

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

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## Abstract

The public policy exception under Article V (2) (b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (NYC) is the most controversial ground for challenging enforcement of foreign arbitral awards. The great uncertainty as to the ambit of the public policy exception has led to inconsistent approach adopted by the courts which created problems for parties wishing to enforce foreign arbitration awards.

This thesis explores the complexity and inconsistent application of the public policy exception in Indonesia. It critically analyses the tendency of the Indonesian judiciary system towards the judicial application of public policy in determining the enforceability of foreign arbitral awards after the ratification of the NYC, considering the distinctive feature of the Indonesian legal system and approaches that have been taken by the courts of other countries. Occasionally, reference is also made to statutory provisions in arbitration from other countries to indicate approaches that have been taken elsewhere in regard to the public policy exception. This thesis examines whether current decisions of the Indonesian Supreme Court and the District Courts are in compliance with the pro-enforcement policy of the NYC, which demands a narrow approach to the public policy exception. It also examines the extent of judicial review of foreign arbitral awards by the Indonesian courts, particularly concerning the standards for applying judicial discretion to refuse or allow enforcement under the public policy exception.

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

Despite the changes brought by new Indonesian arbitration law reform, the central position of the narrow approach to the public policy exception has yet to achieve full recognition. If this situation is related to the enforcement of foreign arbitral awards in Indonesia, it can be seen that the finality and enforceability of the awards will hardly be achieved until the underlying issue concerning a restrictive concept of public policy is addressed. It is argued that a failure to adopt a narrow approach to the public policy exception can be related to the enforceability of foreign arbitral awards in Indonesia.

The recommendations throughout this thesis promote the Indonesian judiciary system to shift away from a 'domestic' concept of public policy. They encourage the Indonesian judiciary and Arbitration legal framework to strongly adopt the concept of internationalism in establishing the judicial approach to public policy exception. In doing so, this thesis also contributes to harmonizing the judicial application of public policy through establishing the concept of 'international' public policy that is based on the narrow approach to the public policy exception and the presumption of favouring enforcement of international arbitral awards.

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# **Table of International Conventions and National Legislations**

## **International Conventions**

1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).
2. UNCITRAL Model Law on International Commercial Arbitration (Model Law).
3. European Convention on International Commercial Arbitration of 1961
4. Inter-American Convention on International Commercial Arbitration of 1975 (Panama Convention)
5. International Centre for Settlement of Investment Dispute Convention (Washington Convention)
6. Geneva Convention on the Execution of Foreign Arbitral Awards 1927 (Geneva Convention)

## **National Laws**

### **Indonesia**

1. Indonesian Arbitration Act No 30 of 1999 regarding Arbitration and Alternative Dispute Resolution
2. Supreme Court Regulation No 1 of 1990 regarding the Enforcement Procedure of Foreign Arbitral Awards—1 March 1990
3. Presidential Decree No 34 of 1981, published in the State Gazette (*Berita Negara*) No. 40 of 1981—5 August 1981
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## **Table of Abbreviations**

<b>Arbitrability exception</b>	New York Convention Art V(2) (a); Model Law Art 3 (1) (b) (i); Indonesian Arbitration Act Article 5 (1)
<b>Annulment exception</b>	New York Convention Article V (1) (e); Model Law Article 36 (1) (a) (v); Indonesian Arbitration Act Article 70
<b>ASA Bull</b>	Swiss Arbitration Association Bulletin
<b>Arb. Int</b>	Arbitration International
<b>Art</b>	Article
<b>Arb</b>	Arbitration
<b>AB</b>	<i>Algemene Bepalingen van Wetgeving</i> (the Code containing the provisions of Private International Law)
<b>Act of 1999</b>	Act No 30 of 1999 regarding Arbitration and Alternative Dispute Resolution (ADR)
<b>All ER</b>	All England Law Report
<b>BANI</b>	<i>Badan Arbitrase Nasional Indonesia</i> (Indonesian Board of Arbitration)
<b>CLOUT</b>	Case Law on UNCITRAL Texts
<b>CCP</b>	Code of Civil Procedure (Dutch)
<b>NCCP</b>	New Code of Civil Procedure (France)

<b>CA</b>	Court d'Appel (Court of Appeal)
<b>Cir.</b>	Circuit
<b>Cour de cass</b>	Cour de cassation
<b>Cass Civ le</b>	Cour de cassation 1ere Chamber Civile (French Supreme Court)
<b>Co</b>	Company
<b>Due process exception</b>	New York Convention Article V (1) (b); Model Law Article 36 (1) (a) (ii); Indonesian Arbitration Act Article 22 and Article 56 (1)
<b>DAC</b>	Departmental Advisory Committee's Report on the Arbitration Bill
<b>Enforcement</b>	Enforcement and Recognition
<b>EWHC</b>	High Court of England and Wales
<b>FAA</b>	US Federal Arbitration Act (1925)
<b>F Supp</b>	Federal Supplement
<b>F 2d</b>	US Federal Reporter Second Series
<b>F 3d</b>	US Federal Reporter Third Series
<b>HIR</b>	<i>Herziene Inlandsch Reglement</i>
<b>Indonesian Arbitration Act</b>	The Act No 30 of 1999 regarding Arbitration and Alternative Dispute Resolution (ADR)
<b>IAA</b>	International Arbitration Act 1974 (Cth/Australia)
<b>ICC</b>	International Chamber of Commerce
<b>ICCA</b>	International Council for Commercial Arbitration
<b>ICSID</b>	International Centre for the Settlement of Investment Disputes
<b>ILA</b>	International Law Association
<b>IS</b>	<i>Indische Staatsregeling</i>
<b>JDI</b>	Journal de droit international
<b>Lloyd's Rep</b>	Lloyd's Law Reports
<b>Ltd</b>	Limited
<b>Model Law</b>	UNCITRAL Model Law on International Commercial Arbitration 1985

<b>New York Convention</b>	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
<b>Non-enforcement</b>	New York Convention Article V; Model Law Article 36; Indonesian Arbitration Act Article 66
<b>Public policy exception</b> Art 36	New York Convention Article V (2) (b); Model Law (1) (b) (ii); Indonesian Arbitration Act Article 66 (c)
<b>Panama Convention</b>	Inter-American Convention on International Commercial Arbitration (1975)
<b>RI</b>	Republic of Indonesia
<b>Rev. Arb.</b>	Review of Arbitration
<b>RBg</b>	<i>Reglement Buitengewesten</i>
<b>Rv</b>	<i>Burgerlijke Reglement of de Rechtsvordering</i>
<b>SDNY</b>	Southern District of New York
<b>SLR</b>	Singapore Law Reports
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNCTAD</b>	United Nations Conference on Trade and Development
<b>UNIDROIT</b>	International Institute for the Unification of Private Law
<b>UPICC</b>	UNIDROIT Principles of International Commercial Contracts (1994)
<b>US</b>	United States of America
<b>VSC</b>	Victorian Supreme Court
<b>YCA</b>	Yearbook of Commercial Arbitration