



## The Ambiguity of the 'Public Policy Clause in the Execution of Foreign Arbitration Awards in Indonesia

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### Abstract

Arbitration has appeared as a leading forum in settlement dispute commercial international. stated that execution decision arbitration international can implemented if not contrary to public policy. Usage This clause gives rise to confusion in interpretation and become the cause failure execution decision arbitration foreign so that required study about what is the cause confusion? and how to execute it so still can implement? This research is research that uses method study law normative equipped with an approach legislation, comparison and approach conceptual work done in a way descriptive analytical in to study interpretation clause in regulation applicable legislation, cases that occur in various countries to compared to as well as concepts as solution. Research results state that uses This clause is contained in the AAPS Act 1999 and Article V of the New York Convention for limit implementation arbitration foreign. Decision arbitration foreign need acknowledged or ratified in the country were implementation execution. Public policy not only concerning interest individual or group just but more to objective together, interests general, or citizens in general. Rejection decision arbitration based on policy public need condition outside usual, namely " threat" real and serious to interest fundamental society." The situation This also happened in India, the European Union and Russia with various each solution. In order not to be ambiguous, Execution decision should load certainty just law, principle consensualism, fair and equal treatment, and violation characteristic final and binding decision. It is hoped that this article will come as reflection stakeholders' policy for escort 'public policy' clause general ' so as not to obstacle for execution decision arbitration foreign.

**Keywords:** Public Policy; Arbitration; Implementation Decision.

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## INTRODUCTION

Dispute can be completed through track litigation or non-litigation. Settlement dispute through track This litigation is in accordance with the assumption general, namely through institution justice. In the system litigation, the parties required For each other give tool valid evidence in a way law and have mark based on opinion juridical and ultimately determined by a decision. Non-litigation legal process is alternative settlement dispute law through external institutions court known by the term *alternative dispute resolution* or settlement dispute alternatives outside court. Settlement dispute outside court based on the approach consensus or agreement of the parties. According to Takdir Rahmadi, the solution dispute alternative covering various form settlement dispute besides through the judicial process, either based on a judicial approach consensus and No. In this system, the parties given more space wide for convey proposal based on each other's interests. Both split party No own obligation For compare tool evidence , and by agreement together with them can ignore tool existing evidence Because base base settlement non-adjudication dispute is look for profit together in the form of a "win-win solution" (Deri, 2019). This method is seen as road go out from the litigation process that is assessed No effective Because its long and time-consuming duration Lots cost Because duration These methods the covering negotiation, mediation, conciliation and arbitration.

Arbitration has risen as the main forum for settlement dispute commercial international. The parties can determine arbitration as choice settlement the dispute they have like Because the right reasons. The most important among these reasons are validity —which is considered as characteristics the most valuable arbitration. Success in arbitration only is victory imaginative If decision No can enforce. Although statistics show that there is level compliance high volunteerism to decision arbitration, compliance voluntary the happen precisely Because there is framework within which decisions are made can enforced in a way effective when decision No obeyed. Based on New York Convention, ruling arbitration can filed in 159 jurisdictions, and enforced in courts national jurisdiction subject to several exceptions. Practice arbitration Still growing and still There is room for repair If concerning cost and speed. One of the benefits quoted by the advertisement orthodox support arbitration is that He offer method settlement more disputes economical cost and time than the court process national Because decision arbitration is final and not involving a lengthy appeal. However, the parties must voice concern that 'the arbitration process the more Lots done through litigation, which can erode profit costs and speeds that were previously only owned by arbitration. Therefore that , the most significant way For reduce cost is by pushing more efficiency big in settlement dispute (Bull, 2019).

This research has reference study previous, the first is Limiardo (2024) who researched about mismatch Indonesia's commitment to agreement international with results study that draft order common in many interpreted as a factor main the occurrence mismatch and this gives rise to uncertainty law as well as can lower foreign investor confidence to system justice in Indonesia. This study proposes a number of steps that can be taken done by Indonesia for align practice justice with commitment internationally , such as clarifying criteria public policy, improve education and training , transparency and accountability , and international cooperation (Limiardo et al., 2024). Then the second There is research conducted by Andriani (2022) which discusses about consequence the law that arises from cancellation decision arbitration about final and binding principles. Research results show that overturned verdict impact decision considered No Once there is and obscures the final binding principle that should be owned by a decision arbitration . (Andriani, 2022)Third, research conducted by Wijaya (2022) which discusses about draft public policy as rejection to recognition and implementation arbitration international in Indonesia and Singapore. The results of the study show that system the judiciary in Indonesia has not own certainty about o public policy, unlike Singapore which does not to hook order common with violations state sovereignty (Wijaya, 2021).

If referring to research previously, there was the differences studied in this article, namely discussion in a way Details about the phrase "public policy" associated with explanatory principles How phrase they should interpreted so that the takers policy can in a way wise interpret and apply it as should be. With the existence of This innovation complements study

previously, namely in a way special to study article 62 paragraph 2 and article 66 letter c Law no. 30/1999, mentioned that execution decision arbitration international can implemented if No contrary to public policy and basic propriety. On the other hand, this law also emphasizes that The District Court does not authorized accept case dispute if second split party Already bound by content an agreement stating that arbitration is a process agreed upon by the parties if happen dispute. But Still Lots cases in which the court still 'interfering' with the verdict arbitration on grounds that decision the contrary to public policy in the eyes Indonesian government. Use 'public policy' clause which has Lots interpretation when used can result in uncertainty law in decision arbitration, in particular decision arbitration international. This will influence implementation decision so that party winner No can fulfil his rights as winner arbitration. Departure from problem said, the author formulate problem that is what causes decision arbitration international canceled? How its implementation still can be implemented?

## **METHOD**

This research is a study the law that uses method normative equipped with an approach legislation by outlining rules domestic and international, approach comparative by comparing problems and solutions in scope clause interest public, as well as approach conceptual by analyzing problem use principles law to obtain the conclusion made in a way descriptive analytical in to study interpretation clause in regulation applicable legislation. Research law normative is study laws that use more secondary data Lots searched in the rules in agreement international related to the implementation decision arbitration and regulations large -scale legislation national including decisions civil case imposed by the Court Arbitration, District Court, High Court, and Supreme Court. Good. Secondary data sourced outside the decision also comes from study legislation and research literature related to the topic research. Secondary data sourced from material primary law, material law secondary, and materials law tertiary. In this type study this law, the law conceptualized as what is contained in regulation legislation, agreements international, ruling court, or source law others, which are conceptualized as rules or norms that serve as benchmarks measuring behavior a worthy human being.

## **RESULTS AND DISCUSSION**

### **Reasons for Cancellation of International Arbitration Awards and Their Enforcement**

Arbitration can cover settlement dispute national and international. In Indonesia, arbitration only covers settlement disputes in the field commercial. This is regulated in Article 5 paragraph 1 of the Law Number 30 of 1999 concerning Arbitration and Alternatives Completion Dispute. While that, in realm international, arbitration nature international moreover past and present commercial. Arbitration international different from arbitration national in essence Because arbitration national subject to law whereas arbitration international No except as long as the parties agree make law a particular country applicable for contract or part from contract said. Even when the parties agreed or rule law opposition decide law which national will applicable for contract mentioned above law national others, concept law this national or the proper law that applies for contract the has perfected more carry on based on agreement of the parties or by application rule law dispute. Arbitration This international is called commercial so that can be separated from arbitration between two sovereign states based on rule law public international. That is, arbitration commercial international will governed by the rules law opposition or the rules that arise from agreement of the parties, different from the rules law public international emerging from customs and practices of the country, agreement of the parties, or convention multinational. (Deshpande, 1989)

Decision arbitration has had strength law final and binding, this has been explained in article 60 of Law no. 30/1999 about Arbitration and Alternatives Completion Dispute (AADR Act). Decision arbitration is final and has strength law still as well as tie for the parties. This aims to ensure that the parties No may appeal, sue, or do review return on decision said, and the decision the tie second split party Want to No Want to must obey decision said in good faith Good

Because before decision taken, they have agreed to finish the dispute through arbitration with all the consequences. (Sihombing & Nuraeni, 2024) For understanding information about the "final and binding" nature in scope justice in Indonesia, then need referring to the regulation's applicable legislation. In general, concept "final and binding" refers to the decision or the decision that has been reached stage final and binding for the parties involved in the process. In the context of system justice, if a decision stated as "final and binding" meaning decision that has reached stage end in the judicial process and mandatory complied with by the parties concerned. The party that doesn't satisfied with the verdict can appeal or effort law others, but until decision the changed or cancelled by the authorized agency, namely court, then final and binding decision the must be obeyed. It is better referring to the regulations applicable laws and regulations or consult an expert the law that has competence in this field. (Winata, 2023)

Although is final and binding, the decision arbitration foreign need acknowledged or legalized in the country were implementation execution. As mentioned in Article 65 and 66 of Law No. 30/1999, the authorized party to validate decision is Central Jakarta District Court. Without existence application, execution No can be implemented in Indonesia. Approval by the Court this is what's next called the execution. Application executioner is application submitted by the winner / applicant Decision International Arbitration to Central Jakarta District Court (in matter certain Supreme Court), so that it can published Executory and Judgment the International Arbitration can be implemented in Indonesia. Products end from application executioner the is decision Central Jakarta District Court, namely reject or acknowledge and implement application Uniquely, at the level of judicial examination cassation and review back, product end from inspection the is decision and not determination. (Hanif & Ariani, 2022) In reality in Indonesia there is still there is a number of case of decision arbitration No accepted by the court and not implemented execution on the grounds contrary to public policy, such as matters PT. Pertamina oppose PT. Karaha Bodas and PT. F Man Sugar against PT. Yani Haryanto. (Prabhata, 2017) However Still there is a number of case of decision arbitration foreign Still can implemented execution, such as the case PT. Churchill Mining vs. PT. Government of Indonesia in 2016, PT. Ministry of Defense oppose PT. Avanti (Jayadi, 2020)

Definition general of public policy is "a proposed action by a person, group, or government in environment certain that provide obstacles and opportunities proposed by the policy for exploited and overcome in effort reach objective or realize objective or target." Public policy not only dealing with interests individual or group certain, but more related to the purpose together, interests public, or citizens in general. The proposed action which is policy Then implemented through decisions and actions next. Some expert to put forward definition public policy: "process or a series decision or activity government designed for overcome problem public, both real or planned (imagined)." Public policy own characteristics certain where the policy will be formulated, implemented, and evaluated by the authorities which are member legislative, executive, or judiciary. Public policy is also defined in a way comprehensive as amount activity government, both acting in a way direct and through agent, because This action has influence to life. Public policy not only must relate to interest's individual or interest narrow a group, but also related to the goals together, interest's public, and all citizens in general. From several draft public policy statement that can be made, concluded that public policy understood as a process or a series action government (good ones who do or not do) found throughout society that has objective certain, and series action the intended For finish a problem as well as fulfil need or interest general, for example efficiency in service general, achievement justice, security, and freedom. (Mutiarin et al., 2017)

New York Convention regulates the limitations that must be implemented by member states in reject implementation decision arbitration foreign. This rejection is only can done if these countries capable prove one from several conditions set in Article 5 of the New York Convention to the competent authority in the country where he asked implementation ruling. The New York Convention offers proposal role limited for institution justice national in carry out implementation decision arbitration. Article 5 stipulates seven bases for institution member state courts for researching decision arbitration foreign with the aim for to validate decision said. Five of seven base It is very detailed and relates to the provisions contractual and procedural

fundamental law. Only the parties' opponents who can raise this objection. Article 5 also mentions two reasons that can be used by institutions justice for reject implementation decision in a way unilateral (sue) *spontaneously*). Thus, the court can reject to validate or on the contrary, namely carry out implementation decision arbitration if according to the laws applicable in the relevant place:

- a. Main Point dispute No completed through mechanism arbitration; or
- b. validation or implementation decision the potential violate public policy.

Rejection For ratify decision arbitration foreign based on public policy in Article 5 Paragraph 2(b) of the New York Convention provides authority to member states For evaluate whether decision arbitration foreign contrary to public policy. (Limiardo et al., 2024)

Difficulties that arise based on New York Convention. Under Article V(2)(b), state courts can reject confession or confirmation decision If matter That contrary to policy state public It's been a long time since it was difficult for define policy public said. Many have tried, including the International Law Association, a seminar in Stockholm, and a symposium. Whatever other shortcomings there may be There is in system law national, clear impossible for national judges for define and implement policy public as principal uniform that must be applied by all state courts, including the state certain difficult mentioned, the amount A little but is in Eastern Europe, Asia, the Middle East, Sub-Saharan Africa, and Latin America. It is a large region with a large proportion huge world trade and, more important, state judge decide case based on New York Convention. Some of these states use policy public as pretext and not as reason real For No to uphold decision based on New York Convention. Therefore that, every design repeat Article V(2)(b) no will produce anything: another pretext will be found by these states with the same effect. We may Already see this, where is the court national in several countries now be careful For No use policy public in a way open even as pretext for prevent criticism from abroad. In these countries, it is said that the judge was secretly instructed For use in decision public they , if allow , pretext besides policy public based on New York Convention for reject enforcement decision arbitration foreign . (Veeder, 2010)

Public policy is values the basis of which is sourced from interpretation of Pancasila as stated in Opening The 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the Constitution) called the 1945 Republic of Indonesia Constitution) and regulation applicable laws and regulations. Public policy functioning as a brake that only used at times critical. Only if public policy of Indonesian law is disturbed so implementation law besides law national will ignored. In conceptual, public policy has a different meaning to the interests general. Interests' general means protect interest public wide or interest together society. While that, public policy involving elements foreign help determine public policy which is necessary checked and examined. public policy interpreted as part from policy of law national which is not can disturbed sue (untouchable *part*). For protect law national from disturbance, the judge will use law national as replacement law foreign. Based on matter said , the existence of law foreign , namely decision arbitration , only can put aside If contrary to public policy. (Harahap, 2022)

"Public Policy" clause refers to the principles and norms that are of concern fundamental for the State and all society. Rejection based on wisdom general to wish existence condition outside ordinary, namely " a real and sufficient threat " heavy to interest fundamental society." Although Thus , the Court look at reason This rejection can applied in context implementation decision arbitration international . (Senftleben, 2021) This clause raises difference view or vague understanding about public policy. This confusion has an impact on the certainty applicable law, certainty arbitration process rules, or certainty arbitration process results That itself. The law plays a role important in guard spirit law That themselves to be obeyed by the community. Uncertainty law in implementation arbitration , particularly on the 'public policy' clause in Article No. 30/1999. (Siregar, 2023) Not only stop at example in the case of Indonesia, this clause also has problems. potential problems in various countries because definition in charter the New York convention own different interpretations in each country that adheres to it. For example, several experts formulate public policy as provision basis and foundation law as well as interest

national a nation, but in practice explanation the Still interpreted in a way wide so that the boundaries and arrangements not enough clear. As a result, matter not fulfil principal certainty the law which is principle the most basic law, so that justice and utility social as ideals sublime enforcement law cannot be achieved. If the country has the potential experience a very big loss, then Already should accepted and not canceled decision with clause that is not There is this certainty is because effect term the length it causes will causing the country to experience losses that are many times greater. Losses the is distrust foreign towards Indonesia.

This loss was caused by the policy badly taken by officials government, namely institution justice alone. Disaster policy is incident important in history political a country. Famine, crumbling infrastructure, crisis financial, and other impacts resulting from the decision bad for the makers policy cause damage huge human and economic for society. Disaster policy often causes bad consequences No only for affected communities impact directly, but also for government and elite ruler. Disaster policies also often give rise to point interesting changes in public policy by creating incident important trigger change big policy. The developing narrative around reason disaster policy shapes the policy agenda. Although is incident rare, disaster policy is very important for understanding We about the policy process. However, the cause disaster policy part big Not yet studied by scientists' politics. disaster policy often considered as shock exogenous , not consequences that can occur prevented or estimated from decision public policy. (Fagan, 2022)

### Comparison of Cases in Various Countries

Application recognition and implementation decision arbitration foreigners in India are stated in article 36 paragraph 1 of the Law Arbitration and Peace 1996. In 2015 , the Government of India updated Article 48 paragraph 2 in Constitution those related to public policy because of This clause becomes a weapon ultimate For reject various decision foreign by categorizing contrary to public policy only If decision contaminated element fraud , corruption , law basis , justice as well as morality . (Kaushik, 2024)

Treatment to decision arbitration foreign can implemented throughout member European Union (EU) without need existence confession from the country where the execution took place implemented. This is based on from revision Brussels I Regulation in 2015. However Still There are some countries that require a process to can execute a decision arbitration foreign. Risk of public policy ' trap ' can avoided with the agreement of member states to One exequatur with strict rules so as not to harm winner decision said . (Herinckx, 2023)

Cancellation decision arbitration foreign consequence contrary to public policy in Russia often happen because of clause the more used as rules that protect interests of the state rather than used as a rare exception happened and needed study deeper. The right solution to the situation the is government need recognize the arbitration institution international in a way intact before arbitration chosen by the parties as a means of resolution dispute . (Andreevskikh, 2022)

Table 1. Comparison of Public Policy Clause Cases

No.	Country	Note.
1	India	The law requires specifications of public policy so that its interpretation is not broad.
2	European Union	Implementing a <i>single mechanism enforcement</i> against all members so that the winning party gets legal certainty
3	Russia	Requires recognition of arbitral institutions by states prior to approval of arbitration selection.

## Utilization of Legal Principles as a Solution for Implementation Exequatur Foreign Arbitration

The principle of certainty fair law based on Article 28 d of the 1945 Republic of Indonesia Constitution is based on the doctrine *jurisprudence sociological*, No wearing glasses like a robot that only own reference to clause of public policy. Certainty law obtained If decision arbitration the approved or not by the court. The problems that arise consequence cancellation decision the No in accordance with article 28 d of the 1945 Republic of Indonesia Constitution because one of the runway implementation contracts is principle consensualism. If traced since beginning, then the parties should has carried out principle consensualism by agreement finish dispute through arbitration, then the parties should has carried out Contents the decision given by the court arbitration and the State must also guard his integrity to law without use principal interest general for cancel decision arbitration or obstruct implementation decision the.

Referring to the principal reciprocity in the process of enforcement law, writer to argue that no all-decision arbitration foreign can recognized and implemented. Therefore that, the verdict arbitration foreigners who are recognized and can implemented only limited to decisions taken abroad which have bilateral relations with the Republic of Indonesia and together in relation to the Republic of Indonesia in a convention international. The existence of the principle nationality and principles reciprocity the cause No There is certainty law to disputes decided by arbitration foreigners who do not fulfil condition from second principle ( Saepullah (Saepullah, 2022)Need existence reformulation Constitution or explanation about 'public policy' clause so that the implementation decision arbitration foreign fulfil principle certainty law by adopting jurisprudence successful foreigner in carry out implementation decision arbitration foreign .

*Treatment Fair and Equal* is one of the standard agreement the most common investment, and among the most controversial. This standard is also the most common standard used by investors, and often proves to be determine the result. In some big agreement, standard stated in a way short. The most difficult points for debated is whether condition fair and equal treatment protect the " legitimate expectations " of investors, and the extent to which the requirements that require compensation on losses incurred from change regulations — that is, an implied "stabilization" clause, in terminology contractual. Most of the court accept that fair and equal treatment require protection to investor expectations until level certain. What 's interesting here is question level Second: whether (and how) states and investors can make contract based on rule agreement. This question is often appeared in arbitration Completion Investor-State Disputes (ISDS) involving contract. However , cases seldom inspect this is in a way explicit , so that need a number of implied understanding .(Arato, 2019)Correlation with *Fair and Equal Treatment* is that strength laws and actions taken on decision arbitration foreign must own equal treatment between law national and legal international . Treatment fair and equal is not characteristic the personal details of the disputing parties but the capital invested, so important for do analysis to clause public policy.

## CONCLUSION

'Public Policy' clause can found in the Arbitration and Alternative Dispute Settlement (AADR) Law No. 30/1999 and in Article 5 of the New York Convention of 1958. Based on second rule said, the court can give his opinion Alone about can or whether execution decision arbitration foreign. Use This clause varies from country to country because Not yet There are regulations that explain more carry on this clause so that happen different interpretations in each country. The impact it causes is disaster policy Because execution that is not can implemented the violate final and binding principle, principle consensualism contractual promises made by the parties prior and fair and equal treatment (*Fair and Equitable Treatment*). This case also occurs in various countries such as India with the solution through Constitution

domestically, the European Union with alignment execution arbitration by its members and Russia with the recognition institution before approval. For the execution still can done, then in validation decision arbitration foreign, it would be better agencies related No may ignore principles appropriate laws and take example from some countries that have through the same case. This is intended so that it does not cause impact economy term detrimental length for the country. Great hope writer For Supreme Court of the Republic of Indonesia for to study Again standardization as reference clause public policy so as not to widen its interpretation with a very rational approach done in this country.

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