens* v. *Southwire Co.*[45] In this case, the

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[43]*Ibid.* at 974.

[44]407 U.S. 1, 32 L. Ed. 2d 513 (1972)[hereinafter *Bremen*].

[45]484 F. Supp. 1063 (D.C.Ga.1980)[hereinafter *Southwire*]. See H. Harnik, "Recognition and Enforcement of Foreign Arbitral Awards," (1983) 31 Am. J. Comp. L. 703 at 704, 705. See also M. Quilling, "The Recognition and Enforcement of Foreign Country Judgments and Arbitral Awards: A North-South Perspective," (1981) 11:3 Ga. J. Int'l & Comp. L. 635 at 649-650.

Federal District Court in Georgia refused partially to enforce an arbitral award rendered in accordance with French law. The award was enforced with a partial refusal for public policy reasons. The award granted the plaintiff interest on the award and, in addition, ruled in accordance with French law that if the award remained unpaid for two months or longer the interest rate would go up by another five percent. The court could not justify this additional penalty. It held that such a punitive type of interest violated the United States' most basic notions of morality and justice.[46] However, in the case of *Willoughby* v. *Kajima International*[47] involving the United States Arbitration Act, the Court has held that punitive damages may be awarded.

3. The Courts' Attitude towards the Limited Coverage of the New York Convention

The *Sumitomo Corp.* v. *Parakopi Compania Maritima*[48] case dealt with the jurisdiction of the court in relation to the interpretation of "commerce" and "commercial". The case arose when two Japanese corporations, Sumitomo Corporation and Oshima Shipbuilding Co., Ltd. (Sumitomo) commenced an action against Parakopi to proceed to arbitration and to appoint a third arbitrator. Parakopi contended that the court lacked subject matter jurisdiction in light of Title 9 Secton

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[46]*Ibid.*

[47]*Willoughby* v. *Kajima International*, 776 F.2d 269 (11th Cir. 1985).

[48]477 F. Supp. 737 (S.D.N.Y.1979).

1, 202 and 203. Parakopi held that Section 1 excluded commerce involving only foreign parties. So did Section 202 and 203. Section 1 controlled Section 202.[49] The court denied Parakopi's assertion. It held that the language of these sections did not support Parakopi's opinion stating that the definition of "commerce" in Section 1 controlled the scope of Section 202. This was based on the following considerations.[50]

First of all, Section 202 did not use the term "commerce" at all, but utilized the term "commercial". Secondly, Section 202 used "commercial" in a substantive rather than geographical sense, whereas Section 1 did not substantively define "commerce" at all, defining it only in geographical terms. Thirdly, in limiting the application of the Convention to "commercial" disputes, the United States did not make reference to Section 1; instead it referred to "legal relationships...which are considered as commercial under the national law of the United States." While Section 1 is certainly part of the national law of the United States, it does not constitute all of the national law of the United States. Furthermore, the court assertion that Section 1 did not control Section 202 was based on the fact that Section 1 was only part of Chapter 1 of the Arbitration Act, whereas Section 202 was part of Chapter 2. Chapter 1 existed prior to the ratification of the New York Convention, and hence

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[49]*Ibid.* at 741. *Parakopi's* assertion was relied upon several cases such as *The Volsinio*, 32 F. 2d 357 (E.D.N.Y.1929); *Petroleum Cargo Carriers, Ltd.* v. *Unitas, Inc.*, Misc. 2d 222, 220 N.Y.S.2d 724 (Sup.Ct.N.Y.Co.1961); 15 App. Div. 2d 735, 224 N.Y. 2d 654 (1st Dev't 1962).

[50]See *supra* note 32.

was not designated as Chapter 1 until the provisions implementing the Convention were added to Chapter 2.

Based on the considerations above, the court concluded that it had subject matter jurisdiction. This conclusion favoring international commercial arbitration has furthered the policies underlying the New York Convention, as seen in *Scherk*.[51] Holding that subject matter jurisdiction is lacking where the parties involved are all foreign entities would certainly undermine the goal of the accession to the New York Convention.

The *Fertilizer Corporation of India* (FCI) v. *IDI Management, Inc.* (IDI)[52] raised complex issues related to the application of the New York Convention, such as retroactivity, reciprocity, public policy, binding effect of the award, and consequential damages.

The FCI filed a petition to a United States District Court for enforcement, under the New York Convention, of an arbitral award[53] rendered in India in favor of the FCI against respondent IDI. IDI invoked five defenses against the award:

1. Application of the New York Convention in the case could be retroactive and therefore improper;

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[51]The Supreme Court in this case noted that the goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

[52]517 F. Supp. 948 (1981).

[53]This award, known as the *Nitrophosphate Award*, is a so-called *speaking award* in which the panel, in a lengthy document, gave reasons for its findings. *Ibid.* at 950.

2. The reciprocity required under the Convention was absent;

3. Enforcement of the award would violate public policy of the United States because of an undisclosed relationship between the FCI and one of the arbitrators;

4. The award was not binding within the meaning of the Convention and was therefore unenforceable at that time;

5. The arbitrators exceeded their jurisdiction in awarding consequential damages in contravention of an express clause in the contract between the parties.[54]

None of these defenses was granted by the court, though at least one of them showed a strong basis. What is most conspicuous about the court's role in the *Fertilizer* case is that it interpreted the concept of reciprocity to determine the New York Convention's coverage liberally. The court was not of the same opinion as IDI, which asserted that reciprocity requires proof that the Signatory State has actually enforced awards against its own citizens. The court assumes that the reciprocity only requires that a State has signed the Convention and made a good faith attempt to abide by its rules. This attitude is based on the following considerations.[55] First the court does not need to examine foreign law, so the court's task will be much simpler. Second, the possibility of enforcing the award under the Convention remains open despite the bad faith of a foreign nation's courts. Finally, the United States courts

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[54]*Ibid.* at 951.

[55]Kennedy, *supra* note 28 at 82.

should construe exceptions to the Convention narrowly in order to avoid giving foreign courts an excuse to not enforcing the United States' awards.

4. The Courts' Attitude towards Article V Defenses

a. Invalidity of Arbitration Agreement

Article V(1)(a) gives reasons for a party to challenge enforcement of foreign arbitral awards for the invalidity of arbitration agreement. These reasons may include the absence of an agreement, the incapacity of the parties, the invalidity of the agreement to arbitrate under the applicable law, non-arbitrability of the disputes, and the violation of public policy. Determining whether or not an agreement is valid is left to judges.

To see the attitude of the United States courts to this defense, *Michele Amoruso E. Figli* (the Amorusos) v. *Fisheries Development Corporation* (FDC)[56] should be taken into consideration. In this case, the court denied the motions of the Amorusos (plaintiff) alleging that certain agreements between them and the FDC (defendants) were illegal and unenforceable. The Amorusos asserted several reasons: the agreements violated the contingent fee proscription of the Foreign Agents Registration Act (FARA) of 1938; the agreements violated the common law rule against fees contingent on success in political lobbying; and the arbitration provision of the agreements was invalid because the Fishery Act reserved exclusive jurisdiction of cases arising under it to the federal court; and the agreements as a whole were

[56]499 F. Supp. 1074, 1080 (S.D.N.Y. 1980).

void as they were fraudulently induced by the defendants' false representations that their conduct would not violate any provision of law.[57]

None of these defenses was granted by the court. The court decided that these agreements were not illegal and did not involve fraud.

Other cases related to the invalidity of arbitration agreements are *Prima Paint* v. *Flood & Conklin Mfg. Co.*,[58] *Transmarine Seaways Corp. of Monrovia* v. *Marc Rich*,[59] and *American Safety Equipment Corp. v. J.V. Maguire & Co., Inc.*[60] In these cases the United States courts showed strong support, though not all the cases appeared after 1970, for the enforcement of foreign arbitral awards.

b. Lack of Procedural Due Process

Article V(1)(b) provides that the improper notification of arbitration or otherwise inability to present the case is reason for non-enforcement of foreign arbitral awards. The United States courts have determined that this Article "essentially sanctions the application of the forum state's standard of due process."[61]

The United States courts generally examine the overall result and do not overturn awards because of the inability of a party to present his case, such as a

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[57]*Ibid.* at 1079.

[58]388 U.S. 395 (1967).

[59]480 F. Supp. 352, 358 (S.D.N.Y.1979)

[60]391 F. 2d 821, 826 (2d Cir.1968).

[61]*Southwire, supra* note 45 at 975.

witness, or to cross-examine the other party's witness.[62] Nor can the party complain if he had notice of the hearing and failed to attend.[63]

In *Parsons & Whittemore*, the court rejected Overseas' assertion that the arbitration tribunal denied the plaintiff an adequate opportunity to present his case based on several reasons. First, inability to produce one's witness before an arbitral tribunal was a risk inherent in an agreement to submit to arbitration. By agreeing to submit disputes to arbitration, the party relinquished his courtroom rights -including that of subpoenaing a witness - in favor of arbitration. Second, the logistical problems of scheduling hearing dates convenient to parties, counsel and arbitrators scattered about the globe argues against deviating from an initially mutually agreeable time plan unless a scheduling change is truly unavoidable. Finally, Overseas could not complain if the tribunal decided the case without considering evidence critical to its defense and within only one witness' ability to produce.

In *Southwire*,[64] Southwire argued that its attorney was prevented from fully cross-examining the opposing party's witness. In its argument on improper exclusion of evidence, Southwire relied upon Section 10(c) of the FAA providing that a district court may vacate the award "where the arbitrators were guilty of misconduct...in refusing to hear evidence pertinent and material to the controversy."[65]

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[62]McClendon, *supra* note 1 at 64.

[63]*Ibid.*

[64]*Supra* note 45 at 1067

[65]*Ibid.*

The court held that arbitrators were charged with the duty of determining what was relevant and what was irrelevant, and barring a clear showing of abuse of discretion, the court would not vacate an award based on improper evidence or the lack of proper evidence.[66] Therefore, the court concluded that the evidentiary decisions made by the tribunal were not clearly an abuse of discretion, nor did they deny a fair hearing.[67]

c. Arbitrator Exceeds Authority

Based on Article V(1)(c) of the New York Convention, enforcement may be refused if a foreign arbitral award deals with matters not contemplated by or beyond the scope of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. This provision is identical with Section 10(d) of the FAA, which authorizes a court to vacate an award where the arbitrators exceed their powers or imperfectly exercise.

In practice, this defense has not been successful due to the United States courts' powerful assumption that the arbitral body acted within its powers. Thus, this defense does not sanction second-guessing the arbitrator's construction of the parties agreement; nor does it constitute a licence to review the record of arbitral

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[66]*Id.*(citing *Petroleum Transport Ltd.* v. *Yacimientos Petroliferos Fiscales*, 419 F. Supp. 1233, 1235 (S.D.N.Y.1976); *Orion Shipping & Trading Co.* v. *Eastern States Petroleum Corp. of Panama*, 312 F .2d.299, 300 (2d Cir.1963), 373 U.S. 949, 83 S. Ct. 1679, 10 L. Ed. 2d 705).

[67]*Id.*(citing *Harvey Alumunium, Inc.* v. *United Stelworkers of America*, 263 F. Supp. 488 (C.D. Cal. 1967).

proceedings for errors of fact or law.[68]

d. Irregularities in Composition or Procedure of Tribunal

Article V(1)(d) provides reasons for refusal of foreign arbitral awards if the composition of the arbitral tribunal or the arbitral procedure is not in accordance with the parties' agreement, or in the absence of such agreement, if it was not in accordance with the law of the place of arbitration. This provision is supported by Section 10(a) of the FAA, which vacates awards procured by corruption, fraud, or undue means, and Section 10(b), which vacates awards due to evident partiality of an arbitrator.

There is no case yet arising under these provisions by which the United States courts denied enforcing an arbitral award. The United States courts disregarded such a defense, though in other jurisdictions, such as in Italy, the opposite result has occasionally been the case.[69] In most cases, the United States courts have found no irregularity.[70]

e. Award Not Binding

If it is not binding on the parties, or has been set aside or suspended by a

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[68]*Ibid.* at 976.

[69]*Gotaverken* v. *G.N.M.T.C.* (1979) VI Y.B. Comm. Arb. 237.

[70]*Imperial Ethiopian Gov't* v. *Baruch-Foster Corp.*, 535 F. 2d 334 (5th Cir. 1976); *International Produce, Inc.* v. *A/S Rosshavet*, 638 F. 2d 548 (1981). See also *Parsons & Whittemore*, *supra* note 34.

competent authority of the rendering country, based on Article V(1)(e), a foreign arbitral award may be refused enforcement.

In *Landegger* v. *Bayerische Hypotheken Und Wechsel Bank*,[71] the United States District Court interpreted the "not binding" defense narrowly by even rejecting to stay enforcement of an arbitral award pending in a German appellate court. In this case, the court considered that both parties were somewhat misled as they thought that the outcome was determined merely by whether the German arbitration award was "final and enforceable" under German law. The court held that the outcome was determined by whether the German arbitration award would be enforceable in the United States even if it were not "final and enforceable" in Germany.[72] It held that the award would be enforceable.

f. Non-arbitrability of the disputes

In accordance with Article V(2)(a) of the New York Convention, the non-arbitrability of disputes is reason to refuse enforcement of foreign arbitral awards. This concept refers to subject matters that categorically cannot be submitted to arbitration under the domestic law of the enforcing forum. In the United States, subject matters involving bankruptcy,[73] employment contracts,[74] securities,[75]

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[71]357 F. Supp. 692 (S.D.N.Y. 1972).

[72]*Ibid.* at 694, 965.

[73]H.R. Evans, "The Nonarbitrability of Subject Matter Defense to Enforcement of Foreign Arbitral Awards in United States Federal Courts," (1989) 21 Int'l L. Politics 329 at 330.

antitrust,[76] and patent[77] issues which are initially considered non-arbitrable.

The non-arbitrability defense is to some extent indistinguishable from and often confused with public policy defense. This is because many categories of law are labelled non-arbitrable due to United States public policy concerns dictating that issues arising from such categories be resolved in the courts.[78] Accordingly, even though this defense is separated from public policy defense, it is generally accepted that arbitrability forms part of the general concept of public policy and therefore, according to one commentator, Article V(2)(a) can be deemed superfluous.[79]

Nevertheless, despite the confusion between these defenses, after the United States' acceding to the New York Convention, their use is limited by the courts in order to promote international commercial arbitration. There are several significant cases in which the United States courts have strongly been biased in favor of arbitration by overriding competing domestic policy interests and supporting the

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[74]*Ibid.*

[75]*Wilko* v. *Swan*, 346 U.S. 427 (1953)(hereinafter *Wilko*). This case has been judicially distinguished by *Scherk*, 417 U.S. 506, 41 L.Ed.2d. 270 (1974), and by *Rodriguez de Quijas* v. *Shearson/American Express* (hereinafter *Shearson*), 109 S.Ct. 1917 (1989). In *Shearson*, the Supreme Court held that all claims under the Securities Act of 1933 could be arbitrated.

[76]*American Safety Equipment Corp.* v. *J.P.Maguire*, 391 F. 2d 821 (2d Cir. 1968). This case has been overruled by *Mitsubishi*, *supra* note 38.

[77]*Zip Mfg. Co. et al.* v. *Pep Mfg. Co.*, 44 F. 2d 184 (D. Del. 1930); *Beckman Instruments, Inc.* v. *Technical Dev. Corp.*, 433 F. 2d 55 (7th Cir. 1970). Based on Patent Law Amendments Act of 1984, patent disputes are now arbitrable.

[78]See *supra* note 73 at 335.

[79]*Ibid.*

argument for refusing to recognize the non-arbitrability defense.

One of the leading cases is *Mitsubishi.*[80] The main issue arising in this case is whether arbitration of federal antitrust claims may be compelled under under the FAA (Section 4), the United States Arbitration Act (Section 201), and the New York Convention. The United States Supreme Court held that antitrust claims arising under the Sherman Act and encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction are arbitrable, though it is argued that such an agreement would not be arbitrable in the domestic context. This was based on the concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the commercial system for predictability in the resolution of disputes. The Supreme Court further stated that "it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration."[81]

This pro-enforcement policy is a continuation and a consequence of previous cases, such as *Parsons & Whittemore*, *Scherk*, and *Bremen*.

In *Parsons & Whittemore*,[82] the Court of Appeals denied the plaintiff's non-arbitrability of subject matter defense. It limited the defense by distinguishing between its use in domestic and in international contexts. Such a defense in international contexts is viewed more narrowly than in domestic contexts.

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[80]See *supra* note 38.

[81]*Ibid.*

[82]See *supra* note 40.

A similar outcome can be traced from *Scherk*, which distinguishes *Wilco*. The court upheld a securities issue as arbitrable, though such an issue was denied in *Wilco*. It stated that *Wilco* involved a domestic arbitration, whereas *Scherk* involved a *truly international agreement*.[83]

The Supreme Court in *Bremen* denied the non-arbitrability defense by stating that the expansion of overseas commercial activities would be discouraged if "we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."

The pro-enforcement policy of the United States courts was somewhat interrupted by the success of a challenger in blocking enforcement of a foreign arbitral award in 1980 in *Libyan American Oil Co.* (LIAMCO)v. *Socialist People's Libyan Arab Jamahirya* (Libya).[84] In this case, LIAMCO sought enforcement of an arbitral award, in its favor, in a United States district court. Libya challenged the enforcement, arguing in the second defense that the subject matter of the dispute was nationalisation. Nationalisation was an act of state; the act of state doctrine barred enforcement of the award.[85] Therefore, the court refused to recognize and enforce the award.

Albert Jan van den Berg, criticized the LIAMCO case as an "unfortunate

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[83]*Ibid.* at 515.

[84]482 F. Supp. 1175 (D.D.C. 1980).

[85]*Ibid.* at 1177.

decision,"[86] and Heather R. Evans believed that the LIAMCO court misapplied the nonarbitrability of subject matter defense.[87] Nevertheless, the case was appealed and settled on 20 March 1981, so that the main issue of the non-arbitrability of a state act has never been resolved.

In summary, the extensive review of the United States' experience in recognizing and enforcing foreign arbitral awards leads to argument that the United States has already successfully removed the main obstacles discouraging the effectiveness of recognition and enforcement of foreign arbitral awards. By the enactment of the United States Arbitration Act of 1925, which rejected the ouster doctrine, and especially by the accession to the New York Convention in 1970, the United States established an emphatic federal policy favoring both recognition and enforcement of international commercial arbitration agreements and that of foreign arbitral awards. This policy results in a presumption of arbitrability. These reflect strong grounds that the final result will be the same, whether the New York Convention or the United States law applies. The result will be the enforcement. Such policy and presumption is strongly supported by the pro-enforcement policy of the United States courts for both domestic and foreign arbitral awards. This can be observed in court's decisions, which mostly in favor of enforcement. The United States courts have apparent bias against public policy in favor of international arbitration is strong. The courts also interpret "reciprocity" liberally, define

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[86]Cited in Evans, *supra* note 73 at 345.

[87]*Ibid.* at 346.

"commercial" broadly, and construe other defenses very narrowly. The attitude of the United States courts as such discourages businessmen to challenge enforcement, and accordingly it may not let parties to challenge foreign arbitral awards and to practice dilatory tactics.

CHAPTER IV

RECOGNITION AND ENFORCEMENT

OF FOREIGN ARBITRAL AWARDS IN INDONESIA

A. Introduction

Indonesia is one of several developing countries that are still having problems in the recognition and enforcement of foreign arbitral awards. One of the problems is that, up to the present moment, foreign arbitral awards were not enforceable. The reasons have varied over time. Before 1981, it was because of Indonesia's non-ratification of the New York Convention. From 1981 to 1990, a new constraint appeared: although in 1981, pursuant to the Presidential Decree of 1981, No. 34, Indonesia ratified the New York Convention, foreign arbitral awards could still not be enforced, since the Supreme Court held that the Convention required an Implementing Regulation.[1] In 1990, the long awaited Implementing Regulation was issued by the Supreme Court,[2] that is, the Supreme Court Regulation of 1990 No. 1. Still, the regulation did not guarantee that foreign arbitral awards could be

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[1]For further discussion see *infra* note 24-25.

[2]In accordance with the Peoples' Advisory Assembly Decree of 1966 No. XX (Peoples' Advisory Assembly is the highest representative body), the sources of law in Indonesia are hierarchically arranged, from the highest to the lowest, as follows: the Peoples' Adviisory Assembly Decre, the Constitution, the Statute, Government Decree, Presidential Decree, and Implementing Regulation. This last source can be issued by high government institutions, such as Cabinet Ministers, the Supreme Court, and the Attorney General, to implement the higher laws on the condition that the laws do not contradict the other sources.

smoothly implemented. In 1991, even though the Supreme Court "extraordinarily"[3] granted an exequatur (writ of execution) request in respect of a foreign arbitral award, the award remained unenforceable. This was due to the defendant's invocation of a cassation[4] of the decision. The case is still in progress.

The above-mentioned problems seem to lead to the presumption that the unenforceability of foreign arbitral awards in Indonesia is due to the lack of adequate legal bases. Further examination of the unenforceability problem reveals that the inconsistency of businessmen's attitude and the courts' role are equally responsible for the problem.

This Chapter will describe the problems related to the recognition and enforcement of foreign arbitral awards in Indonesia, based on given periods of time. This will be followed by an intensive analysis of the problems using the three aspects mentioned above.

B. Problems of Recognition and Enforcement of Foreign Arbitral Awards in Indonesia

1. Before 1981: The 1958 New York Convention Had Not Been Ratified

The only reason why foreign arbitral awards were not enforceable before 1981 was that Indonesia had not yet ratified the 1958 New York Convention. The reason was

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[3]This exequatur might be regarded as "extraordinary" because this was the first time that this request was granted. It was thus unusual.

[4]See *infra* note 13.

justifiable, for in international law a country does not have any obligation arising from a convention or treaty if the said country does not ratify the convention or treaty.

However, a debate arose from the fact that before independence in 1945, Indonesia was a party to the Geneva Convention of 1927. This led to the presumption that foreign arbitral awards were enforceable pursuant to the Geneva Convention. The debate, therefore, focused on the applicability of the Geneva Convention of 1927.[5] One thing that is more certain is that there was no disagreement over the necessity of ratification. Thus, ratification was considered the first step toward recognizing and enforcing foreign arbitral awards.

2. Between 1981-1990: Lack of Implementing Regulation

The debate about ratification ended after the Indonesian government issued the Presidential Decree of 1981 No. 34[6] ratifying the New York Convention. Does this mean that foreign arbitral awards are enforceable?

Based on Indonesia's accession to the 1958 New York Convention in 1981, foreign arbitral awards were supposed to be enforceable in Indonesia. But, in fact, these remained unenforceable.

The Department of Justice through the Directorate General of Law and

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[5]See part C for further discussion about the applicability of the Geneva Convention of 1927.

[6]Presidential Decree of 1981 No. 34, L.N. 1981: 40.

Legislation issued a memorandum[7] to the Chiefs of the Appelate Courts in Indonesia stating that the Convention prevailed and was applicable in Indonesia because of Indonesia's ratification of the 1958 New York Convention. However, the Supreme Court refused to enforce foreign arbitral awards on the grounds that an Implementing Regulation had not been issued yet.

In 1984 the stand of the Supreme Court started to change. The emphasis was no longer on the Implementing Regulations. This can be seen from the case of *Trading Corporation of Pakistan Limited* (TCPL) v. *PT Bakrie Brothers*.[8] In this case, the Supreme Court grounded the unenforceability of foreign arbitral awards on the provisions of Articles I(3) and V of the New York Convention.[9]

3. Between 1990-1991: A New Development

Despite the fact that the last reasons were different from the former one, it did not mean that the Supreme Court had shifted from its initial position. It maintained it until it finally issued an Implementing Regulation in 1990.[10] Indeed, the issuance of the long-awaited regulation marked a new development whereby the

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[7]Memorandum of Department of Justice No. C.UM.01.09.28dated 22 September 1981.

[8]*Trading Corporation of Pakistan Limited* (TCPL) v. *PT Bakrie Brothers*, The South Jakarta District Court Decision No. 64/Pdt/G/1984.

[9]*See infra* E.3 & 4.

[10]The Supreme Court Regulation of 1990 No. 1 on the Procedure of Enforcement of Foreign Arbitral Awards in Indonesia (hereinafter *the Regulation*), dated 1 March 1990.

Indonesian government showed its willingness to enforce foreign arbitral awards.

During 1990, when the Regulation was issued, the Indonesian government was challenged to prove to the world that Indonesia was eager to enforce foreign arbitral awards. A case was in progress at that time.

4. After 1991: A Historical Milestone

The eagerness was proven later by the so-called "extraordinary" decision of the Supreme Court granting the writ of execution (exequatur) requested in respect of a foreign arbitral award in early 1991.

In Decision No. 1 Pen.Ex'r/Arb.int./Pdt/1991 the Supreme Court of Indonesia granted the writ of execution request regarding the Queen's Counsel of the English Bar's award in the case of *E.D & F.MAN (Sugar) Limited* v. *Yani Haryanto*[11]. The decision, issued on 1 March 1991, one year after the Regulation was issued, was a milestone as regards the recognition and enforcement of foreign arbitral awards in Indonesia. The issuance of the decision undoubtedly eliminated the pre-existing fear that the Regulation would not bring any change to the situation respecting the recognition and enforcement of foreign arbitral awards in Indonesia.

In 1982, E.D. & F. MAN (Sugar) Limited concluded two refined sugar contracts with Yani Haryanto. They chose England as their forum, and arbitration, as the method for dispute settlement. The contracts could not be performed because

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[11] *E.D. & F. MAN (Sugar) Limited* v. *Yani Haryanto*, The Supreme Court Decision No. 1 Pen. Ex'r/Arb. Int./Pdt/1991, 1 March 1991.

Yani Haryanto failed to issue a Letter of Credit (L/C). As a result, MAN lost as much as US$ 146,300,000. MAN brought the case to the Counsel of the Refined Sugar Association, an arbitral tribunal sitting in London. Before the case was heard, Haryanto sued MAN in the English High Court, praying the Court to declare the contracts invalid. The English High Court dismissed the suit, and the English Court of Appeal upheld the decision, holding, in addition, that the dispute be addressed to the Council of the Refined Sugar Association.

Once more Haryanto sued MAN before the English High Court, but later offered a reconciliation and promised to pay MAN US$ 27,000,000 in three installments within three years. The first installment of US$ 5,000,000 was settled on the due date of 31 July 1987. But the second and the third payments failed to be made.

In accordance with the reconciliation clause, MAN brought the case to the Queen's Counsel of the English Bar, another arbitral tribunal, and the Council ordered Haryanto to pay immediately US$ 22,000,000 to MAN plus 9 % interest calculated from 12 August 1988 to November 1989.

Because the award was not voluntarily executed by Haryanto, MAN requested a writ of execution from the Supreme Court of Indonesia through the Central Jakarta District Court. The Supreme Court granted the request on the grounds that the award did not contravene the basic principles of the entire legal system and society of Indonesia (public policy), although the Court did not explain the reasons for its

holding.[12]

Again, Haryanto disregarded the decision. MAN then asked the Central Jakarta District Court to issue a warning letter (somatie, aanmaning) in accordance with Article 196 of CCP. The warning letter was a necessary step before proceeding to execute the Court's decision. Up to the present moment, the letter has not been issued yet by the Court because Haryanto invoked a cassation[13] upon the decision before the Supreme Court. At present, the case is still in progress.

By issuing the Implementing Regulation, and by granting the exequatur request, the Supreme Court made it clear that the Indonesian government would seriously enforce foreign arbitral awards, and would not ignore international rules. However, if the Supreme Court reverses the decision granting the writ of execution, this would be a step "backwards" in the area of recognition and enforcement of foreign arbitral awards in Indonesia.

C. Legal Bases

At present, several questions related to legal bases arise regarding the enforceability problems of foreign arbitral awards in Indonesia. First of all, was the nonadherence of Indonesia to the New York Convention before 1981 a justifiable

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[12]*Ibid.*

[13]Art. 642 of the Rv does not allow parties to invoke cassation even when their contracts empower them to do so. The Supreme Court Regulation of 1990 No. 1 for its part, does not deal with the cassation of a foreign arbitral awards. It can therefore be said that such a procedure does not have any strong legal basis.

reason for the unenforceability of foreign arbitral awards? This question is based on the fact that in 1931, before the independence of Indonesia, the Netherlands ratified the Geneva Convention of 1927 and extended its application to the Netherlands Indies (Indonesia). Secondly, do the New York Convention and the Presidential Decree of 1981 No. 34 need further Implementing Regulations? Thirdly, were there any other legal bases, other than international conventions, regarding the recognition and enforcement of foreign arbitral awards made prior to 1990?

1. International Convention

As mentioned above, Indonesia was a party to the Geneva Convention of 1927. This means that even though Indonesia had not ratified the New York Convention, Indonesia had to recognize and enforce foreign arbitral awards, as the previous convention was still valid for independent Indonesia. However, the Supreme Court did not take this view. It was of the opinion that, although the Netherlands government acceded to the Geneva Convention of 1927 on behalf of the Netherlands Indies (Indonesia) in 1931, and although Article 5 of the Agreement on Transitional Measures of 1949 of the so-called "Round Table Conference"[14] provided that Indonesia would be bound by all international agreements entered into by the Dutch government on behalf of the Netherlands Indies, unless they were terminated expressly by the Republic itself, "new principles of international law regarding state

[14]Agreement between the Netherlands and Indonesia concerning transfer of sovereignty (de Overgangs Overeenkomst).

succession had emerged since World War II with the result that Indonesia was no longer bound by treaties acceded to during colonial time."[15]

This is also the opinion of Prof. Z. Asikin Kusumah Atmadja,[16] who holds that the Geneva Conventions were no longer effective since the Round Table Conference. History shows that the Netherlands still occupied Irian Jaya (part of Indonesian country) until 1963 and did not intend to abide by the decisions of the Conference. This condition strained the relations between the Netherlands and Indonesia, and became a reason for Indonesia to nullify the engagements entered into by the Netherlands for Indonesia.

According to Prof. Asikin, the Indonesian government had stated that it should no longer be bound by the Round Table Conference, and unilaterally terminated its Conference obligations, in accordance with "rebus sic stantibus" within the Act of 1956 No. 1.[17]

In a debate with Prof. Sudargo Gautama, Prof. Asikin also stated that Indonesia adhered to the so-called "active system" in the field of the state succession.[18] This means that Indonesia becomes a party to any old conventions made before independence only if it expressly so declares. In fact, Indonesia did not

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[15]The Supreme Court Decision No. 294 K.Pdt/1983, dated 20 August 1984.

[16]Reprinted in Winita E. Kusnandar, "Perkembangan dan Hambatan Pelaksanaan Putusan Arbitrase Asing di Indonesia," (Development and Constraints of the Enforcement of Foreign Arbitral Awards in Indonesia) (1991) 7/II Newsletter 1 at 1.

[17]*Ibid.* at 2.

[18]See S. Gautama, "Some Legal Aspects of International Commercial Arbitration in Indonesia," (1990) 7 J. Int'l Arb. 102.

declare expressly and actively that it would still be bound by the Geneva Convention of 1927. On the contrary, Prof. Gautama felt that Indonesia adhered to the "passive system," meaning that international conventions (including the Geneva Convention of 1927) remained applicable, except Indonesia had expressly cancelled its adherence and stated that it would not be bound by the conventions.[19] This means that if Indonesia wants to withdraw from conventions it should also be expressly stated. For example, besides withdrawing from the Round Table Conference, Indonesia has also withdrawn from the Bern Copyright Convention. But such a statement of withdrawal had never been made in relation to the Geneva Convention. For this reason, Prof. Gautama did not share the opinion of the Supreme Court, as previously stated. He said that, "...the old 1927 Geneva Convention on the Recognition and Enforcement of Foreign Arbitral Awards, is still valid for Indonesia...."[20] Robert N. Hornick is also of this opinion, and states that, "following independence, Indonesia remained a party to the Geneva Convention ...and that therefore some foreign awards were enforceable pursuant to such Convention."[21]

None of the persons involved in the arguments above based them on the Indonesian Constitution of 1945.[22] Indeed, Article II of the transitional provisions

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[19]*Ibid.*

[20]*Ibid.*

[21]R.N. Hornick, "The Recognition and Enforcement of Foreign Judgments in Indonesia," (1977) 18 Harv. Int'l L. J. 97 at 102.

[22]"Undang-undang Dasar 1945" (Indonesian Constitution of 1945)[*hereinafter Constitution of 1945*], dated 18 August 1945.

of the Constitution states that all laws or regulations prevailing during colonial rule are still applicable so long as they do not contravene the Constitution, and there are no new laws or regulations cancelling or substituting them.[23] This means that the argument that the Geneva Convention of 1927 was still applicable at that time was supported by this constitutional provision. Therefore, the unenforceability of foreign arbitral awards based on the non-accession of Indonesia to the New York Convention was not entirely appropriate.

2. Implementing Regulation

The attitude of the highest judicil organ in refusing to enforce foreign arbitral awards, by reason of the absence of Implementing Regulation, can be seen in the decision of the Supreme Court in the remarkable case of *Navigation Maritime Bulgare* (NMB) v. *PT Nizwar*.[24] In this case, NMB, a Bulgarian Shipping company, requested an exequatur from the Supreme Court, through the Central Jakarta District Court, in respect of an English arbitral award rendered against PT Nizwar, an Indonesian company. The award ordered PT Nizwar to pay a claim of US $72,576.39 plus 7.5 % interest per annum from 1 January 1975 until the award was enforced. The opinion of the Supreme Court at that time was as follows:[25]

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[23]Constitution of 1945, "Transitional Provision," Art. II ("All existing institutions and regulations valid at the date of independence shall continue to be valid, pending the enactment of new legislation in conformity with this Constitution").

[24]*Navigation Maritime Bulgare* (NMB) v. *PT Nizwar*, Supreme Court Decision No. 2944K/Pdt/1983, dated 29 Nov. 1984.

[25]*Ibid.*

> In connection with the 1981 Presidential Decree No. 34 dated 5 August 1981 on the Ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, in accordance with prevailing legal practice, the Decree still needs an Implementing Regulation, that is, whether the request of exequatur can be invoked to which district court; or the request is addressed via Supreme Court in order to be considered whether the awards do not contain matters that are in contradiction with public policy in Indonesia.

Prof. Sudargo Gautama was not of this opinion because, according to him, Indonesian law did not require any Implementing Regulation as a condition for the enforcement of the convention.[26] In Article III of the New York Convention itself, it is stated that each Contracting State shall recognize arbitral awards as binding, and enforce them in accordance with the rules of procedure obtaining in the territory where the award is relied upon, and in conformity to the conditions laid down in the Convention. This article also provides that 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.

According to Prof. Gautama and Article III of the New York Convention as mentioned above, it can be said that the enforcement of foreign arbitral awards may be carried out in accordance with the procedure of execution applicable to domestic arbitral awards.[27] Therefore, the Implementing Regulation for the New York Convention and the Presidential Decree of 1981 No. 34 are a sine qua non.

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[26]Gautama, *supra* note 18.

[27]See *infra* Ch. IV.C.3,for further discussion about the procedure of enforcement of domestic arbitral awards in Indonesia.

a. The Regulation: A General Review

Article 1 of the Regulation provides that the Central Jakarta District Court is competent to handle matters related to the recognition and enforcement of foreign arbitral awards. The question of "the competent district court" is therefore answered.

According to Article 2, a foreign arbitral award is defined as an award rendered by an arbitral institution or an adhoc arbitrator outside the jurisdiction of Indonesia, or otherwise an arbitral institution or an adhoc arbitrator under the laws of Indonesia which is deemed to be foreign. The definition is the same as that used by the 1958 New York Convention which uses geographical and procedural criteria.

In order for foreign arbitral awards to be recognized and enforced in Indonesia, the following requirements should be fulfilled:[28]

1. The awards must be rendered by arbitral institutions or adhoc arbitrators in a country which is party to a bilateral or unilateral convention with Indonesia relating to the recognition and enforcement of foreign arbitral awards, based on the principle of reciprocity;
2. The awards must be limited to those falling within the scope of commercial law, under Indonesian law;
3. The awards must not contravene public policy.
4. The awards must be enforced in Indonesia after applicants obtain a writ of execution (exequatur) from the Supreme Court of Indonesia.

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[28]Art. 3 of *the Regulation*.

The exequatur mentioned above is given by the Chief or Deputy of the Supreme Court or the Junior Chief of the Written Private Law Section under the authority of the Chief or Deputy.[29] The said exequatur will not be given if the foreign arbitral award apparently contravenes public order.[30] To obtain a writ of execution an applicant must fulfill the procedures mentioned in Article 5.[31]

After the Supreme Court grants the exequatur, the subsequent implementation is forwarded to the Chairman of the Central Jakarta District Court.[32] If the enforcement has to be done in another jurisdiction, the Central Jakarta District Court

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[29]Art. 4(1) of *the Regulation*.

[30]Art. 4(2) of *the Regulation*.

[31]Art. 5 of *the Regulation*:

(1) To apply for an exequatur, an application must be lodged at the clerk of the Central Jakarta District Court;
(2) The Chief Justice of the Central Jakarta District Court forwards the application to the Clerk/Secretary General of the Supreme Court to obtain exequatur;
(3) The delivery of the files to the Supreme Court is done within 14 days from the day the application is lodged;
(4) The delivery of the files must be accompanied by the following documents:
   a. An original or copy of the arbitral award authenticated in conformity with the requirements for legalization of foreign documents, and an official translation of the award, in accordance with the laws valid in Indonesia;
   b. An original or copy of the agreement containing an arbitral clause authenticated in conformity with the requirements for legalization of foreign documents, and an official translation of the award, in accordance with the laws obtaining in in Indonesia;
   c. A statement from the diplomatic representative of Indonesia in a country where the foreign arbitral ward was handed down, confirming that the respective country had a bilateral or multilateral convention with Indonesia concerning the recognition and enforcement of foreign arbitral awards.

[32]Art. 6(1) of *the Regulation*.

will ask for the assistance of the competent District Court in that jurisdiction.[33] Executory confiscation can apply to the assets and goods of the debtor or the losing party.[34] The application for the enforcement of foreign arbitral awards is subject to the official costs comprising the cost for obtaining exequatur and the cost for confiscation and execution.[35]

The regulation described above is relatively simple. However, it is generally a sufficient positive regulation as a means accomodating procedures of recognition and enforcement of foreign arbitral awards. Basically, there is no need to make a regulation that is complex and onerous, because the 1958 New York Convention itself has set down a "jus sanguinis" or "personality" principle for the enforcement of foreign arbitral awards.[36] Based on the principle above, the procedure for recognition and enforcement submits and adapts to the rules of procedure prevailing

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[33]Art. 6(2) of *the Regulation*.

[34]Art. 6(3) of *the Regulation*.

[35]Art. 7 of *the Regulation*:
The costs of the application for enforcement of foreign arbitral awards consist of 2 (two) parts:
(1) The cost for obtaining exequatur is Rp 250,000.00 (about US$ 126), paid through the Clerk/Secretary of the Central Jakarta District Court to be forwarded to the Clerk/Secretary of the Supreme Court. The cost mentioned above can be reviewed;
(2) The cost of confiscation and execution of an award is paid to the Clerk/Secretary of the Central Jakarta District Court;
(3) In case of the confiscation and execution are held outside the jurisdiction of the Central Jakarta District Court as outlined in Article 195(2) of HIR/Article 206(2) of the Rv, the cost will be paid to the District Court asked for its assistance.

[36]M.Y. Harahap, *Arbitrase* (Arbitration)(Jakarta: Pustaka Kartini, 1991) at 62.

in the country where the application for execution is made. If so, then the procedure of recognition and enforcement of foreign arbitral awards in Indonesia is ordered in accordance with Article 195 to 224 CCP; what is regulated in Article 6 par. 2 of the Supreme Court Regulation is the same as what is regulated in Article 639 CCP. The Article provides that the enforcement of arbitral awards is ordered by the District Court Chairman in accordance with the procedural law relating to the enforcement of court decisions.

Some fundamental principles contained in the Regulation will be examined. These are principles include "executorial kracht", reciprocity, commercial limitation and public policy.

b. The Principle of "Executorial Kracht"

Article 2 of the Regulation provides that foreign arbitral awards are considered to be similar to domestic court decisions that have had "executorial kracht" (executing effect). This means that for a foreign arbitral award to be enforced in Indonesia, its validity must be recognized and it should be executory.

Basically what is meant by the "executorial kracht" in Article 2 is a "binding effect," similar to that in Article III of the 1958 New York Convention which states that "Each Contracting State shall recognize arbitral awards as binding and enforce..."

Nevertheless, an Indonesian Court can refuse the enforcement of foreign arbitral awards for reasons set out in Article V of the 1958 New York Convention.

c. The Principle of Reciprocity

The principle of reciprocity is enshrined in Article 3, paragraph 1 which states that "The enforcement is based on the reciprocity principle." This stipulation is supported by Article 5, paragraph 4(c) which provides that one of the requirements for the enforcement of foreign arbitral awards is that applicants must enclose statements from the diplomatic represenative of Indonesia in countries where the foreign arbitral awards were handed down; which implies that the respective countries had bilateral or multilateral conventions with Indonesia concerning the recognition and enforcement of foreign arbitral awards.

Both of the above-mentioned stipulations are reflections of the first reservation forwarded by Indonesian government when it ratified the 1958 New York Convention by the 1981 Presidential Decree No. 34.[37] The decree forms the first reservation "will apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the country of another Contracting State." This wording is the same as that of Article I(3) of the 1958 New York Convention. This Article provides an opportunity for any Contracting State to make two reservations: the reciprocity reservation and commercial reservation. As regards the reciprocity reservation, it should be noted that "reciprocity" here does not refer to "special treatment" as understood in international law.[38] Let us, for instance, consider

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[37]Setiawan, "Eksekusi Putusan Arbitrase Asing: Peraturan Mahkamah Agung No. 1 Tahun 1990,"(Enforcement of Foreign Arbitral Awards: Supreme Court Regulation of 1990 No. 1) (1990) June Varia Peradilan 142.

[38]*Ibid.* at 143.

country A and country B. A will give preferential treatment to a national of B only if B gives simiar treatment to a national of A. The reciprocity reservation here merely means that the enforcement of foreign arbitral awards is based on mutual respect. Thus, an application for the recognition and enforcement of a foreign arbitral award may be rejected if the applicant's country is not prepared to recognize and enforce arbitral awards rendered in Indonesia.

In practice, it is the duty of Indonesian courts to investigate whether there are bilateral or multilateral agreements between Indonesia and applicants' countries.

d. The Principle of Commercial Limitation

The other reservation made by the Indonesian government under the 1958 New York Convention, is the "commercial reservation." Such reservation can be seen in the Annex of the 1981 Presidential Decree No. 34 where it is stated that the Indonesian government will apply the Convention only to differences arising out of legal relationships, whether or not contractual, which are considered to be commercial under Indonesian law. This formulation is the same as that of the 1958 New York Convention. Furthermore, Article 3(2) of the Regulation also provides that, "...only limited to those according to Indonesian law relate to the field of commercial law."

Even though the language used in the Regulation is a little bit different from the terminology of the Convention and of the Presidential Decree, the meaning is the same. Refering to the difference, Robert N. Hornick remarks that, "Probably this

slight variation in language is without significance, and the Regulation was intended to adopt the position of Indonesia's Declaration."[39]

The commercial limitation above generally applies to the concept of arbitrability, whereby each state can decide, taking into consideration its economic and social policy, which matters may be settled by arbitration and which ones may not. It is very important for any country to balance considerations of policies competing with each other. Just as a country must protect matters of public interest, such as human rights and criminal law issues, so must it also protect matters of commercial interest, such as arbitration. Hornick believes that protecting the latter interest is aimed at

> ...Reducing the burden on overloaded courts, the promotion of the country as a venue for international arbitrations, the promotion of international trade generally or maintaining respect for international comity. There are some commercial agreements which would probably not be made if the parties were compelled to settle their disputes in one or the other's courts.[40]

From the statement above, it can be noted that if the subject matter is not arbitrable under the *lex contractus* under the *lex fori*, then the agreement is without effect. Accordingly, if the subject matter is not arbitrable, the arbitral award may be refused in the country where the enforcement is applied for.

Subject matters which are not arbitrable may differ from one country to another. Even though such matters, as securities laws, competition laws, antitrust

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[39]R.N. Hornick, "Indonesian Arbitration in Theory and Practice," (1991) 39 Am. J. Comp. L. 575.

[40]*Ibid.*

matters, bankruptcy, and particularly, intellectual property rights are in the scope of commercial law, these are not arbitrable in European Economic Community States.[41] Nor are matters of a public law nature, such as criminal law. Thus, to consider whether the subject matters are arbitrable or not, as well as whether they are related to commercial law or not is left to the country where enforcement is sought. Because of that, the extent of recognition and enforcement of a foreign arbitral award is a matter for each country to decide. The New York Convention itself does not oblige the Contracting States to recognize and enforce foreign arbitral awards in all aspects of private law. Every country is free to limit the scope of foreign arbitral awards according to the sovereign interests of the country. There is no doubt that every country knows better what moral, social, political and economic interests it should protect against intervention from other countries.

In the case of Indonesia, M. Yahya Harahap demanded that the Indonesian government make a reservation upon the recognition and enforcement of foreign arbitral awards.[42] According to him, there was an irresponsible group of people who wanted to mortgage national sovereignty and public order for the other countries' interests, on the ground that Indonesia must be prepared in the globalization arena.[43] He belives that such a meaning of globalization was exaggerated and irrational, because it was clear that the view would lead to blinded liberalism and

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[41]A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 1991) at 139.

[42]Harahap, *supra* note 36 at 49.

[43]*Ibid.*

solely departed from the unreal "prosperity" without balancing with "security" approach.[44]

Under Indonesian law (Article 3(2) of the Regulation), "the field of commercial law" means that every agreement is subject to the Code of Commerce of Indonesia. This embraces commerce in general, governed by Book I which contains provisions on corporations, the stock market, brokers, commissioners, expeditors, transportation, money orders, cheques, promes, and insurance. This also includes subject matters governed by Book II concerning agreements in shipping, as well as bankruptcy. The court also has authority to decide whether or not a subject matter, apart from those stated above, is related to the field of commercial law.

e. Public Policy: A Shield, Not a Sword

Article V(2)(b) of the New York Convention, stipulating the importance of public policy is reechoed in Article 3(3) of the Regulation. The Regulation provides that foreign arbitral awards can be enforced in Indonesia only if they do not contravene "public policy."[45] The meaning of public policy can be found in Article 4(2). This article provides that exequatur (writ of execution) will not be given if the foreign arbitral awards contravene the basic principles governing the entire legal system and society in Indonesia (public policy).[46] From this provision, it can be

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[44] *Ibid.*

[45] Art. 3(3) of *the Regulation.*

[46] Art. 4(2) of *the Regulation.*

seen, accordingly, that Robert N. Hornick's statement that the concept of public order is undefined in Indonesian law[47] is only half true. It may be true if the concept meant by him is of public order which is narrow, exact and detailed exclusively written in a statute.

The concept of public order, in general, has actually existed in Indonesia for a long time. However, the concept is so broad that, in practice, it frequently poses some problems, especially in its interpretation and application. One such problem is the meaning of "the basic principles of the entire legal system and society in Indonesia." What is the meaning of that phrase and how should it be applied? To answer the question two views should be examined: a narrow one and a broad one.

Proponents of the narrow view argue that public policy related to the enforcement of law (concerned with the legal certainty needed for the enforcement of foreign arbitral awards) should be interpreted narrowly. In doing so, the meaning should be limited to that expressed in provisions of statutes. This means that a foreign arbitral award can be classified as being in contradiction with public policy of Indonesia only if it entirely contravenes provisions of the statutes or regulations of Indonesia. The narrow view is less accepted in Indonesia.

As regards the broad view, its proponents hold that the narrow view could result in the violation of the values of a nation. From a sociological approach, that is also not acceptable. From this point of view, public policy is not only a value conforming to statutes or positive law, but also includes values growing in society's

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[47]Hornick, *supra* note 39 at 576.

consciousness arising from economic, social, culture, moral and religious values.[48] Von Savigny's view of positivism is not properly accepted in this matter; realism, integralism and functionalism are more accepted. These views prevail not only as those which are formulated in articles of statutes and rules or regulations, but also as those which include all the values binding on social order and arising from the economic, social, moral, cultural and religious values. Moreover, the undeniable fact that written law always lags behind the development of society's values supports the reasons to refuse the interpretation and application of public policy narrowly.

What can be learned from the discussion above is that the criteria to measure whether or not a foreign arbitral award (foreign law) contravenes Indonesian public policy are: social, economic, political, moral, cultural, and religious values, in either written or unwritten laws. These values are contained mainly in both the Indonesian Constitution of 1945 and the Five Basic Principles (state grounds of Indonesia).

The broad view appears to be more reasonable. However, because of the very broad meaning it attaches to public policy, it can be argued that public policy is "unlimited," and its application very "flexible" and frequently confused with political interests. It is not surprising, therefore, that its application is often politicized, and used as a tool to reject foreign law. Yet, the proper use of public policy should not be as a sword to stab to death foreign law, but only as a shield to protect the

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[48]Harahap, *supra* note 36 at 68.

Indonesian legal system and its values.[49] The function of public order is to preserve the fundamental moral values or principles of the forum. It is for the judge to determine whether or not a foreign arbitral award violates the fundamental moral interests or policies of the forum.[50]

3. Other Legal Bases prior to 1990

Up till now, Indonesia does not have a specific statute governing arbitration. However, arbitration has been practiced for a long time. The general basis for the existence of arbitration is Article 1338 of the present Indonesian Civil Code (CC),[51] which provides that all agreements shall be legally binding on the parties who make them. This provision is supported by the official elucidation of Article 3 of the Basic Statute on Judicial Power,[52] which permits the settlement of disputes by arbitration. Furthermore, Article 377 of the Code of Procedure (HIR)[53] emphasizes that Indonesian nationals may settle disputes by arbitration in accordance with the

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[49]*Cf* S. Gautama, *Masalah-masalah Baru Hukum Perdata International* (Actual Problems of Private International Laws)(Bandung: Alumni, 1984) at 6.

[50]For further discussion about the attitude of Indonesian courts towards public policy, see *infra* E.2.

[51]S. 1847: 23 (hereinafter *the CC*).

[52]Act of 1970 No. 14, L.N. 1970:74.

[53]S. 1941:44 [hereinafter *the HIR*](The HIR is a Code of Procedure for both civil and criminal matters. As far as criminal matters are concerned, this code has been repealed by the Act of 1981 No. 8 on Criminal Code of Procedure).

provisions on arbitration set forth in the Code of Civil Procedure (Rv).[54]

Arbitration in the Rv was governed by Articles 615-651 contained in Book III headed "Various Procedure," First Chapter, titled "Decision of Arbitrators." These articles provide a framework for arbitration in Indonesia. Nevertheless, it is questionable whether these provisions are still in force, considering the ambiguity over the status of the Rv itself. Even though Article 377 of the HIR refers directly to the Rv, the latter has been superseded by the former. In this case, it should be read that Article 377 of the HIR reestablishes Rv Articles 615-651,[55] which Articles should be considered to be an exception. Therefore, the articles remain applicable.

The "First Chapter" mentioned above is divided into five parts: the first (615-623), on Arbitration Agreements and Arbitrators' Appointment; the second (624-630), on Hearing Before Arbitrators; the third (631-640), on Arbitral Awards; the fourth (641-647), on Remedies towards Arbitral Awards; and the fifth (647-651), on The Termination of Arbitral Proceedings.

Provisions governing the recognition and enforcement of arbitral awards are found in the third part, especially Articles 634-639. Pursuant to these articles, there are three stages in the process: the deposition of the awards, the issuance of exequatur and the execution.

In order for an arbitral award to be recognized and enforced, the original of

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[54]S. 1847:52 jo. S. 1849:63 [hereinafter *the Rv*](This code was superseded by the HIR in 1941).

[55]Hornick, *supra* note 39 at 564.

the award must first be deposited by, or on behalf of the arbitrators at the Clerk's Office of the competent District Court of the place where the award is made.[56] The time limit for such a deposition is 14 days for Java and Madura, and three months for other parts of Indonesia.[57] In addition to the award, arbitrators must also deposit their letters of appointment or copies thereof.[58] This deposition process is imperative, which means that this is not merely an administrative procedure, but also a formal requirement without which the exequatur cannot be granted.

After the deposition, the person wishing to enforce the arbitral award must file a request in the District Court, as mentioned in Article 634, for issuing of an exequatur (a writ of execution or enforcement order). The chief judge of the court is then supposed to issue the exequatur.[59]

An arbitral award bearing the enforcement order of the chief judge of the competent district court must be enforced in the ordinary manner of execution of a court decision.[60] "Ordinary manner" here means the normal procedure applicable to a court decision, in accordance with Articles 195-224 HIR.

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[56]Art. 634(1) of *the Rv*.

[57]*Ibid*. The difference was based on the condition of Indonesia at the time *the Rv* was codified, more than a century ago. At that time, the geographic conditions of Java-Madura were very different from those of other regions of Indonesia. The condition of the cities and the level of communications and transportation in Java and Madura were more developed than those of other regions.

[58]Art. 635 of *the Rv*.

[59]Art. 637 of *the Rv*.

[60]Art. 639 of *the Rv*.

From the discussion above, it can be seen that before 1990, Indonesia had provisions governing the enforcement of arbitral awards. The procedure for depositing an arbitral award and obtaining an exequatur, as well as for performing an execution was relatively adequate. The argument that the provisions would not be able to accommodate the enforcement of foreign arbitral awards, on the ground that they were only for domestic awards, was not entirely correct. Besides, the provisions of the Rv alone did not make any distinction between the enforcement procedure for domestic and foreign awards. This means that this can be used for both, thus making the distinction itself uncalled for. As shown by Article III of the New York Convention, the domestic enforcement procedure can be used also for the enforcement of foreign arbitral awards. Thus, the Supreme Court Regulation of 1990 No. 1 (the Regulation) was a duplication, and hence, the refusal of the Supreme Court to issue exequatur based on the absence of an Implementing Regulation for the New York Convention and the Presidential Decree 1981 No. 34 was not quite reasonable, as well.

The provisions of the Rv have several weaknesses. For example, since foreign arbitral awards, as a rule, are not deposited with any court in Indonesia, practical difficulties would arise with regard to which Indonesian district court should be regarded as competent to grant the enforcement order. From the point of view of practical needs, the opinion of the Supreme Court, which favours the necessity of an Implementing Regulation, could be very justified.

D. The Attitude of Business Community

The problem of enforcement of foreign arbitral awards in Indonesia is, in the first place, caused by businessmen who are not committed to arbitration clauses they have made. They do not respect, and, hence, do not enforce foreign arbitral awards voluntarily; nor do they even challenge them. No studies have been carried out about this. It is therefore very difficult to explain why they do not comply with foreign arbitral awards. This is further compounded by the fact that before Indonesian independence, international arbitration was a common practice, and the parties (businessmen) involved enforced the awards voluntarily; Secondly, businessmen, in general, enforce domestic arbitral awards voluntarily. Following is an historical overview, as well as several presumptions that may be useful to analyze the problem. All in all, these are, of course, only open-ended views.

During the period of Dutch colonization, which spanned about 344 years, Indonesia had an economic structure which was dominated by foreign companies, including Chinese merchants.[61] Most big companies were owned by Dutch nationals. They dominated plantations, mining, international trade, industry and the banking sectors. The Colonial government placed Chinese merchants as intermediary merchants connecting Dutch or other foreign companies with native Indonesians. Colonial policy gave Chinese people an important status as the middle class in a pyramidal system called "struktur kasta kolonial" (colonial class structure) based on

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[61]Y.A.Muhaimin, *Bisnis dan Politik: Kebijaksanaan Ekonomi Indonesia 1950-1980* (Business and Politic: Economic Policy of Indonesia 1950-1980)(Jakarta: LP3ES, 1991) at 2.

a racial and social stratification system.[62] The native Indonesians, who formed the the largest group, were placed in the lowest class.

Consequently, modern business, especially international commercial transactions, should be viewed here as transactions between Dutch companies located in Indonesia and Dutch and other companies located in their own countries; Indonesians did not usually participate in international commercial transactions, because their activities were limited to subsistence agriculture and small business. Arbitration became a cultural and an effective means of dispute resolution among the Dutch and other non-Indonesian companies; challengeing arbitral awards would mean a hindrance to the smooth running of their business. It is not strange, therefore, that international arbitration was a frequent practice, especially in the field of international commercial transactions,[63] and certain foreign arbitral awards were enforced voluntarily without problem.

In post-war Indonesia, the number of arbitration cases has decreased significantly,[64] especially in international arbitration. Historically, the decrease in international arbitration was a logical consequence of the economic damage caused by three-and-a-half years of Japanese colonization (1942-1945). Japanese colonization destroyed economic conditions; imports were usually prohibited, industrial equipment

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[62]*Ibid.* at 2-3.

[63]Gautama, *supra* note 18 at 96.

[64]*Ibid.*

were sent abroad, worker supplies were cut, and foreign assets were occupied.[65] In 1945 (after Indonesian independence) and in 1949 (after the Dutch government recognized Indonesian independence), Japan returned the foreign assets. Nevertheless, business activities remained weak; practically no new investments were carried out.

Less than a year after the Dutch government recognized Indonesia as an independent country, the new government of Indonesia applied the "Rencana Urgensi Perekonomian" (Economic Urgence Planning) which was extremely nationalistic, as an attempt to reform the colonial economic structure.[66] In this framework, the Indonesian government elaborated an ambitious economic policy named the "Program Banteng" (Wall Program), which was aimed at protecting and developing national businessmen, and at discouraging foreign and Chinese competition, and also at reducing its dependency on them.[67] The government, besides nationalizing Dutch, British and Malaysian companies,[68] also gave import licences, devised allocations and gave loans only to domestic businessmen.

The main objective of such a policy was to accumulate capital through import transactions which would enable the establishment of industries. However, the policy became a facility transaction device between bureaucrats, who were dominated by the

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[65]H. Hill, *Investasi Asing dan Industrialisasi di Indonesia* (Foreign Investments and Industrialization in Indonesia)(Jakarta: LP3ES, 1991) at 13.

[66]Muhaimin, *supra* note 61 at 5.

[67]*Ibid.*

[68]Hill, *supra* note 65 at 16.

ruling political party members, and their supporters who become their economic clients. Since that time, groups of so called "client businessmen"[69] have grown largely throughout Indonesian political history, while at every period, government develops various protection policies. The growth was accelerated by the enactment of the Foreign Investment Law in 1967 and the Domestic Investment Law in 1968, which gave the government or bureaucrats full authority to give capital allocations, loans, concessions and licences to their clients.

What is the relationship between the growth of client businessmen and the noncompliance of Indonesian businessmen with foreign arbitral awards? It can be presumed that such noncompliance occurs because of the client businessmen's culture, which is very paternalistic. This paternalistic relationship between businessmen and bureaucrats is so influential that "genuine businessmen"[70] are also trapped into this relationship. By resisting foreign arbitral awards, Indonesian businessmen expect that foreign parties will bring the awards to Indonesian courts. Indonesian businessmen believe that courts, being part of the government institution, will protect them from foreign parties and favour their interests. Thus, it is unlikely

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[69]*See* Muhaimin, *supra* note 61 at 5; See also C. Wibisono, "Anatomi Konglomerat Indonesia" (Anatomy of Indonesian Conglomeration) in K.K. Gie & B.N. Marbun, *Konglomerat Indonesia: Permasalahan dan Sepak Terjangnya* (Indonesian Conglomeration: Problems and Activities)(Jakarta: Pustaka Sinar Harapan, 1990) at 15. Wibisono uses the term *ersatz capitalist*, which usually uses by Kunio Yoshihara, to refer to a businessman whose success is not due to his own productivity, creativity, hard work, discipline, motivation and dedication, but rather by bureucratic licences, access to authority, or his status as an agent of an MNC.

[70]This term is used as the opposite of "client businessmen."

that their recalcitrance is due to the lack of consciousness and knowledge of arbitration. This is supported by the reality that there have been no reported instances of any recent attempt to enforce a local arbitration award; it is believed that all awards issued since 1977 under the auspices of the Indonesian National Arbitration Board have been complied with voluntarily.[71]

Apart from the above-mentioned reasons, it may be assumed that noncompliance with foreign arbitral awards by Indonesian businessmen is practiced as a dilatory tactic which is common in the enforcement of court judgments. By using this tactic, a party, against whom a foreign arbitral award is sought to be enforced, will have time to take necessary actions to save his assets. He may transfer his assets to his relatives or to other people, or declare bankruptcy so that the winner may not get anything from him, thus losing only on paper.

Another reason which makes sense is that a losing businessman seeks to take advantage of the loopholes in the Indonesian legal system, wherein foreign arbitral awards are not properly addressed. Assisted by his lawyer, he knows the substantive or procedural weaknesses in Indonesian arbitration law, so he speculates that the application for enforcement will be rejected. This is illustrated by the case of *Navigation Maritime Bulgare* (NMB) v. *PT Nizwar*[72] and *E.D & F.MAN (Sugar) Limited* v. *Yani Haryanto,*[73] in which legal lopeholes were exploited.

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[71]Hornick, *supra* note 39 at 573.

[72]*Navigation Maritime Bulgare* (NMB) v. *PT Nizwar*, *supra* note 24.

[73]*E.D. & F. MAN (Sugar) Limited* v. *Yani Haryanto*, *supra* note 11.

Finally, the losing party uses the possibility afforded to him by law to challenge foreign arbitral awards. The case of *Trading Corporation of Pakistan Limited* (TCPL) *v. PT Bakrie Brothers*[74] is very illustrative.

The reality that Indonesian businessmen do not comply with foreign arbitral awards seems to be strange and paradoxical since they are always used by foreign businessmen in making contracts. Viewed from the perspective of dependency of Indonesian businessmen on foreign businessmen, for loan capital, it would be unlikely that they ignore foreign arbitral awards against them on the sole ground that the judgment is unenforceable.[75] Every Indonesian company which is engaged in business should consider the effect of noncompliance with a foreign judgment on its reputation and ability to do business. Therefore, in principle, Indonesian businessmen can be expected to enforce foreign arbitral awards against foreign businessmen voluntarily, though the awards may be technically unenforceable. However, the last consideration is probably absent, and their recalcitrance may be viewed as a compensation for the imbalance.

E. Courts' Attitude towards Foreign Arbitral Awards

The unenforceability of foreign arbitral awards is caused by the attitude of Indonesian courts towards such awards. The attitude of the courts can be classified

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[74]*Trading Corporation of Pakistan Limited* (TCPL) v. *PT Bakrie Brothers*, *supra* note 8.

[75]*Cf.* Hornick, *supra* note 21 at 107.

as follows: the general attitude, the attitude towards the public policy defense, the attitude towards the limited coverage of the New York Convention, and the attitude towards defense provided under Article V.

1. General Attitude

In general, the attitude of Indonesian courts is unfavourable. The enforcement problems, as chronologically surveyed above, are sufficient proof of this attitude. The emergence of a new reason in every given period, asserted by Indonesian courts to reject enforcement, has strengthened this proof. Consequently, the question why such an attitude should exist arises. Although it is quite difficult to know the exact background, three important considerations can be identified: the unenforceability of foreign judgments, the disrespect for choice of law and choice of forum of Indonesia in foreign countries, and the effort to protect Indonesian parties' weaker position in their contracts.

The unfavourable attitude of Indonesian courts towards foreign arbitral awards may be directly influenced by the system of Indonesian law whereby foreign judgments are not enforceable.[76] This can be seen from the provision of Article

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[76]S. Gautama, *Aneka Masalah Hukum Perdata Internasional* (Various Problems of Private International Law)(Bandung: Alumni, 1985) at 281; Tumbuan & Associates, "Indonesia," in Charles Platto ed., *Enforcement of Foreign Judgment Worldwide* (London/Dordrecht/Boston: Graham & Trotman and International Bar Association, 1989) at 53.

436 in the Rv.[77] Following the classification of the methods of enforcement of foreign judgments made by Bradford A. Caffrey,[78] Indonesia adheres to the *Evidentiary Method* which results in the foreign judgments being treated merely as evidence of a debt. Except as provided in Article 436(1), in practice, all claims must be retried, and thus enabling the courts to determine the merits of the judgment creditor's claim anew. The unenforceability of foreign judgments is strongly deemed to influence the unenforceability of foreign arbitral awards. This is because the judges dealing with the enforcement of foreign judgments are the very judges who deal with the enforcement of foreign arbitral awards. Apart from this, what is meant by foreign judgment mentioned in Article 436 is defined in Article 440 to include a foreign

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[77]Art. 436 of *the Rv*:

Foreign judgments may not be executed in Indonesia:

(1) Except as provided in Art. 724 of the Commercial Code and in other legislation, judgments rendered by foreign courts may not be executed in Indonesia.
(2) Such cases may be commenced, retried and decided in an Indonesian court.
(3) With respect to those cases covered by the exception in sub-paragraph (1) hereof, the judgment of the foreign court may be enforced only after an *exequator* order in the form prescribed by Art. 435 hereof has been obtained by the successful party from the district court in Indonesia having jurisdiction at the place where the foreign judgment is to be executed.
(4) For purposes of obtaining said execuator order, it shall not be necessary to retry the case involved.

[78]B.A. Caffrey, *International Jurisdiction and the Recognition and Enforcement of Foreign Judgments in the LAWASIA Region: A Comparative Study of the Laws of Eleven Asian Countries Inter-se and with the E.E.C. Countries* (New South Wales: CCH Australian Limited, 1985) at 66. Caffrey classifies the method of enforcement of foreign judgments into five groups: the English, Indian, Japanese, Evidentiary and Appeal Methods.

arbitral award.[79]

Foreign businessmen doing business with Indonesian businessmen usually insist on a choice of foreign law and a choice of forum clauses in their contracts.[80] If any, choice of law and choice of forum referring to Indonesian law and forum are not always respected in foreign countries.[81] Foreign businessmen and their lawyers urge that Indonesian law and forum are not yet sufficiently developed to govern and handle complex multinational business disputes. For this reason the choice of Indonesian law and choice of forum clauses are considered not to prevail, and hence it is not surprising that in a case involving Indonesian and foreign companies, an English court claims to have jurisdiction to handle the disputes.[82] A Hongkong court has even ruled that "...thedispute should be judged in Hongkong, because there is no law in Indonesia..."[83]

This ruling seems to give Indonesian courts reasonable grounds to act similarly. This means that their hesitation to enforce foreign judgments or foreign arbitral awards should be read as a response to the treatment that foreign countries give to Indonesian law and forum.

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[79]Art. 440 of *the Rv* states that a first copy of a mortgage deed, a notarial deed for acknowledgement of indebtedness, *a decision of an arbitrator* (emphasis added) and a judicial warrant have the same force as a decision of a foreign judge or court.

[80]Hornick, *supra* note 21 at 97.

[81]S. Gautama, *supra* note 49 at 35.

[82]*Ibid.* at 42.

[83]*Ibid.* at 43.

The last reason that should be considered is that the hesitation of Indonesian courts to enforce foreign arbitral awards may be intepreted as an attempt to protect Indonesian businessmen's weaker position in their contracts with foreign businessmen. In this respect, Noles thinks that "a refusal to enforce typically occurs when the court determines that a substantial inequality in bargaining power existed at the time the contract was formed."[84] For example, courts have not allowed a choice of forum clause to benefit a party with superior bargaining power who could force a weaker party to submit to the jurisdiction of a forum it would otherwise not have chosen.[85]

The weak bargaining power[86] of Indonesian parties *vis à vis* foreign parties leads the former to accept clauses in their contracts which usually take the form of adhesion contracts. It is an undeniable fact that due to economically superior bargaining positions in their dealings with Indonesian parties, foreign parties, developed countries- based enterprises, often insert clauses which cause Indonesian parties to be continuously dependent upon them. As well, they frequently insert both choice of law and choice of forum clauses in an attempt to obtain the law and forum most advantageous to the enterprises. International arbitrations are the choice of

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[84]Reprinted in C. Noles, "Enforcement of Forum Selection Agreements in Contracts Between Unequal Parties," (1981) 11 Ga. J. Int'l & Comp. L. 693.

[85]*Ibid.*

[86]The weak bargaining power of Indonesian parties has also influenced the aplication of foreign investment law which is very accommodative to foreign investors. See T.M. Lubis, "PMA dan UUPMA: Harapan dan Kenyataan Sebuah Telaah Mengenai Kebijaksanaan Penanaman Modal"(Foreign Investments and Foreign Investment Law: Ideality and Reality A Study of Investment Policy) in Sumantoro ed., *Hukum Ekonomi* (Economic Law)(Jakarta: Penerbit Universitas Indonesia, 1986) at 92.

forum clauses most favoured by them.

In the opinion of developing countries, international or foreign arbitration is a system that is tilted in favour of the capital exporting States, and is an instrument of subjugation, as well as a product of Western dominance.[87] Much of the suspicion flows from the fact that publicists of capital exporting countries have sought to build a system of arbitration for the protection of foreign investment contracts and related business activity in the context of international law.[88] In the Indonesian context, such views gain a justifying ground that in cases of dispute, it can almost always be predicted that Indonesian parties will become the losers. In connection with this reality, the hesitation of Indonesian courts to enforce foreign judgments or foreign arbitral awards could be viewed as an expression of their sensitivity to exploitation. In the alleged inferior position, it is reasonable if courts urge preferential treatment for Indonesian parties, as without special treatment in the area of commercial relations, development will continue to be encumbered by the activities of foreign enterprises.[89]

2. The Attitude towards Public Policy Defense

In general, Indonesian courts adhere to the broad view of public policy. This conclusion can be drawn not only from the theoretical approach, as mentioned

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[87]M. Sornarajah, "The Climate of International Arbitration," (1991) 8 J. Int'l Arb. 47 at 47-48.

[88]*Ibid.* at 48.

[89]*Cf.* Noles, *supra* note 84 at 706.

earlier, but also from decisions which are mostly in favour of public policy, either in general cases or in cases concerning arbitration. The following are some court decisions regarding the application of public policy.

The first case was about slavery involving two African citizens: a slave and his master.[90] They had lived in Indonesia for a long time. Eventually the slave did not wish to work any more without being paid. He no longer performed his obligations as a slave. The master then came before the court, and asked the court to decide that the slave had to remain working for him without payment.

According to Article 16 Algemene Bepalingen van Wetgeving (AB), which contains the provision of Private International Law of Indonesia, personal status is governed by national law (nationality principle). This means that the law of an African country would have been used. However, Indonesian judges refused to use the law allowing the slavery, based on the belief that it would raise a very great social turmoil. Indonesian society would not have accepted a decision justifying slavery (*exploitation de l'homme par l'homme*), because it went against the Indonesian Constitution of 1945 and the Five Basic Principles of Indonesia. Therefore, albeit the Private International Law of Indonesia favoured the use of foreign law, the latter would not be used. Exceptionally, foreign law was overridden by public policy. According to Indonesian public policy slavery is unlawful, whatever the reasons.

The second case was about divorce based on mutual consent.[91] The case

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[90]Reprinted in Gautama, *supra* note 49 at 2-3.

[91]*Ibid.* at 9-12.

concerned two citizens from the Republic of China, a husband and a wife, who lived in Indonesia. The wife sued her husband to get a divorce before the Central Jakarta District Court. She and her husband had agreed on the divorce. They grounded their reason on the New Marriage and Divorce Act of the Republic of China that allowed divorce based on mutual consent. In accordance with the Chinese law, they would have to be divorced. However, the court did not apply the Chinese law. Chinese law did not prevail because it was considered against Indonesian public policy. Based on Indonesian law concerning marriage, the marriage cannot be dissolved if only grounded on mutual consent between husband and wife. The divorce must be based on the relevant grounds laid down either in the Indonesian Civil Code or the Indonesian Marriage Act of 1974 No. 1 (the newest act concerning marriage).

Even though the cases described above did not concern the application of public policy towards foreign arbitral awards, the cases still give a general picture of the application of public policy by Indonesian courts. It may not be an exaggeration if those cases above are the best examples of the proper application of public policy.

There are several cases concerning the application of public policy in connection with arbitration. Except for two cases, decided in 1959,[92] and in 1991,[93] all the rest were in favour of public policy.[94] Two recent court decisions

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[92]Supreme Court Judgment No. 1/1959 Pem. Put. Wst. dated 5 September 1959 (held that arbitration agreement prohibiting appeal of arbitral award was not contrary to Indonesian public order, even though Indonesian law authorized appeal of arbitral awards).

[93]See *supra* note 11.

show an interesting stand point in the development of public policy matters in the field of arbitration.

The first is the Supreme Court Decision in the case of *E.D & F.MAN (Sugar) Limited* v. *Yani Haryanto*.[95] In issuing an exequatur, the court stated that the subject did not contravene public policy,[96] though it did not give further explanation about the reason. Nevertheless, the decision was extremely important not only for the development of arbitration as a whole, but also for public policy in particular. The most important was that the decision showed the strong bias of Indonesian courts in favour of arbitration.

However, this new development was not maintained. The court changed its position in the last case concerning domestic insurance arbitration between *PT UJ* v.

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[94]For examples, Jakarta High Court Judgment No. 244/Pdt/1987 dated 30 July 1987 (held that it was against public policy to allow arbitration of the insurance claim); Central Jakarta District Court Judgment No. 499/Pdt/G/VI/1988 dated 27 July 1989 (in an action by an Indonesian buyer against an English vendor to invalidate contracts for purchase of sugar "C&F Indonesian port," held that sugar contracts contravened Indonesian public policy and were therefore invalid, because they violated Indonesian regulation providing that only BULOG, the government procurement agency, could make contracts to import sugar to Indonesia); Supreme Court Decision No. 1840 K/Pdt/1986 dated 23 October 1991 and published in May 1992 (held that the arbitral award rendered by BANI (Badan Arbitrase Nasional Indonesia, Indonesian National Board of Arbitration) was in contradiction with Indonesian public policy, because it contravenes the fundamental principles of *audi alteram partem* and *indemnity*).

[95]See *supra* note 11.

[96]*Ibid.*

PT MU[97], where the enforcement of an arbitral award was refused on grounds of public policy. This means that public policy in Indonesia remains a sensitive matter which will always possibly be restrained by courts.

3. The Attitude towards Limited Coverage of the New York Convention

After the issuance of the Regulation there has not yet been any case related to the limited coverage of the New York Convention with regard to reciprocity or commercial reservation. The case of *Trading Corporation of Pakistan Limited* (TCPL) v. *PT Bakrie Brothers*[98] was, as far as this researcher is aware, the only case decided after the accession to the New York Convention in 1981, and before the issuance of the Regulation in 1990. *In casu*, PT Bakrie Brothers (Indonesian company), seeking to block enforcement of an arbitral award made in London in favour of TCPL (Pakistani company) asserted that Pakistan did not accede to the New York Convention, and therefore, the convention could not apply.[99] The South Jakarta District Court was of the opinion that the relevant criterion for purposes of determining whether the Convention applied was the place where the award was made, not the nationality of the claimant, and thus the fact that Pakistan was not a

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[97]*PT UJ* v. *PT MU supra*, note 93. See H. Gunanto, "Seputar Yurisprudensi Mahkamah Agung Terbaru Tentang Arbitrase," (The Current Decision of the Supreme Court on Arbitration)(1992) 9 Newsletter 31.

[98]*Trading Corporation of Pakistan Limited* (TCPL) v. *PT Bakrie Brothers*, *supra* note 8.

[99]*Ibid.*

party to the Convention did not preclude enforcement under the Convention.[100] The opinion was in line with the purpose of Article I(3) of the New York Convention and later with Articles 3(1) and 5(4)(c) of the Regulation, despite the unenforceability based on another ground.[101]

4. The Attitude towards Article V Defenses

The case of *Trading Corporation of Pakistan Limited* (TCPL) v. *PT Bakrie Brothers*[102] was the only test case of the application of Article V of the New York Convention by an Indonesian court after the accession to the Convention and prior to the issuance of the Regulation. Seeking to block enforcement, PT Bakrie Brothers (respondent) relied on Article V(1)(b) of the New York Convention, Which allowed a court to reject enforcement, *inter alia*, where the party against whom the award is invoked was unable to present his case. Based on the defense, the respondent sought a declaration that the foreign arbitral award was unenforceable. The court granted the relief based on the fact that there was no proof in the award that the Federation of Oils, Seeds and Fats Association (the tribunal) had given the Indonesian party an opportunity to be heard, and to appoint representative in the forum of arbitration in accordance with Article V (1)(b) of the 1958 New York Convention.[103] The

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[100]*Ibid.*

[101]See *infra* E.4.

[102]*Trading Corporation of Pakistan Limited* (TCPL) v. *PT Bakrie Brothers*, *supra* note 8.

[103]*Ibid.*

opinion of the court was upheld by the Supreme Court.[104]

Commenting on the decision, Robert N. Hornick said that the court mistakenly placed the burden on the successful claimant to prove that the respondent had been given an opportunity to present its case, instead of on the respondent to prove it had not.[105]

From the broad review above, it appears that Indonesia has not so far been able to cope with the obstacles of the recognition and enforcement of foreign arbitral awards. The ratification of the New York Convention and the promulgation of the Implementing Regulation, as well as the issuance of the Supreme Court Decree granting exequatur are not entirely satisfactory answers to the problem of unenforceability of foreign arbitral awards.

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[104]*Trading Corporation of Pakistan Limited* (TCPL) v. *PT Bakrie Brothers*, The Supreme Court Decision No. 4231K/Pdt/1988 dated 11 May 1988.

[105]Hornick, *supra*, note 39 at 578.

CHAPTER V

CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

The research for this thesis reveals significant similarities and differences between the experience of the US, as a developed country, and Indonesia, as a developing country, in recognizing and enforcing foreign arbitral awards. Nevertheless, the similarities are fewer than the differences.

The major similarities are found in the three following facts: firstly, both countries have experienced a period of hostility towards foreign arbitral awards and a period of transition from hostility to acceptance; secondly, both ratified the New York Convention as the first step to recognize and enforce foreign arbitral awards binding multilaterally; and thirdly, both issued implementing regulations for the application of the New York Convention.

As stated above, both the United States and Indonesia have experienced a period of hostility towards foreign arbitral awards which was manifested in the *non-enforcement policy*, and a period of transition. Historically, in the United States the hostility attitude towards arbitration in general appeared before the enactment of the United States Arbitration Act of 1925. Before 1925 the United States applied the so-called *ouster doctrine* which opposed the arbitral process based on the reason that arbitration agreements *oust* the court of jurisdiction. Although by the enactment of the United States Arbitration Act in 1925 the doctrine was replaced by an *emphatic*

federal policy favoring arbitral dispute resolution, it did not mean that the United States immediately accepted the international arbitral process. The country did not fully supported the process until 1970. It can be said, therefore, that between 1925 and 1970 was a period of transition from hostility to acceptance and enforcement.

In Indonesia, the hostile attitude was obviously seen before the country ratified the New York Convention in 1981. Despite the accession of the Netherlands (Indonesian colonizer) to the 1927 Geneva Convention in 1931 on behalf of Netherlands Indies (Indonesia), and despite the "Round Table Conference,"[1] the country seemed to apply an *unenforcement policy* of foreign arbitral awards. This policy was manifested in the refusal of this country to recognize and enforce such awards based on the reason that Indonesia was no longer bound by treaties acceded to during colonial time, and hence it was necessary to ratify the New York Convention. Despite some developments, the effect of this policy continuously existed until now. This can be seen from the fact that even though Indonesia has ratified the New York Convention since 1981, foreign arbitral awards still cannot be enforced; other constraints continuously show up. Nevertheless, efforts to remove the barriers have already been made. The most fruitful attempt, apart from the enactment of the Supreme Court Regulation of 1990 No. 1, was the issuance of an exequatur (writ of execution) upon a foreign arbitral award in 1991, though the award could not still be

[1]Art. 5 of the Agreement on Transitional Measures of 1949 of the so-called "Round Table Conference" provided that Indonesia would be bound by all international agreements entered into by the Dutch government on behalf of the Netherlands Indies (Indonesia) until they were terminated expressly by the Republic itself.

executed. Considering those attempts, it is not an exaggeration to say that this country is in a period of transition from hostility to hospitability towards foreign arbitral awards.

As indicated earlier, both the United States and Indonesia considered the ratification of the New York Convention to be the first step in order for foreign arbitral awards to be legally and multilaterally recognized and enforced. The accession of the United States to the Convention has been a remarkable event giving the full acceptance of the country to foreign arbitral awards. The results of the accession were not only the smoothness of the recognition and enforcement of foreign arbitral awards, but also the furtherance of the international commercial arbitration development both in that country and at the international level.

Just as in the United States, in Indonesia the ratification of the New York Convention also has had a great impact. After the accession, the political will of Indonesian government and the efforts of Indonesian courts as well as Indonesian law experts to overcome the problems of recognition and enforcement of foreign arbitral awards became stronger than ever. The issuance of the Supreme Court Regulation of 1990 No.1 and of the exequatur in 1991 as mentioned above is evidence of such efforts.

The enactment of implementing regulations for the application of the New York Convention both by the United States and Indonesia is another similarity between these countries. This implies that both countries believe that the New York Convention does not have a self executing power; there is still a necessity for the

presence of implementing regulations. Nevertheless, the issuance of the regulations does not influence the self executing power of the Convention, since these do not substantially impose more onerous conditions or higher fees or charges on the recognition and enforcement of arbitral awards to which the Convention applies. The regulations are needed by both countries merely to give a stronger legal basis for the recognition and enforcement of foreign arbitral awards, and to give clear guidances with the hope that the smoothness in doing so is guaranteed.

For the United States the importance of the implementing regulation is obviously evident, since by the regulation this country has established not only the *enforcement policy*, but also the *presumption of arbitrability* policy by which the court should decide in favor of arbitration in case the scope of an arbitration clause was fairly debatable or reasonably in doubt. Whereas for Indonesia, such a regulation is extremely important since government and the courts have a very formalistic thought. Such a thought is always a big constraint in applying any law provisions. This was so in recognizing and enforcing foreign arbitral awards and in implementing the New York Convention in particular. By this regulation, formalistic reasons constraining the smoothness of the recognition and enforcement of foreign arbitral awards are gradually reduced.

In general, the major contrast between the United States and Indonesia is that foreign arbitral awards in the former have been able to be recognized and enforced without facing many problems, unlike in the latter. This means that the United States has been in a period of hospitability, whereas Indonesia is still in a period of

transition. Such a difference is caused by the fact that foreign arbitral awards in the former have received more support than those in the latter.

The support towards foreign arbitral awards in the US comes from all aspects which constitute required factors which are interrelated one each other in the success of the recognition and enforcement: adequate legal bases, positive attitude of the business community, and supportive role of the courts. Conversely, such support does not exist in Indonesia. Indonesia, despite trends to the contrary, does not, as yet, fully support a system of international commercial arbitration in general and foreign arbitral awards in particular. Recently, as stated earlier, this country is still in a period of transition from a period of hostility to a period of hospitability towards international commercial arbitrations. This is based on the fact that the signal of change has appeared; various obstacles are beginning to be removed.

Such a contrast between the United States and Indonesia in supporting international commercial arbitration can be conceived in light of the difference of developing and developed countries' perspectives. If the State is a developing country, entrenched suspicions of international arbitration become accentuated. Such suspicions result from the fact that these States have seen international arbitration as a system that is weighted in favor of the capital exporting States. Much of the suspicion has developed because publicists of capital exporting countries have sought to build a system of arbitration for the protection of foreign investment contracts and related business activity. That in itself generates suspicion and has been seen by the African, Asian and Latin American States as an instrument of subjugation and as a

product of Western dominance.

The claim is sometimes made that Third World States are showing an increasing willingness to participate in international commercial arbitration. It is generally conceded that these states have been suspicious of international methods of settling commercial disputes but it is claimed that such suspicion is now receding. The claim that the suspicion is receding is a subjective one dependent on the selection favorable evidence.[2] Regardless of such an opinion, which is the case in Indonesia, the decrease of the suspicion can be proven by the last ten year development in which Indonesian government, the courts and legal experts view international commercial arbitration as a global necessity. This is because of the intensity of interaction, especially in international trade, among countries in the world no matter developed or developing countries.

Specifically, the contrast between the United States and Indonesia in recognizing and enforcing foreign arbiral awards can be clearly observed in the following points. The first is that even though both countries have their own legal bases concerning arbitration, the level of adequacy of those in each country is to a large extent different. Although the United States adheres to a common law system in which case law is the main basis, this country retains presenting other legal instruments, such as the United States Arbitration Act and the Federal Arbitration Act of 1925, the New York Convention, bilateral treaties, and enforcement through

[2]M. Sornarajah, "The Climate of International Arbitration," (1991) 8 J. Int'l Arb. 47 at 48.

the recognition of a foreign judgment. The existence of these various legal instruments have adequately been able to anticipate the problems of recognition and enforcement of foreign arbitral awards. By these instruments, it will be very difficult for a recalcitrant party to avoid and resist enforcement if he inserts his defense based on the weakness and particularly on the absence of legal bases, because all these legal bases strongly support enforcement policy.

Unlike the United States, Indonesia has not yet had adequate legal bases concerning international commercial arbitration so that these constitute the weaknesses which were and are frequently used by resistant parties as well as Indonesian courts to reject enforcement. This inadequacy of the legal bases is found previously in the absence of legal instruments concerning recognition and enforcement of foreign arbitral awards, such as ratification of conventions on recognition and enforcement of foreign arbitral awards, and implementing regulations for such conventions. Currently, the inadequacy is mainly found in the absence of statutes governing specifically and independently international commercial arbitration. The existence of Article 1338 of the Indonesian Civil Code (CC)[3] and the official elucidation of Article 3 of the Basic Statute on Judicial Power,[4] the presence of

[3]Art. 1338 of the Civil Code provides that all agreements shall be binding as law on the parties who make them.

[4]Act of 1970 No. 14, L.N. 1970: 74. The elucidation of Art. 3 states that settlement of disputes by arbitration is permitted.

Article 377 of the Code of Procedure (HIR)[5] and Articles 615-651 of the Code of Civil Procedure (Rv),[6] the ratification of the New York Convention, the enactment of the Supreme Court Regulation of 1990 No.1, and the issuance of the Supreme Court Decision[7] granting exequatur does not suffice the need to cope with the enforcement of foreign arbitral award problems. Article 1338 of the CC is so broad that it embraces all kinds of contract, whereas Article 377 of the HIR and Articles 615-651 of the Rv are considered to govern merely domestic arbitration, and hence there is no space for international commercial arbitration. The rest of those legal bases indeed have imparted a great impetus leading to recognition and enforcement of foreign arbitral awards. However, those only deal with the recognition and enforcement of foreign arbitral awards, whereas the international commercial arbitration alone as an integrated system is not substantively governed. Besides, there exist some weaknesses in those instruments, such as the lack of provisions concerning the appeal or cassation of foreign arbitral awards.

The second aspect that contrasts the United States and Indonesia in recognizing and enforcing foreign arbitral awards is that the former's business community tends to comply with foreign arbitral awards voluntarily, unlike in the latter. Such a difference is not due merely to the different levels of law consciousness

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[5]S. 1941:44. Art. 377 emphasizes that Indonesian persons may settle disputes by arbitration in accordance with provisions on arbitration set forth in the Code of Civil Procedure (Rv).

[6]S. 1847:52. Arts. 615-651 set a framework for arbitration in Indonesia.

[7]The Supreme Court Decision No. 1 Pen. Ex'r/Arb. Int./Pdt/ 1991 dated 1 March 1991, *E.D. & F. MAN (Sugar) Limited* v. *Yani Haryanto*.

and law knowledge in business, but rather to different conditions in each country.

Since 1970 the United States, as has been examined in many cases, has been a conducive place for international commercial arbitration as well as foreign arbitral awards. Due to the full acceptance of this country, it has been very difficult for a party to challenge enforcement for whatever reason is inserted. A party invoking a defense has to face the reality that legal instruments have become too strong to be challenged and that the courts strongly support foreign arbitral awards. Facing such a reality, an unsatisfied party tends to hesitate to resist enforcement, since he is aware that his attempt would be exhausting and would fail.

Unlike the United States, Indonesia has not been a conducive place for both international commercial arbitration and foreign arbitral awards. As mentioned earlier, the legal bases for international commercial arbitration and recognition and enforcement of foreign arbitral awards still remains inadequate. This inadequacy is worsened by the attitude of the courts, as will be explored later on, which seems to overprotect parties, i.e Indonesian parties, seeking to challenge enforcement. These two weaknesses become deadly weapons for recalcitrant parties to stab to death foreign arbitral awards. That every foreign arbitral award is challenged shows that the business community in this country has not yet voluntarily complied with those awards.

The last aspect contrasting the experience of the United States and Indonesia in recognition and enforcement of foreign arbitral awards lies in the attitude of the courts, either in general or in the attitude towards the New York Convention based

defenses.

Generally, the attitude of the former's courts towards foreign arbitral awards is favorable, whereas the attitude of the latter's is unfavorable. Since 1970 the United States Courts have not rejected to enforce foreign arbitral awards in any case; the courts have confirmed foreign arbitral awards under the New York Convention. This ultimate pro-enforcement policy has been taken even when to do so placed the United States businessmen and interests at a disadvantage.

Such a general attitude of the United States courts has not been reached by Indonesian courts. Before 1981, Indonesian courts totally applied an unenforcement policy. It was manifested in the fact that Indonesian courts denied to recognize and enforce foreign arbitral awards for any reason. Such an attitude may directly or indirectly be influenced by the adhered *Evidentiary Method* in which foreign judgments are not enforceable. It may also be a response to the reality of foreign treatments upon Indonesian laws and forums. The reality is that choice of laws and forums in international business contracts involving Indonesian parties and foreign busniessmen always refer to foreign laws and forums. If any, those referring to Indonesian laws and courts or tribunals are not always respected by foreign parties or forums. Apart from these, the hesitation of Indonesian courts to enforce foreign arbitral awards has been an attempt to protect Indonesian businessmen from exploitation arising out of the imbalance position in their contracts with foreign businessmen. Due to the weakness in bargaining power *vis à vis* foreign parties, usually Indonesian parties are forced to accept any clause even if it is

disadvantageous. It is not strange therefore, that in case of disputes, such contracts will always result in Indonesian parties becoming the losers. This background gives Indonesian courts a reasonable ground to apply an unenforcement policy. Nevertheless, despite not yet being successful after passing such a totally unenforcement policy, since 1990 Indonesian courts have been moving forward to enforcement policy.

With regard to the attitude of both countries' courts towards the New York Convention based defenses, case law of both countries show a significant contrast. In facing the defenses, the United States courts have shown a consistent line favoring foreign arbitral awards, whereas Indonesia's have not. As has been proven in many cases, the United States courts have interpreted commercial and reciprocity defenses broadly and liberally, and construed public policy and other Article V based defenses narrowly. So far these have successfully led to enforcement of most cases submitted to the United States courts.

As clearly seen above, in anticipating the New York Convention based defenses as a whole, Indonesian courts have not had clear attitudes yet. This is because there have not been enough cases yet to evaluate them. Nevertheless, there is a strong tendency that there will always be a strong bias of Indonesian courts in favor of public policy. Public policy in Indonesia remains a sensitive matter which will always be restrained by the courts, and hence will be the main obstacle in recognition and enforcement of foreign arbitral awards. Public policy will be interpreted broadly to include domestic and international ones, and to embrace any kinds of alleged

violations upon domestic and international laws including other Article V of the New York Convention based defense provisions.

As a matter of fact, the extensive review of the experiences of the United States and Indonesia in recognition and enforcement of foreign arbitral awards proves the following facts: the former country has successfully increased the level of adequacy of both domestic and international commercial arbitration laws, anticipated unscrupulous businessmen defenses, and established a consistent attitude of courts committed to arbitration. These have resulted in the smoothness of recognition and enforcement of foreign arbitral awards in that country.

Conversely, Indonesia has not reached what the United States has done: its arbitration laws have not been adequate yet, though the advent of several important legal bases; its business community is still too spoil to comply with what have been agreed upon in their contracts; and its courts remain too hesitate to implement arbitration laws have existed. Consequently, foreign arbitral awards have not been recognizeable and enforceable yet.

Of these three factors, as elaborated above, determining whether or not recognition and enforcement of foreign arbitral awards is effective, the last one, i.e. the courts' attitudes, seems to be the key element. How weak or inadequate the law is concerning arbitration, and how strong the defenses are as asserted by unscrupulous businessmen against foreign arbitral awards will certainly mean nothing if the courts have consistently, with a full faith and credit, taken a position in favor of foreign arbitral awards. Otherwise otherwise will be serious constraints. The United

States' courts have demonstrated the former one, and it makes sense if they are considered to be *a model* that might be adopted by other countries' courts for promoting foreign arbitral awards in particular, and international commercial arbitration in general.

B. Recommendations

Whether or not the recognition and enforcement of foreign arbitral awards is succesful mainly depends on three factors, i.e. the level of adequacy of legal bases, the level of consciousness of the business community to comply with what they have been agreed upon, and the courts' attitudes. It is highly recommended that Indonesia, as well other developing countries which have not yet recognized and enforced foreign arbitral awards, pay much attention to upgrading those factors. Several alternatives may be considered as follows.

Firstly, the existence of a comprehensive statute regarding both domestic and international commercial arbitrations is an unnegotiable necessity. This statute should be comprised not only of the governance of the procedural matters of both domestic and international commercial arbitrations, but also of the substantive ones. Among these matters, the provision concerning public policy should be paid much more attention both substantively and procedurally, for this potentially constitutes the main obstacle to the free flow of foreign arbitral awards. Existing Indonesian laws have been left behind and hence unable to anticipate the development of international arbitration. The country may consider the United States' laws concerning domestic

and international arbitrations, and the UNCITRAL Model Law on International Commercial Arbitration to be adopted as models. Apart from such a comprehensive statute, the country also needs to make bilateral treaties, since not all countries are members of the New York Convention. Such treaties may well be used to anticipate the assertion of reciprocity reservation based defense.

Secondly, to upgrade the attitude of the business community, it is an immediate need to remove factors stimulating them not to comply with foreign arbitral awards by several means. In the first place, the patternalistic relationship between businessmen and bureaucrates which include the courts, which born "client businessmen," should be gradually cut especially by reducing various protection policies. Then, the courts should be sensitive towards a dilatory tactic usually practiced by a losing party against whom a foreign arbitral award is sought to be enforced. It is suggested that the courts impose more onerous conditions or higher additional charges to the person practicing such a tactic in order to prevent him and other businessmen from doing so. At last, it is important that businessmen reduce their dependency upon foreign businessmen so that at the same time their bargaining power could gradually increase. As well, it is also required that businessmen, or at least their lawyers, broaden their knowledges about contract law so that they can avoid disadvantageous clauses which usually lead them to be losers in arbitration proceedings.

Finally, since the courts are presumably considered the key component in the success of recognition and enforcement of foreign arbitral awards, it is recommended

that their judges be freed from undue phobia of losing state's sovereignty, from urging preferential treatments for their country's businessmen, and from being unnecessarily overprotective to their laws and forums. This may be achieved by giving them full freedom of discretion in responding to problems of recognition and enforcement of foreign arbitral awards in particular, and in resolving other legal problems submitted to them in general. By imparting to them such ultimate discretion, it may prevent them from denying to recognize and enforce foreign arbitral awards based on, as they have usually asserted, the absence or the weakness of law. This should be accompanied by the opportunity to broaden their knowledge of both international commercial arbitration and international commercial laws. Last but not least, the harmonization of attitudes between the Supreme Court and the lower courts is also among the important factors in order for the courts to function as expected in the recognition and enforcement of foreign arbitral awards. Such a necessity is based on the fact that in the latest development, the unenforceability of foreign arbitral awards was caused by the lack of harmonization between them.

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