THE DOCTRINE OF PUBLIC POLICY AS A GROUND FOR THE ANULLMENT OF ARBITRAL AWARD IN INDONESIA

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ABSTRACT

This research aims to determine the position of the doctrine of public policy as a ground to annul foreign arbitral awards in Indonesia. The methodology used in this research is normative juridical research method. The results of the study concluded that in practice the use of public policy doctrine as a reason for the annulment of awards may be conduct by the country, because if the award is executed it will cause a great jolt in the Indonesian legal system. However, on the other hand, if this doctrine is often used as a reason to refuse an enforcement of foreign arbitral awards, it will also be a negative assessment for Indonesia in the eyes of the world and affect Indonesia's relations with other countries.
Key Words: *Public Policy, Award,Arbitration.*

INTRODUCTION

Business disputes can be resolve through litigation and non-litigation. Arbitration is one of the non litigation dispute resolution forums in Indonesia as regulated in Law Number 30/1999 on Arbitration and Alternative Dispute Resolution. By agreeing to arbitration as an alternative dispute resolution, the parties are bound by the award issued by the institution. The problem is whether any foreign arbitratral award can be enforce or not in the country where the contract was made.

The existence of arbitration in the law of Primary Justice Power, can be seen in the explanation that cases outside the court based on peace or arbitration are still permitted, however the arbitratral award only has executorial power after the court gave permission or order to be executed (executoir).[1]

Arbitration awards can be distinguished on national and international (foreign) arbitral awards. According to Article 1 number 9 of Law No 30/1999, "International arbitration award means an award handed down by an arbitration institution or individual arbitrator outside the jurisdiction of the Republic of Indonesia, or an award by an arbitration institution or individual arbitrator which, under the provisions of Indonesian law, is deemed to be an international arbitration award".

Interpretation of the *argument a contrario* of a national arbitration award is a award imposed in the jurisdiction of the Republic of Indonesia based on the legal provisions of the

[1] Gunawan Wijaya and Ahmad Yani, 2000, *Seri Hukum Bisnis, Hukum Arbitrase*, cet. ke I, PT. Raja Grafindo Persada, Jakarta, page. 2.

Republic of Indonesia. As long as the award is made and enforce in Indonesia, this award is included as national awards.[2]

In relation to international arbitration awards stipulated in the 1958 New York Convention on Recognition of Awards, in some cases the award may be refused for reasons of public policy, as contained in Article V paragraph (2) letter b which stated:

> *Article V : 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: (b) The recognition or enforcement of the award would be contrary to the public policy of that country;*

Furthermore, the implications of the New York Convention by the government issued Presidential Decree No. 34/1981 on the Ratification of *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* and Supreme Court Ruling No. 1/1990 on Procedures for the Enforcement of Foreign Arbitration Awards, which also regulates the principles of public policy as follows:

> Article 2 paragraph (3) Supreme Court Ruling No 1/1990 states: "*Foreign arbitration awards can only be enfoce in Indonesia limited to awards that are not contrary to public policy*"
>
> Article 4 paragraph (2) states: "*The Exequatur will not be given if the Foreign Arbitration awards are proven contrary to the ground principles of the entire legal system and society in Indonesia (public policy)*".

According to Sudargo Gautama, to distinguished the public policy, is the authority of the judge to determine it using the inductive method.[3] In reality it turns out that it is not easy to enforce foreign arbitral awards due to reasons of public policy. For an instance, the case of Pertamina vs Karaha Bodas Company (KBC), where the international arbitration award was annuled by the Central Jakarta State Court against Pertamina's claim on Karaha Bodas Company (KBC). The ruling was in accordance with the 1958 New York Convention which ratified by Indonesia through Presidential Decree No. 34/1981. Therefore it is interesting to study, is the doctrine of public policy can be use for annulment or refusal of foreign arbitral awards in Indonesia?

RESEARCH METHODOLOGY

This research is normative juridical, which includes research on legislation or international treaties which are tested through rulings, both court rulings and arbitration

[2] Rachmadi Usman, 2002, *Hukum Arbitrase Nasional*, PT. Gramedia Widiasarana Indonesia, Jakarta, page.101.

[3] Sudargo Gautama, 1989, *Hukum Perdata Internasional Indonesia*, Buku ke 4 cet. ke 2, Alumni, Bandung, page. 170.

awards (national / international). The research is focused on the literature research to obeserve the enforment of foreign arbitration awards in Indonesia related to the doctrine of public policy which means reviewing secondary data obtained from research and not requiring the absolut formulation hypotheses.[4]

RESULT AND DISCUSSION

The doctrine of public policy is known by various terms, in Dutch it is called "*openbare order*", in French "*ordre public*", in Germany "*vorbehaltHausel*", while countries with the common law system call it "public policy".[5] The term policy itself is used to show a large influence of political factors in terms of determining whether it is public policy.[6]

Until today there are still many contradictions about what is actually meant by public policy. Although there is no united opinion about public policy among legal experts, they all argue that public policy plays an important role in the sense that any legal system of any country requires a kind of *veiligheidsklep* or emergency brakes called public policy.[7]

There are times when this "emergency brakes" tend to be defensive and used only for protection, we do not actively eliminate the use of foreign law, because if this doctrine often used, the impact will be negative to our national law. Thus there will be no possibility for development. Therefore we must only use this doctrine "as a shield, not as a sword".[8]

According to Komar Kantaatmadja, the notion of public policy is broadly a *daadwerkelyke belangen with a van land en volk* or in other words the public interest as the goal of the State, namely justice and society welfare.[9] Moreover, William H Clune stated that the public policy has a nature that is always associated with people's welfare in the sense of food and health as opposed to culture well-being, economic achievement related to production and consumption, centrally driven, because the state inherits things created by experts, but not resolved, political, and military conflict.[10]

Schnitzer, Kollewijn and Wolf said that public policy must be used sparingly, only needed once as an *ultimatum remedium*. If we use this doctrine too often, the result is that we

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[4] Maria.,S.,W., Sumardjono, 1997, *Pedoman Pembuatan Usulan Penelitian,* PT. Gramedia Pustaka Utama, Jakarta, page. 25

[5] *Ibid,* page. 73.

[6] Tineke Louise Tuegeh Longdong, 1998, *Azas Ketertiban Umum & Konvensi New York 1958*, PT. Citra Aditya Bakti,Bandung, page. 9.

[7] Sudargo Gautama, 1992, *Hukum Perdata Internasional Indonesia*, Buku ke 1 cet. ke 5, Alumni, Bandung, page. 17.

[8] Sudargo Gautama, 1989, *Hukum Perdata Internasional Indonesia*, Buku ke 4 cet. ke 2, Alumni, Bandung, page. 134.

[9] Tineke Louise Teugeh Longdong, Op.Cit, page. 99.

[10] Clune, William H, 1993, *Law and Public Policy : Maf of an area, Southern Interdiciplinary Law Journal*, vol 2 : 1, page. 3 - 4

only use our own law, so we show the attitude of *chauvinimus juristischen* and *national eitelkeit*, this certainly cannot be accounted for in international relations.[11]

While the term "*arbitrase*" or "*perwasitan*" in Indonesian is different from other countries, the word "*arbitrase*" is used to translate or replace foreign terms such as "*arbitrage*" (Dutch), "arbitration" (English), "*schledspruch*" (Germany), and "*arbitrate*" (Latin).[12] Arbitration is one method of dispute resolution. Disputes that must be resolved come from disputes over a contract in the form of interpretation constraints, breach of contract, termination of contracts, claims regarding compensation for breaching or violation against the law.[13]

Abdul Kadir stated that arbitration is: "*voluntary submission of a dispute to someone who is qualified to resolve it with an agreement that the arbitration award will be final or binding*".[14] Furthermore, R Subekti stated that the arbitration is: "the settlement or termination of a dispute by a judge or judges based on the agreement that they will submit or obey the award given by the judge they have chosen or appointed.[15] While M. Yahya Harahap said that arbitration was: "*one of methods to resolve disputes that arise from a contract*".[16]

As for the considerations put forward by the Central Jakarta District Court judge above, it cannot be blamed, because in accordance with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitratral Award, it does not conflicted with the convention especially Article 1958 of the New York Convention which states that every Convention parties must recognize and enforce foreign arbitration awards. Where Article III is not absolutely valid, because there are provisions that limit it, namely Article V paragraph (2), which allows authorized officials to refuse to recognize and enforce foreign arbitration awards, if it is contrary to public policy in the country requested to enforce the award

In addition to the problem faced in the enforcement of foreign arbitration awards in Indonesia, the courts still often ignore foreign awards in practice, courts rarely consider foreign law, as seen from international arbitration award on disputes between businessman or

[11] *Ibid*, page. 141

[12] HMN. Purwosutjipto, 1992, *Pengertian Pokok Hukum Dagang Indonesia : Perwasitan, Kepailitan, dan Penundaan Pembayaran*, PT. Djambatan, Jakarta, page. 1.

[13] Munir Fuady, 2000, *Arbitrase Nasional Alternatif Sengketa Bisnis*, PT. Citra Aditya Bakti, Bandung, page.11

[14] Huala Adolf, Op.Cit, page. 11.

[15] R. Subekti, 1987, *Hukum Perjanjian*, cet. ke 11, PT. Intermasa, Jakarta,page. 45.

[16] M.Yahya Harahap, 1991, *Arbitrase*, Pustaka Kartini, Jakarta, page. 108.

the Indonesian government with foreign parties, even though they agreed to have appointed foreign arbitration in resolving their conflict consequently the arbitration award could be implemented.

Basically, these considerations are acceptable, as long as the criteria for public policy are clear and definitive in practice that occurs more precisely the subjective elements which tend to depend on the opinion of the judge. For example on the grounds of the doctrine of state sovereignty, the argument that as a sovereign country, Indonesia has the right to determine what is best for its national interests.

For example due to the monetary crisis experienced by the Government of Indonesia since 1997, where the depreciation of the rupiah against the US Dollar exchange rate at that time reached more than 300%, and at the request of the International Monetary Fund (IMF) Indonesia was forced to thoroughly review projects which is based on payment obligations in US Dollars. On that basis through Presidential Decree No. 39/1997 and Presidential Decree No. 5/1998 for the sake of the country and people of Indonesia for a while, IMF-funded development projects including the project between Karaha Bodas and Pertamina and PLN were suspended. The reason for being forced to develop the project has an adverse impact on the state's finances and on the interests of the wider community. It is clear that the suspension order is a force majeure event that applies to the parties. Thus, the enforcement of foreign arbitratral award is considered as a violation of the public interest or the doctrine of public policy of a country.

Furthermore, in Article 1337 the Civil Code stipulates that a *causa* is prohibited if it is contradicted the law or contrary to public policy. This means that the monetary crisis and the situation experienced by Indonesia, the government is obliged to issue Presidential Decree No. 39/1997 and Presidential Decree No. 5/1998, so that employment contracts between the Indonesian government through Pertamina and KBC can be suspended so that the policy through the Presidential Decree is made into positive law that applies at that time.

As for the issue is that the ground of public policy should be truly selective and carefully considered. This is based on the fact that the notion of public policy is very difficult to form universally, because each country has a different understanding, depending on the constitutional, ideological, political and philosophical system of a country. Until today international civil law experts, could not find the criteria of a public policy that can apply universally.

In addition, Indonesian courts should be as cautious as possible using the doctrine of public policy in their rulings, especially in resolving international disputes. For international

business people, legal certainty is very important and also law enforcement trust is crucial for their investment efforts. This means that we do not expect investors to be reluctant to invest their capital in Indonesia simply because the judges overly prioritize their national law and reject the application of the laws of other countries.

The further problem of defining public policy such as the terms, nature, characteristics and objectives are not explained in detail. Therefore the judge interprets itself about the doctrine of public policy. In fact, if we see there are differences in the understanding and interpretation of judges against the provisions of international law and national law relating to arbitration, even the judge seems to not fully understand it.

CONSLUSION

1. The 1958 New York Convention only regulates the enforcement and refusal of foreign arbitral awards. While annulment are not specifically regulated. The annulment itself is more related to the issue of the validity of an agreement under the contract law (Article 1320 of the Civil Code). The elements of annulment are also contained in Law No. 30/1999 on Arbitration and Alternative Dispute Resolution. Basically the arbitration award is final and binding. Indonesia has ratified the 1958 New York Convention, therefore the Indonesian Government has an obligation to carry out in good faith "*pacta sun servanda*".
2. In certain cases the doctrine of public policy may be applied by a country as a reason for refused an international arbitration award, because it will cause a great jolt in the Indonesian legal system. On the other hand, if this doctrine is over used, it will undermine international relations.

BIBLIOGRAPHY

Clune, William H, 1993, Law and Public Policy : Maf of an area, Southern Interdiciplinary Law Journal, vol 2 : 1.

Gunawan Wijaya dan Ahmad Yani, 2000, Seri Hukum Bisnis, Hukum Arbitrase, cet. ke I, PT. Raja Grafindo Persada, Jakarta.

Huala Adolf, 1993, Hukum Arbitrase Komersial, PT. Rajawali Pers, Jakarta.

HMN. Purwosutjipto, 1992, Pengertian Pokok Hukum Dagang Indonesia : Perwasitan, Kepailitan, dan Penundaan Pembayaran, PT. Djambatan, Jakarta.

M.Yahya Harahap, 1991, Arbitrase, Pustaka Kartini, Jakarta.

Munir Fuady, 2000, Arbitrase Nasional Alternatif Sengketa Bisnis, PT. Citra Aditya Bakti, Bandung.

Maria.,S.,W., Sumardjono, 1997, Pedoman Pembuatan Usulan Penelitian, PT. Gramedia Pustaka Utama, Jakarta.

R. Subekti, 1987, Hukum Perjanjian, cet. ke 11, PT. Intermasa, Jakarta.

Rachmadi Usman, 2002, Hukum Arbitrase Nasional, PT. Gramedia Widiasarana Indonesia, Jakarta.
Sudargo Gautama, 1989, Hukum Perdata Internasional Indonesia, Buku ke 4 cet. ke 2, Alumni, Bandung.
Tineke Louise Tuegeh Longdong, 1998, Azas Ketertiban Umum & Konvensi New York 1958, PT. Citra Aditya Bakti,Bandung.
Sudargo Gautama, 1992, Hukum Perdata Internasional Indonesia, Buku ke 1 cet. ke 5, Alumni, Bandung.