Migration Letters

Volume: 20, No: 6, pp. 525-536

ISSN: 1741-8984 (Print) ISSN: 1741-8992 (Online)
www.migrationletters.com

The Urgency of the Principle of Public Policy as a Basis for Refusing the Execution of Commercial Arbitration Awards Submitted for Execution in Indonesia

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Abstract

Arbitration as a dispute resolution has been recognized and accommodated in Indonesian positive law. Against international arbitral awards that are requested for enforcement in Indonesia, there is an obstacle regarding the refusal of execution of the award based on the violation of the principle of public policy. The limitative definition in the 1958 New York Convention and no further regulation of the principle of public policy provide uncertainty to the execution of international arbitration awards in Indonesia. The type of research used in this legal writing is normative legal research. Research that is evaluative research. The approaches used include a statutory approach, case approach, and conceptual approach. The technique of collecting legal materials is done through literature study using deductive legal logic. The results show that although there is no unity of meaning regarding the principle of public policy, every country definitely needs an emergency brake to protect national interests called the term public policy.

Keywords: *Arbitral Award; Legal Certainty of Arbitration; Refusal to Execute the Award; Violation of Public Policy.*

1. Introduction

Indonesia as a member of the World Trade Organization, hereinafter abbreviated as WTO, cannot let go of its involvement in international trade. In principle, the WTO is a means of encouraging global free trade in an policyly and fair manner. The consequence of being a member of the WTO makes the Indonesian government obliged to ratify the regulation through Law Number 7 of 1994 concerning the Ratification of the Agreement Establishing the World Trade Organization on November 02, 1994. The implications of the establishment of the world body make trade between countries become policyless, which then makes many companies at the world class company level cooperate with local entrepreneurs to expand production and market expansion into a natural activity. When the flow of trade between countries increases, the next consequence is the increase in cooperation agreements that do not rule out the possibility that it will cause conflict based on several things, for example related to state licenses and policies, differences in interpretation of the contents of the agreement, and then circumstances claimed as force majeure.

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In relation to conflict, a trade relationship between one country and another has great potential regarding the occurrence of a trade dispute or commercial dispute. In fact, it can be said that this dispute is a necessity. The reason is that there are many factors and variables that then affect the implementation of a cooperation agreement. The development of the world of trade that has increased significantly in the face of the era of disruption has made conventional international trade dispute resolution through ordinary courts no longer popular. Considering that the settlement through ordinary courts often takes a long time (Priyatna, 2002). In addition to being time-consuming, such dispute resolution is relatively costly. Dispute resolution in and out of court, when compared between the two, it will appear that the dispute resolution process through the court results in a decision that is adversarial and has not been able to embrace the common interest because it results in a win-lose solution, while the dispute resolution process outside the court results in a win-win solution agreement. Based on the above by prioritizing the effectiveness and efficiency of the parties, foreign entrepreneurs prefer to resolve their disputes through non-litigation channels. This non-litigation dispute resolution outside the court is called Alternative

Dispute Resolution (ADR) or Alternative Dispute Resolution (APS) (Usman, 2003). Until now, arbitration is still considered as one of the most appropriate forums for resolving international trade transaction disputes because there is no court that is specialized to be able to examine international commercial disputes (Priyatna, 2002). In connection with the settlement of trade disputes through international arbitration in this case, of course, related to its execution in Indonesia, it cannot be denied that the rejection of the execution of existing decisions is inevitable. Rejection of the execution of an arbitral award is a legal effort in the form of refusing the implementation or execution (enforcement) of an international arbitral award by the court where the assets or goods are located (Nugroho, 2015). Regarding the rejection, there are already arrangements in Indonesian positive law and international provisions. Where the reason used as the basis for rejection is placed on the violation or incompatibility of the contents of the decision against the principle of public policy so that with the execution of the decision, it will conflict with the principle of public policy. Although there are regulations governing this rejection, in fact it has not been able to provide rigid interpretations and boundaries regarding the principle of public policy. Until now, the interpretation of public policy by experts and judges around the world still experiences fundamental differences.

Regarding the regulation regarding the recognition and enforcement of arbitral awards, one of them has been accommodated in the national provisions, namely in the substance of Article 66 letter c of Law Number 30 Year 1999 on Arbitration and Alternative Dispute Resolution which states the condition that international arbitral awards as referred to in letter a (this article) can only be implemented in Indonesia limited to awards that are not contrary to public policy (public policy). This requirement is an ambiguous part, considered the most complicated and complex with regard to practice (Tuegeh-Longdong, 1998). It concerns the lack of clarity on the meaning and framework of the scope of public policy (public policy). The issue as intended, in the authentic explanation of Article 66 letter c of Law Number 30 Year 1999, no answer is found because it is only mentioned in a short sentence "quite clear".

Furthermore, arrangements regarding the recognition and enforcement of arbitral awards in international provisions are also found in the 1958 New York Convention, but this convention provides a limitative definition of the principle of public policy so that this rule becomes multi-interpretive in its implementation. The New York Convention in the case of the notion of public policy leaves the interpretation to each member state of the convention through judicial institutions that have the authority to handle the issue in question. In line with this statement, according to Lena Farsia (2018), the submission of public policy issues to each country is suspected that each country certainly has different characteristics from one another and each country is a sovereign legal subject and is not

subject to the authority of any country. In the 1958 New York Convention, Article 5 paragraph (2) states the refusal to execute a judgment when it is contrary to public policy. This article is considered as an obstacle to the full implementation of the convention. Such discretion, often especially in civil law countries, uses this principle as a "sword" rather than a "shield" against international arbitral awards. Indeed, if the interpretation of public policy is intended only for the protection of national political interests, it will undermine the values contained in the New York Convention (Farsia & Taufik, 2018, Pujiyono, et al, 2022).

Public policy is interpreted more broadly by civil law countries while common law countries give a narrower interpretation to public policy. Countries with a common law legal system are more predictable and provide more assurance of legal certainty. This is reinforced by the concept of precedent adopted by the common law system. Judges in the common law system are obliged to follow previous court decisions so as to increase the possibility of consistency in maintaining the basic meaning of public policy (Manan, 2004, Pujiyono, et al, 2021). In countries with a common law legal system, the use of public policy is more aimed at achieving justice for all parties. For example, in the Singapore High Court decision in the case of Hainan Machinery Import and Export Corporation and Donald & Mc. Arthy PTE-Ltd where the award should have been enforceable, but the Court took a different view on the use of public policy in setting aside international arbitral awards in a more favorable manner (Muttath, 2000). The opposite is the case in civil law countries, which override substantive public policy and emphasize procedural public policy. In Indonesia, for example, with regard to the Indonesian Supreme Court Decision Number 423 1 WPdtl1986 in the case between Bakrie & Brothers and Trading Corporation of Pakistan Ltd, in this case the authorized Court rejected the international arbitration award on the basis that there had been a violation of procedural public policy.

Based on the description above, the author is interested in conducting further studies related to the reasons that make the principle of public policy the basis for a rejection of the execution of an international commercial arbitration award requested for the execution of its decision in Indonesia under the title "Urgency of the Principle of Public Policy as a Basis for Rejection of the Execution of Commercial Arbitration Awards Requested for Execution in Indonesia".

2. Research Method

The type of research used in this legal writing is normative legal research. The research conducted by the author is evaluative research. As for this research, the author uses several approaches that are relevant to the research issues raised, including the statute approach, case approach, and conceptual approach. Furthermore, related to the data for this legal writing, a literature study was conducted with the data sources used can be divided into research sources in the form of primary legal materials and secondary legal materials. The data obtained is then analyzed qualitatively by interpreting it based on existing theories and applicable regulations or norms to then draw conclusions on the issues under study (Marzuki, 2006, Pujiyono, et al, 2020).

3. Research Results and Discussion

The thing that remains a debate in the execution of international arbitration awards is with regard to the basis for refusal of execution carried out by authorized judicial institutions where public policy is used as the basis for reasons by the court to refuse to execute international arbitration awards. International arbitration awards that have been decided by the arbitration institution that has been established to resolve the dispute between the two parties, related to execution cannot be directly implemented in the jurisdiction of one

of the parties as stated in the award. Despite the recognition and enforcement of international arbitral awards, the 1958 New York Convention in Article III states: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, ..." which more or less means that "Each Signatory State (of this convention) shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, ..." in the case of the execution of the award, it must be in accordance with established procedures. Through Presidential Decree Number 34 of 1981 Indonesia itself has ratified the 1958 New York Convention. The consequence of the ratification of the New York Convention requires the guarantee of the implementation of the convention, so then in policy to provide clarity of procedures for the execution of international arbitration awards in Indonesia, Supreme Court Regulation Number 1 of 1990 concerning Procedures for the Implementation of Foreign Arbitration Awards was drafted, hereinafter referred to as PERMA Number 1 of 1990.

Regarding the procedure for obtaining exequatur and the enforcement of international arbitration awards, it has been regulated in Article 5 and Article 6 of PERMA Number 1 of 1990. In Article 5 paragraph (1) it is stated that "An application for the execution of a Foreign Arbitration award can only be made after it is registered (telephoned) at the Registrar of the Central Jakarta District Court, ..." and in Article 5 paragraph (1) it is stated "The Chairman of the Central Jakarta District Court mentioned in paragraph (1) sends the application file for the execution of the Foreign Arbitration to the Registrar/Secretary General of the Supreme Court to obtain exequatur." Due to the limitation of this PERMA, Law Number 30 Year 1999 on Arbitration and Alternative Dispute Resolution was drafted. The Central Jakarta District Court as referred to in Article 1 of PERMA Number 1 of 1990 is an institution authorized to handle issues related to the Recognition and Implementation of Foreign Arbitral Awards and related to the execution as referred to in Article 4 paragraph (1) of this PERMA, which is the authority of the Supreme Court. This procedure must be followed by the exequatur applicant to obtain recognition and enforcement of the international arbitral award in accordance with the award rendered by the arbitrator.

In addition to this standard procedure, sometimes the award for which the request for execution is made is rejected. Article 3 paragraph 3 of PERMA Number 1 Year 1990 states that the recognition and enforcement of foreign arbitral awards within the jurisdiction of Indonesia can only be carried out if it fulfills the conditions, one of which is "Foreign Arbitral Awards mentioned in paragraph (1) above can only be implemented in Indonesia limited to awards that are not contrary to public policy." also in terms of exequatur in Article 4 of this PERMA, it is stated that "Exequatur will not be granted if the Foreign Arbitral Award is clearly contrary to the basic principles of the entire legal system and society in Indonesia (public policy)". In line with this, the substance of Article 66 letter c of Law Number 30 Year 1999 also states that the requirement that international arbitral awards can only be enforced in Indonesia is limited to awards that are not contrary to public policy (public policy). According to Tineke Louise Tuegeh Longdong (1998), the requirement as intended above is a complex and multi-interpretive part that has implications for complexities related to practice. This concerns the issue of unclear definitions and the vagueness of the scope of what is meant by public policy (public policy) (Tuegeh-Longdong, 1998, Pujiyono, et al, 2019). The abstractness of the principle of public policy makes the guidelines on the boundaries and interpretations regarding the use of this principle to be used as a basis for refusing the execution of international arbitral awards. In foreign conventions, with regard to efforts to find clarity on this principle, the author finds several conventions that include the principle of public policy in the causal article, as follows:

1) The Convention on the Execution of Foreign Arbitral Awards

Article I

To obtain such recognition or enforcement, it shall, further, be necessary:

e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

2) Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Article V

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

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

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

3) The Uncitral Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985)

Article 34

(2) An arbitral award may be set aside by the court specifi ed in article 6 only if

(b) the court fi nds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in confl ict with the public policy of this State.

Article 36

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(b) if the court fi nds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State

After reviewing the various rules on arbitration, it is clear that there is no definition that further explains public policy. The unfortunate thing about these conventions is that the articles as above only include the causation of public policy with the word "public policy" and do not provide further clarity on the issues that the author emphasizes, even in the Convention on the Execution of Foreign Arbitral Awards, Article 1 of the convention only provides a general description of what is meant by public policy so that in my opinion rigid interpretations and the extent of the limits of public policy have not yet been found in both national and international provisions. Indeed, this kind of regulatory probematics makes biases against the execution of foreign arbitral awards, especially in Indonesia. For international commercial arbitration awards, in connection with the existence of this principle of public policy which is made fundamental (a patent thing) and cannot be violated even by foreign rules, it is then common for a situation to occur which is commonly suspected of being a rejection of foreign arbitration awards because national law is put forward when a matter clashes with foreign rules. Furthermore, in addition to being guided by the provisions in positive law and international conventions, the author also tries to examine this principle from the conception of countries with common law and civil law systems, including as follows:

1) Public Policy in French-Italian Conception

According to the French-Italian conception, all French legal rules that must be used are those of public ordre. Although foreign law is still allowed to be accommodated, but because of the ordre public, making the use of French law becomes a necessity. French rules that because of their importance have important strengths, must be applied, then foreign rules that do not have compatibility with French rules in this specific field, can be ruled out without further attention to the important elements contained or members of it (Wahyuni, 2014).

2) Public Policy in German Conception

Public policy in the German conception is known as vorbehaltklausel where this public policy is considered as an exception or privilege, and is defined as something that is not commonly accepted. The override of foreign rules in Germany occurs when foreign rules that should be mandatory for enforcement according to German International Civil Law (HPI), apparently will violate the basics of political or economic life of German society (Wahyuni, 2014).

3) Public Policy in Dutch Conception

There are several concepts about public policy (public policy) in the tenth book related to the conflict of law. Article 6 states that foreign law will not be applicable if its implementation is manifestly incompatible with public policy (Wahyuni, 2014).

4) Public Policy in Anglo Saxon Conception

The determination of whether a foreign rule is contrary to public policy or not, is determined based on the views generated by the executive, not by the authority of the judge. Based on this, it appears that the political element in the Anglo Saxon conception always has an important role to play in determining whether a foreign rule is considered to violate public policy or not (Wahyuni, 2014).

Public policy is known in various countries in a variety of terms including openbare policy in the Netherlands, ordre public in France, vorbehaltsklausel, in Germany, and public policy in countries with common law legal systems (Gautama, 1989). The term "policy" is intended to emphasize the great influence of political factors in determining whether or not public policy exists. There is so far no unity of opinion on the limitations and what is meant by public policy, but public policy basically plays an important role in any legal system with regard to the need for a kind of veiligheidsklep or emergency brake which is then commonly known as public policy (Tuegeh-Longdong, 1997). M. Sumampouw (1968) states that although every legal system from various countries recognizes the conception of public policy, it would be better if its use is as sparing as possible and only as an exception (Sumampouw, 1968)

The conception adopted by countries in continental Europe states that foreign law will not be applied if its implementation is clearly not in accordance with public policy. The attack of fundamental things in society, political issues, becomes a point for the inapplicability of a foreign law or provision. The conceptions of various countries also only provide a view of public policy for its implementation in the state and the interests of the state compiled by stakeholders according to legal politics. In addition to the conceptions adopted by civil law and common law countries, the author also tries to present some experts both from within and outside the country, as follows:

1) Sudargo Gautama

Public policy should only be used as a shield and not used as a sword to stab foreign laws (Gautama, 2004).

2) Tineke Louise Longdong Tuegeh

Public policy is indispensable for its use as a veiligheidsklep or "emergency brake" in the various legal systems of each country. Sometimes this "emergency brake" is needed to keep away the applicability of foreign laws that should be used according to the rules of International Civil Law (HPI) (Tuegeh-Longdong, 1997).

3) Erman Rajagukguk

Public policy means policy, welfare, and security or equated with legal policy or equated with justice (Gautama, 2004).

4) Kegel

Public policy in its basic concept concerns the "untouchable part of the local legal system" which, therefore, can override foreign law (which should apply) if it is considered contrary to "the untouchable part" of the lex fori (Bayu, 2006).

5) Wolff

The question of ordre public is an exception to the application of foreign law (Onibala, 2013).

6) Jan van den Berg

Basically, public policy functions as a guardian of "the fundamental moral conviction policies of the forum" which has a direct relationship with "the principle of territorial souvereignty" (Setiawan, 1992).

Regarding expert opinions on the principle of public policy, if generalized, these opinions lead to the override of foreign law when a foreign law enforcement is considered to attack the national issues of the country concerned. However, this principle should be used as sparingly as possible in the sense that not all foreign laws are then set aside when they clash with national issues. Regarding the scope of public policy, there is actually a distinction of public policy which is divided into two, namely the first internal public policy, which is a provision that only limits individuals; and then the second external public policy is a rule that has the aim of providing protection for the welfare of the state as a whole (Tuegeh-Longdong, 1998). Here, towards the imposition of the principle of public policy the author also presents several case disputes regarding the rejection and accommodation of an international arbitral award. That then, an international arbitration award that is requested for the execution of its decision in Indonesia, cannot be said to have increased or decreased. This is due to the data that the author found, within a certain period of time, an international arbitration award was rejected and at a certain time no rejection data was found. With regard to the interpretation of public policy as the basis for rejection, what kind of instrument is then categorized as "public policy", the author describes the case dispute as below:

1) In the case of a business dispute between E.D. and F Man Sugar Ltd and Yani Haryanto in Supreme Court Decision Number 1 Pen. Ex'r/Arb.Int/Pdt/91.

The Supreme Court Decision stated that the basis of the arbitration agreement was null and void because it contained an unlawful cause. Where the contents of the agreement are contrary to Presidential Decrees Number 43 of 1971 and Number 39 of 1978, then because of this the agreement between the two parties to the dispute has violated Article 1320 of the Civil Code regarding the valid requirements of the agreement (Tjitrosudibio, 2003).

2) In the case of Bankers Trust Company, Bankers Trust International and PT BT. Prima Securities Indonesia with PT Mayora Indah Tbk in the Decision of the Chairman of the Central Jakarta District Court Number 001 and 002/Pdt/Arb.Int/1999/PN.JKT.PST juncto 02 /Pdt.P /2000 /PNJKT. PST, dated February 3, 2000 (rejection of the request for execution of the London Arbitration award) was confirmed by Supreme Court Decision Number 04 K/Ex'r/Arb.Int/Pdt/2000, dated September 5, 2000.

3) In the case between PT Astro Nusantara International B.V. and PT Ayunda Prima Mitra in the Supreme Court Decision Number 67 PK/Pdt.Sus-Arbt/2016 where the judge reinforced the Judex Juris and Judex Factie in the Supreme Court Cassation Decision Number 01 K/Pdt.Sus/2010 and the Decision of the Central Jakarta District Court Number: International Arbitration Decision based on Number: 32 Year 2009.

Astro Group was declared not to fulfill the requirements listed in Article 66 letter c of Law Number 30 Year 1999 on Arbitration and Alternative Dispute Resolution. In addition, the dispute in SIAC Arbitration Award Number 062 (ARB062/08/JL), is not a dispute concerning the scope of commercial law as specified in Article 66 paragraph b of Law Number 30 Year 1999 on Arbitration and Alternative Dispute Resolution. The dispute in SIAC Arbitration Award Number 062 (ARB062/08/JL) is an intervention into the policyly application of Indonesian civil procedure law, which can be seen in its ruling that reads "Immediately stop the judicial process in Indonesia (case Number 1100/Pdt.G/2008/PN.JKT.SEL) insofar as it relates to C6, C7, C8 and Mr. Ralp Marshall." An arbitral award which stops the judicial process in Indonesia violates the principle of sovereignty of the Republic of Indonesia because no foreign power can interfere with the ongoing legal process in Indonesia (Hariyudi, 2020).

Furthermore, to see the extent to which public policy is used as the basis for the rejection of the execution of foreign arbitral awards, this can be found in various major international cases abroad (one of the subjects is not an Indonesian state, Indonesian citizen, or legal entity with its legal territory located in Indonesia) which were denied the execution of the award, as follows:

1. Case of Dongfeng Garments Factory of Kai Feng City and Taichun International Trade (HK) Co. Ltd. case, with Henan Garments Import & Export (Group) Co. (1992), where the Chinese court refused the execution of a judgment that obliged the local party to pay a certain amount of compensation with the consideration that it could have a negative impact on the Chinese economy (Farsia & Taufik, 2018).

2. The case between Laminoirs Tc De Len (France) and Southwire Company (United States) related to a dispute over the sale and purchase of zinc-plated steel wire, where the two parties differed in their interpretation of the quality of the steel wire which led the ICC to make a decision requiring Southwire to pay a sum of money with interest of 9.5 to 10% a year. The provision of payment with interest under French law was considered by the United States Court to be incompatible with morality and justice so that the arbitral award could not be enforced under Article 5 paragraph (2) letter b of the 1958 New York Convention (Basarah, 2010).

3. The case between National Oil and Libyan Sun oil (United States vs Libya), where in this case the public policy approach was used on the basis of providing protection to national interests. The court refused to enforce the arbitral award on the basis that Libya was "a country known as a supporter of international terrorism" (Budidjaja, 2002).

4. A case between Bryant and Mansei Kogyo Co. in which the Tokyo District Court accepted the recognition and enforcement of an arbitral award issued in the jurisdiction of the United States regarding an award of damages. In contrast to this, the Tokyo High Court held that the District Court had violated the rule in Article 200(3) of the Japanese Competition Law. According to this rule, the concept of punitive damages is a criminal offense, so the Tokyo High Court refused to enforce the American arbitral award because it violated public policy in Japan (Heriyanto, 2009).

Starting from the above, there are some countries that view that public policy must be interpreted more broadly, not only for national interests so that foreign arbitral awards must be accommodated and accepted for the execution of their decisions as stated by the United States Supreme Court in the decision of the case between Scherk (Germany) and

Alberto-Culver (United States) in which the Supreme Court emphasized that the purpose of the 1958 New York Convention is to encourage the recognition and enforcement of international arbitration agreements by enforcing arbitration agreements and arbitral decisions in signatory countries. Against arbitral awards that are accommodated and implemented, including:

1. Case between Parsons & Whittemore Overseas Co., Inc. and Société Générale de l'Industrie du papier (RAKTA) in 1967

Public policy if interpreted only to protect national political interests would undermine the values contained in the New York Convention. In America, public policy is divided into two: domestic public policy and international public policy. Even if international public policy is violated, the Court will still enforce the foreign arbitral award (Heriyanto, 2009).

2. In the case between General Electric Co. and Renausagar Power Co. the Supreme Court of India held that the grounds for refusing to enforce a foreign arbitral award should be interpreted more narrowly. The Supreme Court upheld an ICC (International Chamber of Commerce) arbitration award that penalized General Electric US$12.3 million. The Supreme Court also ruled that the arbitral award justifying the double interest did not violate India's public policy (Heriyanto, 2009).

3. Case between Scherk (Germany) and Alberto-Culver (United States)

Alberto brought the dispute to the District Court of Illinois, even though both parties had agreed to settle the dispute at the International Chamber of Commerce in Paris. The refusal to enforce international arbitration is a shortsighted act of a country's court that frustrates international goals (Hariyudi, 2020).

4. The case of Aloe Vera of America Inc with. Asianic Food (S) Pte. Ltd, and Another, Chew (Director of Asianic) in his application to the High Court of Singapore, stated that the enforcement of the American Arbitration Association (AAA) award filed by Aloe Vera of America, Inc with Asianic Food because Chew had signed an Exclusive Supply Distributorship and License Agreement which gave rise to the dispute, and therefore should be rejected as contrary to public policy. The Singapore High Court then rejected Chew's application for rejection of the arbitration award (Wijaya, 2021).

In connection with several foreign arbitral awards that continue to be enforced abroad, although the definition of public policy is not rigidly regulated, this public policy is interpreted in different scopes. According to Sunaryati Hartono (1995,Pujiyono, et al, 2017), what constitutes "public policy" is difficult to formulate with certainty because its definition is strongly influenced by various aspects, including time, place, as well as state philosophy and others that are related to the legal community concerned (Hartono, 1995, (Schlosser, 1985, Pujiyono, et al, 2019). The meaning of public policy can be said to have been violated if: "shocks the conscience" (as in the Downer Connect case); clearly injures the public interest or is completely contrary to a reasonable and recognized reason of society (as in the case of Deutsche Schachbau with Shell International Petroleum Co. Ltd. in 1987); or violates basic public morality and justice (as in the case of Parsons & Whittemore Overseas Co Inc with Societe Generale de L'Industrie du Papier (RAKTA)); and international arbitration awards are considered illegality (prohibited by law), for example such as corruption, bribery or fraud, and serious cases that have similarities will be the subject of refusal of execution based on public policy, but then against arbitration cases where the impact of the award only concerns civil relations and does not penetrate into aspects of public interest, then such arbitration awards are not suitable for refusal of execution (Wijaya, 2021).

Based on the above explanation, towards the rigid definition in various provisions relating to and regulating foreign arbitration that are not further explained, again in this case the role of the judge becomes a major contribution to determining the substance of

public policy so that the authority to give an assessment of an international arbitration award whether it is considered contrary or not to public policy, is included in the authority of the judge (discretionary authority) (Hariyudi, 2020). The definition of public policy interpreted by Indonesian judges is located in the Arbitral Award Decision of the Central Jakarta District Court which refers to the definition of public policy in Article 4 paragraph (2) of Supreme Court Regulation Number 1 of 1990 concerning Procedures for the Implementation of Foreign Arbitral Awards which states "exequatur will not be granted if the Foreign Arbitral Award is found to be contrary to the basic principles of the entire legal system and society in Indonesia." In relation to the enforcement power derived from the Court, this is actually a loophole in arbitration law that corresponds to the applicability of the competence-competence doctrine. This doctrine has been confirmed as a basic principle in modern law arbitration which provides that the arbitral tribunal is authorized to determine its own jurisdiction or competence. It is appropriate then that the first institution to declare that arbitration is authorized is arbitration and not the courts.

The urgency of the principle of public policy makes the principle of public policy used as a basis for rejecting the execution of foreign arbitration awards, although in the antithesis case there are many elements and aspects that should be put forward, such as the principle of executorial kracht, the theory of legal certainty and other elements that are categorized as rational aspects. Although there is no rigid definition of the principle of public policy, it does not limit the executorial power of this principle. Based on several decisions that provide refusal to execute international arbitration awards on the grounds that they are contrary to public policy, it can be concluded that something is considered contrary to public policy if it is contrary to the fundamental joints of the entire legal system and society in Indonesia, contrary to the laws and regulations in force in Indonesia and has violated the sovereignty of the state and the legal sovereignty of the Republic of Indonesia (Tuegeh-Longdong, 1998). Against a country that is more concerned with internal public policy that assumes that foreign agreements containing arbitration clauses must not conflict with the internal public policy of the country (Tuegeh-Longdong, 1998). Some of the above decisions also indicate that as the development of international arbitration disputes becomes more complex, the meaning of the principle of public policy often differs with regard to different dimensions of time, space, place, and subject.

Although there is no rigid understanding of the principle of public policy, it does not limit the executorial power of this principle. This has implications for the role of judges in contributing to the determination of the substance of public policy. Based on this, in its implementation, public policy is often likened to a "double-edge knife" that can sometimes provide benefits and sometimes can also be dangerous for the implementation of foreign arbitral awards (Mistelis, 2000). Furthermore, with regard to the authority of judges, this large share has serious implications for the legal certainty of international arbitration in Indonesia. According to Peter Schlosser (1985), many state courts do not have judges who are competent or specialized in international commercial law (Schlosser, 1985, Pujiyono, et al, 2017). With regard to the refusal to execute international arbitral awards in Indonesia, where the interpretation of the general public policy is left to the court judge, this eliminates the legal certainty of the enforcement of international arbitral awards, so it is not surprising then, that Indonesia is considered as an arbitration unfriendly country in the eyes of the international community.

4. Conclusion

The principle of public policy as a principle whose existence is very important in relation to the recognition and enforcement of international arbitration awards is often used as a "sword" rather than a "shield" in arbitration awards that are requested for enforcement. Every legal system of any country basically requires a kind of veiligheidsklep or

emergency brake commonly known as public policy, but the use of this principle should be as sparing as possible and only as an exception. A breach of public policy is intended when it shocks the conscience, manifestly injures the public interest or is wholly contrary to the common sense and accepted reasons of the society or violates the basic morality of the society. An international arbitral award deemed to be an illegality as in corruption, bribery or fraud and similar serious cases will be grounds for denying enforcement on public policy grounds. An international arbitral award will be denied enforcement if it violates the basic principles of the entire legal system and society in Indonesia, contradicts the prevailing laws and regulations in Indonesia and has violated the state sovereignty and legal sovereignty of the Republic of Indonesia.

5. Suggestions

Countries with common law legal systems are more predictable and provide guarantees of legal certainty. This is supported by the concept of precedent adopted by the common law legal system while countries with a civil law legal system emphasize procedural public policy rather than substantive public policy. This has implications for the inconsistency of judges in their discretionary authority in assessing whether or not a decision is contrary to public policy. Such discretion biases the legal certainty of arbitration awards. These things should be changed in legal arrangements so that they can adjust to the development of an increasingly globalized era of disruption. The widespread use of non-judicial dispute resolution through arbitration in the world of trade should be accompanied by the ease of recognition and enforcement of international arbitral awards in policy to create legal certainty of international arbitral awards in Indonesia.

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