I. INTRODUCTION

The growth of international investment and trade and the reluctance to litigate in foreign courts have stimulated parties to choose arbitration as a means of transnational dispute resolution. When they choose an arbitration, they not only hope that it can be prompt, inexpensive, not too formal, confidential, neutral but also expect that it can result in an award, definitely disposing of their respective claims, that can readily be enforced. They also hope that the award can easily be recognized and enforced in the states other than the state in which the arbitration takes place.

Because it is not as self-exercising as a judgment of courts, an arbitral award needs a judicial enforcement mechanism if it is not voluntarily complied with by parties. Thus, if it is international, it may require a “favor” from foreign courts. The involvement of foreign courts cannot be regarded as a simple issue in that it relates to foreign law systems or attitudes that may be hostile to the awards to be enforced.

There is a general notion that courts should not review the merits of an arbitral award unless the disputed issue falls outside the scope of the parties’ arbitration agreement. To put it in other words, courts should defer to arbitrators’ decision because their recognition of and respect for the parties’ intent to arbitrate their disputes. This kind of deference is very much bolstered by the New York Convention” that through Article II requires that its signatory states recognize and enforce arbitral awards made in other signatory states. The Convention preserves the enforceability of the awards by placing the burden of proof on the party defending against the enforcement of the awards.

The presumption of enforceability of foreign arbitral awards is also subscribed to by the UNCITRAL Model Law on International Commercial Arbitration. Article 36 of the Model Law suggests that a country recognize and enforce an arbitral award irrespective of the country in which it was rendered. The Model Law is also in line with the Convention in placing the burden of proof on the party refusing the enforcement of the award.

The presumption of enforceability, however, is subject to a number of exceptions. Article V of the New York Convention, for instance, sets forth several grounds for refusing the enforcement of arbitral awards, the two most important of which are nonarbitrability of the subject matter of parties’ dispute and the contravention of public policy. The Model Law is Article 36 also

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1Presented in East Asia Legal Forum 1999 “Dispute Resolution in Transnational Economic Activities in East Asian Countries” at the National Taiwan University, Law Department, Taipei, Taiwan, March 14-16, 1999.

2See the Judith Hadas University Law School Vagashrea Indonesia, LLM in international Business Law from the American University Law School (Washington College of Law), Washington, DC, USA, Lecturer in Business Law at the Hadas-Micha University Law School.


4The United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958

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ments similar provision to the
Convention's. Thus, there has been a "universal"
consensus that a country (its courts) may
refuse to enforce foreign arbitral awards if the
subject matter of the dispute cannot be
arbitrated under the law of that country, or if
the enforcement of the award will be contrary
to the public policy of that country.

The question of nonarbitrability is not a
simple issue taking into account the possi-
blity that the types of claims that are non-
arbitrable may differ from nation to nation.1
Probably, an award rendered in a nation can
not be enforced by another nation due to non-
arbitrability of the claims disposed of even if
the claims are certainly arbitrable in the
former nation. Similarly, the public policy
defense is also an important issue because it
is not easy to define the term of public policy
itself, and, again, the notion of public policy
differs widely from state to state, and every
state has obvious discretion to fashion its
laws and standards of its public policy. Then,
it follows that the presumption of enforce-
bility of foreign arbitral awards can easily be
vacated due to the availability of the two
defenses. I would, therefore, think that the
defenses have made the presumption
weak.

This paper will try to discuss the two
important issues in greater detail. Then, it
will also try to come up with some points for
East Asian countries so as to evade or rectify
the weakness of the presumption. The dis-
cussion in this paper will frequently refer to
the New York Convention for its playing
central role in the enforcement of transna-
tional arbitral awards. In addition, this paper
will touch on 'Indonesian Law' more than it
will do on any other countries' law.


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11. THE PRESUMPTION OF ENFORCE-
IBILITY OF FOREIGN ARBITRAL AWARDS

Relevant to this matter is Article II of
the Convention which provides: "Each con-
tracting 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, under the
conditions laid down in the following articles.
They shall not be imposed substantially more
onerous conditions or higher fees or charges
or the recognition or enforcement of arbitral
awards to which the Convention applies than
are imposed on the recognition or enfor-
cement of domestic arbitral awards."2

The word "shall" can be used to indicate
orders or instructions.3 "Shall", as used in stat-
ues, contracts, or the like has generally an
imperative or mandatory meaning, or it
denotes an obligation.4 Using this meaning,
this article requires or obliges signatory states
of the Convention to enforce international
arbitral awards.

It is important to note that "arbitral
awards" meant by this article are those made
in the territory of states other than the states
where the recognition and enforcement of
such awards are sought and not considered as
domestic awards in the states where their
recognition and enforcement are sought
(Article I (3)). The requirements for arbitral
awards to be covered by the New York
Convention are minimal, although com-
mencing states may provide more requirements
like "commercial relationship" and "reciproc-
ity" Article I (3) as are evident in Indone-
sian Law. In fact, the consideration of the
last "non mandatory" requirements may also
convey the message of the Convention to
counsel the courts of contracting states not to inhibit the enforceability of foreign arbitral awards if they want other contracting states to do the same.

Article III uses the term "binding," which historically replaced the word "final" required by the Geneva Convention of 1927. The purpose was to dispense with the "double acquiescence" requirement when the word "final" was used. Double acquiescence means that parties seeking to enforce foreign arbitral awards had to obtain judicial confirmation of the awards in the local courts of the places where they were rendered in order to prove their finality. Under the New York Convention, an award can be deemed binding and enforceable as soon as it is rendered. Thus by just using the word "binding," which does not need the judicial confirmation, the New York Convention encourages the enforceability of international arbitral awards.

The last sentence of Article III expressly provides that signatory states may not impose procedural requirements that are more onerous than those applicable to domestic awards. This does not mean that the enforcement mechanism for international arbitral awards must be either more onerous or efficient than that for domestic arbitral awards; it merely requires that signatory states use mechanism no more cumbersome than their domestic enforcement mechanism.

From the wording of Article III of the New York Convention, the presumption of the validity of international arbitral awards or the message of "pro enforcement" of those awards is evident.

The presumption of enforceability of arbitral awards in the Convention is also upheld by placing the burden of proof on the party seeking enforcement and limiting his defenses to a certain number set forth in Article V. This is an improvement if it is compared with the Geneva Convention of 1927 which placed the burden of proof on the party seeking enforcement and did not circumscribe the range of available defenses to those enumerated in it. In the New York Convention, the defenses to the enforceability of the awards can be summarized as follows:

a. the award was rendered pursuant to an arbitration agreement that was invalid because, under applicable laws, the parties lacked capacity to make the agreement or the agreement itself was invalid (Article V(1)(a));

b. the losing party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case (Article V(1)(b));

c. the arbitral award dealt with a difference not encompassed by or not falling within the terms of the submission to arbitrage (Article V(1)(c));

d. the composition of the arbitral panel or the panel procedures violated either the parties' agreement or the law of the arbitral forum (Article V(1)(d));

e. the arbitral award is either not yet "binding" or has been set aside or suspended by a competent authority of the country in which, or under the law of which, this award was made (Article V(1)(e));

f. the subject matter of the parties' dispute is not capable of settlement by arbitration

* St. Ruth, supra, at 494.

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under the law of the enforcing nation (Article V(2)a); and

5. recognition or enforcement of the arbitral award would be contrary to the public policy of the enforcing nation (Article V(2)b).

There is a preface to those all exceptions mentioned in Article V(1) which says: “recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority evidence that the recognition and enforcement is sought, proof that: ...”. From this, it is clear that the New York Convention explicitly places the burden of proving those grounds of nonenforcement of an arbitral award on the party opposing enforcement, except for “non-enforceability” ground (Article V(2)a) and “public policy” ground (Article V(2)b) that must be invoked by enforcing court.

Article V(1) uses the term “may be refused”. Hence, the New York Convention actually does not oblige contracting states to refuse to recognize or enforce international arbitral awards in spite of the availability of the defenses as forth in Article V above. This trend is also conceived by the UNCITRAL (Model Law—a model law that is supposed to be followed by states with a view to harmonizing the international arbitration legislation—Article 36.

Article V(1)e mentioned above exactly-upholds the presumption of the enforceability of foreign arbitral awards. It can be inferred from this article that an arbitral award that has been set aside or suspended in the country in which, or under the law of which, that award was made can still be enforced in other contracting states. In other

words, the setting aside or suggestion of the arbitral award in the arbitral forum can only constitute a ground for the refusal of enforcement of the award in other contracting states. In addition, consistent with this stipulation, there is no article in the New York Convention which limits the places where a party may seek to enforce an arbitral award.

There are two different laws used to determine the availability of the grounds for nonenforcement under Article V of the New York Convention. First, for grounds set forth in Article V(1)b, c, d, e, the applicable law is used. This can be the law chosen by parties in their arbitration agreement, or by tribunals, or the law of arbitral forums. Second, for the grounds in Article V(1) a and b, it is clear that the law of enforcing nations is used. It means that the Convention does not provide any definitive mechanism to ensure the validity of an arbitral award. This was left to the provisions of the applicable law and/or the law of enforcing states. Thus, the grounds in Article V (1) a, b, c, d, and e must be proven by the party refusing the enforcement by using the first law, whereas the grounds in article V(2) a and b that is nonenforceability and public policy defense must be “found” by rational courts asked to enforce foreign arbitral awards by using the second law.

The wording in Article V(2) a and b can be said as indicative of the Convention’s “support” to judicial intervention in the realms of arbitration. This article uses the word “find” in lieu of “prove” as used in Article V (1). The former means “to discover, to locate, to ascertain and to declare.” The meaning of this word does not amount to that of the word “prove” which is “to establish a fact or hypothesis as true by satisfactory and
sufficient evidence. Unlike the latter, the former does not require evidence to be conveyed. Thus, by the word "find", enforcing courts can easily use the nonarbitrability and public policy defenses in an excuse for nonenforcement.

So far, Article V vis-a-vis Article III mentioned above has enforced that, of the one hand, the Convention fosters the enforcement of foreign arbitral awards by its presumption of enforceability but, on the other hand, it has made the presumption easy to be vitiated by allowing enforcing courts to find the nonarbitrability and public policy defenses. Thus, the presumption can really be at stake if the enforcing courts use the two defenses thriftlessly.

III. NONARBITRABILITY AND PUBLIC POLICY DEFENSES: THE WEAKNESS OF THE PRESUMPTION OF ENFORCEABILITY OF FOREIGN ARBITRAL AWARDS

1. Nonarbitrability Defense

All nations regard some certain claims as incapable of resolution by arbitration. The types of claims that are nonarbitrable differ from nation to nation. However, the typical reason asserted by most nations is the same, that is their society will be injured by arbitration of public law claims because public law issues are too complicated for arbitrators, and arbitration proceedings are too informal to solve issues of public interest. It can be briefly stated that their reason is that arbitrators are not capable of resolving the issues of public interest.

Various nations refuse to permit arbitration of disputes concerning labor or employment grievance, intellectual property rights, competition (antitrust) claims, real estate and firearm relations. Common law, however, has prohibited intellectual property claims and competition law claims to be arbitrated.

In the USA, securities law, anti-trust law, patent law, bankruptcy claims have been designated as nonarbitrable. Argentina has also treated as nonarbitrable claims on company law, foreign investment law, anti-trust, trademark and patent legislation, legal capacity of persons and family law. Italy through Article 806 of Italian Code of Civil Procedure has also deemed labor, social security, and obligatory medical aid disputes, issues of personal status and marital separation nonarbitrable.

Under Indonesian Law, nonarbitrable disputes are those falling under the scope of laws involving the state's authority, or those not pure individual rights. Article 616 of Reglement op de Burgerlijke Rechtsvordering (R.V.) enumerates such nonarbitrable disputes as those relating to grants, divorces, legal status or many others banned by legislation which can be very broad.

Although nonarbitration question may start to appear when one party to a dispute refuses to recognize an arbitration agreement, it can also be used as a ground to refuse to enforce an arbitral award. Thus, the arbitral award that arises out of these kinds nonarbitrable disputes can be refused enforcement. In international arbitration, if a nonarbitrability question is raised to reject an arbitration agreement before an award is rendered, of course the laws used to resolve the question...
are the laws other than those of an enforcing country (except that the latter laws have been chosen beforehand) most of which are those of arbitral courts probably not foreign to parties to the dispute, and logically, this question is mostly invoked by one party to the dispute refusing the arbitration agreement. On the other hand, when the nonarbitrability defense is raised after the arbitral award is made, the question of whether or not the subject matters of the dispute are arbitrable is for foreign enforcing courts to determine under its own laws. Hence, the award is amenable to and under the control of foreign or "strange" laws. In this case, it is very easy for the enforcing courts to vacate the award. Unfortunately, Article V (2a) of the New York Convention which, as mentioned above, allows the competent authority in an enforcing country to refuse to recognize and enforce foreign arbitral awards if it "finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country..." is clearly "supportive" to that kind of judicial intervention by foreign nations in the realm of arbitration.

The ease to refuse foreign arbitral awards due to nonarbitrability defenses can apparently make the presumption of enforceability of foreign arbitral awards easy to be vitiated. The presumption of law is certainly refutable, but it imposes the burden of proof on one who wants to rebut it. It is true that under the New York Convention's Article V the presumption of enforceability still remains intact until it is rebutted. The Article, however, has exposed foreign arbitral awards to the risk of being refused by one party and by foreign courts. The refusal of the award by a losing party to the dispute is understandable as long as he can prove the grounds for his refusal for the right of refusal can exactly be a means to test the awards and to avoid a flawed award as well as to create fair and impartial dispute resolution. The refusal to enforce the awards because of nonarbitrability defense under the law of foreign enforcing courts, however, is just a showing of serious judicial control by foreign courts by using their parochial concepts. Thus, I would think that the nonarbitrability defense has weakened the presumption of enforceability of foreign arbitral awards.

2. The Public Policy Defense

One of the most significant and most controversial bases of refusing to enforce an arbitral award is the public policy defense. National arbitration legislation uniformly permits the nonrecognition of arbitral awards because they violate public policy. That is why this defense is the most frequently piled of all the defenses enunciated in the New York Convention.

The public policy defense is laid down in Article V (2b) of the New York Convention. Unfortunately, the language of this article is overly broad and the Convention provides no guidelines to its construction. Consequently, it can be abused as the "catchall" by those evading enforcement. Thus, the public policy defense would give courts considerable latitude in refusing enforcement of arbitral awards. Because of this, the public policy defense has permitted the circumvention of the Convention's objective which is the uniform enforcement of foreign arbitral awards. It then also follows that the defense can easily eviscerate the Convention's presumption of enforceability mentioned in Article III leaving the Convention without force and effect.

10 Black, supra at 1185.
11 ibid, supra at 528.
12 Bouvier, Texas International Law Journal, the University of Texas at Austin School of Law Publications, Inc., at 2 (Winter 1995).
13 Bouvier, supra at 3.

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Public Policy Defense in Indonesia:

"A Legislative Wording"

The Presidential Decree No. 34 of 1991 by which Indonesia acceded to the New York Convention does not mention the public policy defense. The Indonesian Supreme Court Regulation 1 of 1990 (the Regulation) which enunciated as an implementing regulation of that decree mentions the public policy defense in Article 3(1) and 4(2). Article 4(2) of the Regulation provides that public policy (public order) is "the fundamental principles of the legal and social system in Indonesia."

To interpret this definition is not easy. What do the fundamental principles of legal system mean? What are the fundamental principles of social system? Reading that kind of construction, one may profit an outright assumption that it is indicative of the Regulation's intent to broaden the public policy defense.

Article 3(1) of the Regulation provides:

"Foreign arbitral awards are only recognized and enforced in the territory of the Republic of Indonesia if they satisfy such requirements as .... (3) the foreign arbitral awards .... are not contrary to public policy (public order)."

The plain meaning of this wording can clearly indicate the Regulation's intent that foreign arbitral awards are basically not recognizable and not enforceable unless they do not violate the Indonesian public policy (public order). In other words, the recognition and enforcement of international arbitral awards are only the exception of the Regulation's general presumption of the unrecognizability or unenforceability of the awards.

As stated above, Article 4(2) of the Supreme Court's Regulation provides that public policy is "the fundamental principles of the legal and social system in Indonesia." By reading this article, one may assume that the definition of public policy is that article is very broad. However, in practice, that the definition can be broad or narrow probably depends on Indonesian courts' interpretation. Up to now, the definition is for the Central Jakarta District Court and the Supreme Court to interpret, and as indicated below, an "interpretation test" has been done in EC & F Man (Sugar) v. Yani Harvanto by the Supreme Court.

The Civil Law system which does not require courts to follow precedents may engender various interpretations which can give rise to the uncertainty or those interpretations. Therefore, the situation in Indonesia cannot be equated to that in a common law country. In the United States, for instance, due to the requirement for courts to follow the precedents, the consistency of interpretation of the public policy exception will perhaps be achieved more readily or the variety of the interpretations may tend to be less frequent than that in a civil law country like Indonesia. In the US, the "well-defined", "narrow", and "explicit" construction of the public policy may be achieved by virtue of courts ab initio not having statutes have provided the construction.28

The nonarbitrability concept is closely related to the public policy concept, that is: to arbitrate certain non-arbitrable disputes can create a defaulting party, finding out of the forum being involuntary of public policy. If this is the case, for the moment, Indonesian courts can consue Article 613 (1) and 416 of

28 See, Bom. Supra, at 503: the Federal Arbitration Act (FAA), the implementing Act of the New York Convention in the United States, does not contain a provision of public policy exception. Nevertheless, a common law public policy exception has been implied under the FAA. In S.R. Grace & Co. v. Local 799 et al., 51 U.S. 737 (1983), and
29 Mino, Inc. V. United Paper Workers Int'l Union, 484 U.S. 92 (1987), the exception is interpreted very narrowly

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Reglement op de Burgerlijke Rechtsvordering (R.V.) which mention certain arbitral disputes and enumerate nonarbitrable ones. In fact, just by Indonesia’s accession to the New York Convention (just by the Presidential Decree 34 of 1981) and without the implementing regulation (the Supreme Court Regulation 1 of 1990), the domestic R.V. is applicable to the recognition and enforcement of international arbitral awards.27 This is consonant with Article III of the Convention which requires each contracting state to recognize and enforce international arbitral awards in accordance with its rules of procedure and proscribes it to impose more onerous conditions or other requirements on international arbitral awards than those on domestic arbitral awards.

b. Court’s Interpretation

Since Indonesia’s accession to the New York Convention, there have been many cases in which the Supreme Court refrained from enforcing international arbitral awards. However, the mostly provided reason for that was unavailability of an implementing regulation —asserted by the Supreme Court— as required by the Presidential Decree 34 of 1981. That expected implementing regulation is the Supreme Court Regulation 1 of 1990 (March 1, 1990) which sets out the manner by which international arbitral awards will be recognized and enforced by Indonesian Courts. There was only one case, ED & F Man (Sugar) v. Yani Haryanto, which could be viewed as the first implementation of the New York Convention in which the public policy defense to the enforceability of an international arbitral award was first tested. The case is stated below.28

Man (Sugar), a member of the ED & F Man Group, contracted in 1985 to supply 400,000 tons of sugar to an Indonesian businessman, Yani Haryanto. The contract stipulated the acceptance of the jurisdiction of London courts and provided for arbitration of any dispute by the Council of the Refined Sugar Association (RSA). Man procured the sugar but Haryanto failed to make payment. Man claimed damages of U.S. $146.3 million and the dispute was arbitrated by RSA Council in 1984. The Council found Haryanto in violation of the contract and ruled that he compensate Man in full. Haryanto rejected the award and the case went to the High Court in London, where both the English High Court (1985) and the English Court of Appeal (1986) reinforced the arbitral award.

An out of court compromise was reached in 1986. Mr. Haryanto agreed to pay $27 million (US dollars) over three years. He paid the first installment of $9 million (US dollars) but not the other two. Instead, he questioned the validity of the contract and its status quo. Haryanto contended that interpretation of the Presidential Decree 43 of 1971 and 39 of 1978 that imports of sugar might only be made by BULOG, an Indonesian government procurement agency.29 The Supreme Court ruled that the import contract was invalid because it was contrary to public policy. The sentiment reached in London was therefore invalidated. Although the plaintiffs, Man, put up a counter argument

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29 Article Two (c) of the Presidential Decree 43 of 1971 stated: “The Chief of BULOG carries out the task to have the complete authority to, and manage, the procurement, the dissemination and marketing the ‘floating stock’ of sugar with a view to maintaining the price stability of sugar at a reasonable level”. Article 3 (c) of the Presidential Decree Number 39 of 1978 stated: “...holding various tools for the function of importing rice, sugar, wheat, and other foodstuff in order to provide for internal needs without interrupting.
that Harjanto had agreed to assume responsibility to obtain the licenses required to import sugar. The Court rendered the foreign arbitral award unenforceable.

It can be inferred from that case that because the import contract was contrary to the two Presidential Decrees, the contract violated Indonesia’s public policy, and, as a consequence, the arbitral award was unenforceable. Apparently, this decision conforms with a principle in Article 182 of the Civil Code of Indonesia that “there is no accessory contract if there is no valid underlying contract.”

Based on Article 182 of the Civil Code, it is correct to assert that because the import contract was invalid, the arbitration agreement contained in that contract is also invalid. However, even if it is correct to say that the contract violating existing laws can be regarded as violating public policy, the Court can not rely on Article 3 (3) of the Supreme Court Regulation Number 1 of 1990 to uphold that the arbitral award is unenforceable, because Article 3 (3) itself refers to “arbitral awards,” not arbitration agreements.

Article 3 (3) of the Supreme Court Regulation provides: that: “Foreign arbitral awards are only recognized and enforced in the territory of the Republic of Indonesia if they satisfy such requirements as: (1) the foreign arbitral awards are not contrary to public policy.” It is clear that this article refers to arbitral awards not arbitration agreements. In fact, the idea of this article is the same as that of Article V (3) of the New York Convention.

It is also important to note that the New York Convention explicitly does not equate the invalidity of arbitration agreement concept with the contemnence of public policy concept; and, therefore, the Convention mentions them in different places. Unfortunately, the Supreme Court Regulation, which implements the Convention, does not include the invalidity of arbitration agreement concept for nonenforcement of arbitral awards. Thus, if the Court were consistent with its previous decision which held a foreign arbitral award unenforceable because it is not an implementing regulation for Indonesia’s accession to the Convention at that time had not been adopted, the Court in this case should only have relied on the implementing regulation which was then adopted, that is the Supreme Court Regulation 1 of 1996. Consequently, it does not have any right to rely on it to refrain from enforcing the foreign arbitral award in favor of EDF & F Man (Sugar) mentioned above. I do not suggest that the arbitral award arising out of the invalid arbitration agreement is invalid but rather that as far as the implementing regulation is concerned, the Court has no ground to refuse to enforce the award. The refusal to enforce the award would mean that the implementation of the public policy defense is not in line with the thrust of the New York Convention.

Suppose the Supreme Court directly used Article 4 (2) of the Supreme Court’s Regulation which said: “any award will not be given if foreign arbitral awards unequivocally violate the fundamental principles of the legal and social system in Indonesia (public order/policy).” But the arbitral award

36 See, Article 182(3) of the New York Convention for the availability of arbitration agreement concept, and Article 182(3) for the contemnence of public policy concept.

38 Cup 421 U. “Sec. 1

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in this case really violate the public policy defined in this article?

It is difficult to answer that question affirmatively, because the arbitral award itself just resolves the parties' dispute without touching on any "existing laws" mentioned above. Therefore, suppose the Court interpreted the definition of public policy in Article 4(2) as encompassing the "existing laws", which were the two Presidential Decrees, the Court would have difficulty in arriving at the conclusion that, because of Article 1821 of the Civil Code, the arbitral award itself had violated public policy.

As an example of an arbitral award which violates public policy, a prominent case in the United States is appropriate to be mentioned here. In *Newsday v. Long Island Typographical Union*, 915 F.2d 840, 843, 845 (2d Cir. 1990), the United States Court of Appeals for the Second Circuit held that the arbitrator's reinstatement of an employee who had been found guilty of sexual harassment violated public policy. In this case, the arbitrator considered the serious nature of sexual harassment, as well as the fact that the employee had engaged in similar misconduct in the past, in deciding whether or not to reinstate the employee. Nevertheless, the arbitrator reinstated the employee concluding that the discharge would be too severe because the employer had not disciplined the employee for his previous misconduct. The District Court in *Newsday* vacated the arbitrator's award holding that reinstating the employee violated the public policy against sexual harassment because it returned a known sexual harasser to the workplace and, therefore, impeded the employer from preventing a hostile and offensive workplace. On appeal, the Second Circuit affirmed the lower court's decision.12

The arbitral award in *Newsday* clearly violates the well-defined public policy mentioned in Title VII of the Civil Rights Act of 1964 which, in pertinent part, provides that "it is unlawful to fail to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his (or her) compensation, terms, conditions, privileges of employment, because of such individual's race, color, religion, sex, or national origin."13 The Supreme Court has interpreted this provision of Title VII to include not only sexual harassment that has an economic effect on the victim, but also sexual harassment that causes a hostile or offensive working environment.14

The arbitral award in *ED & F Man (Sugar) v. Yani Haryanto* only resolved the parties' dispute that the award was made had to compensate the prevailing party. Actually, by refraining from enforcing the arbitral award in question, the Supreme Court has unequivocally accorded the party against whom the award was rendered a chance to commit two kinds of "sins", First, not performing the obligation to the other party who has prevailed in the dispute settlement, and secondly, violating the existing laws or the two Presidential Decrees (by importing sugar without license) without having been punished. In fact, that is not only detrimental to mention; Indonesian Government itself, in this case, has evaded esteeming international comity which is palpably a necessary means to support this country's strenuous efforts to step up the pace.

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of its international economic relations with foreign nations.

IV. SOME POINTS TO RECTIFY THE WEAKNESS OF THE PRESUMPTION OF ENFORCEABILITY

1. Hospitality

As mentioned above, the non-arbitrability and public policy defenses are the prerogative of countries. Up to them is to determine whether the two defenses shall be broad or narrow. If they are hostile, they tend to make the two defenses broad, thus if they make every effort to shirk down arbitration agreement as well as awards. Therefore, it is strength-then the presumption of enforceability of foreign arbitral awards the hostility must be converted to hospitality.

a. The relaxation of non-arbitrability defense

Perhaps the development of arbitration in the US can be used as an example of the relaxation. In domestic context, the US has changed its position on claims in securities law and antitrust law. As of 1989, claims based on the 1933 Securities Act have been arbitrable. Rodriguez De Quijas v. Shearson/ American Express Inc. (1989)20 overruled Wilko v. Swenson (1953)21 that had held invalid an arbitration agreement of issues arising under the Securities Act.22 Also, in antitrust claims, Kawasaki v. Chicago Tribune Co. (1989)23 struck down American Safety Equipment Corp v. P. Mc Guire & Co. (1968)24 that had deemed antitrust claims inappropriate for arbitration.25

In international context, the escalation of non-arbitrability defense in the US had even occurred before. If international commercial arbitration is involved, US courts have been less willing to entertain non-arbitrability defense. In Shek v. Alphena-Culver Co. (1974),26 the Supreme Court held that a claim under Securities Exchange Act 1934 was arbitrable provided that it arose from an international transaction. And in Mitsubishi Motors Corp v. Soler Chrysler-Plymouth Inc. the Court held that federal antitrust claims were also arbitrable, again, as long as they arose from international transaction.27

In both Shek and Mitsubishi de Supreme Court have relaxed the consideration of non-arbitrability defense to international arbitration for such reasons as: the need to facilitate international commerce, respect for party autonomy, concerns of international comity, respect for capacities of foreign or transnational tribunals, sensitivity to the need of international commercial system for predictability is the resolution of disputes, and the view that the international commerce required rejection of parochial concept.28 I would think that East Asian countries could consider the example from the US mentioned above. The reasons similar to those in Shek and Mitsubishi can be taken to pneumatize the enforceability of international arbitral awards in the countries. Perhaps to support this suggestion, it is also good to...
consider the International Chamber of Commerce's opinion that the enforcement of certain domestic laws would not be vitiated by allowing the arbitration of international claims because other features of the enforcement scheme of the laws might provide ample incentives for parties to conform to their conduct to the requirement of the laws and because "arbitral tribunals are not likely to find valid and enforceable agreements which permit violation of public law in their place of performance." The relaxation of public policy defense

The relaxation of public policy defense can also be made by doing use of the same reasons as mentioned above. East Asian countries should employ the public policy defense with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the countries. I think transnational commerce among East Asian countries and with other countries will function best when they respect each other. For this, they should construe the defense narrowly. Again I would think that the US law could be considered as an example. The US Supreme Court in WR. Grace & Co. v. Local (1983) concluded that the public policy had to be "explicit, well defined ad dominant," and must be "ascertained by reference of the laws or legal precedents and not from general consideration of supposed policy." With regard to the New York Convention, I do not think I can agree with the notion that the public policy defense is Article V(2)(b) should be removed from the Convention. I think the removal will give rise to a serious danger. That is, because they are free from judicial control, unfair awards will probably be enforced. In the long run, this may cause legislatures and courts to seize disputes back into their firm grasp. If this is true, the judicial hostility toward arbitration will return again.

2 Harmanization

The fact that there are several defenses to the enforceability of foreign arbitral awards does not negate the importance of the presumption of enforceability but rather just weakens the presumption. Thus, at least, countries should adopt the presumption because it is a minimal requirement to be satisfied unless foreign arbitral awards will always be vacated everywhere. Additionally, the presumption of enforceability by every country is a must due to the likelihood that many arbitrations are conducted outside a country. It is, therefore, enough that countries harmonize their laws in order that they have the presumption taken into account that it will be very difficult to harmonize the nonarbitrability and public policy defenses.

3. The adoption of the UNCITRAL Model Law in International Commercial Arbitration therefore constitutes a reasonable effort of harmonization of laws although this Model law also recognizes the two defenses as the Convention does. Although most of the pro-

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37 461, US, 757 (1962)
38 Born, Supra, at 529
39 See, Ruy, "The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards," Fordham International Law Journal, Fordham University Law School, USA, at 857 (March, 1993) some lawyers have suggested removal of the public policy defense from the Convention saying that the removal would not leave a party opposing the enforcement of foreign arbitral award without a remedy, he may invoke the remaining provisions of the Convention (Article V(4)) to question the validity of the award.
40 Stewart, et al., The Growth Triangle of Singapore, Malaysia, and Indonesia, Georgea Journal of International and Comparative Law, Georgea, USA, at 54 (Spring, 1993).
visions in the Model Law are similar to those in the Convention, it goes beyond the Convention especially in making clear the grounds for vacating international arbitral awards. Unfortunately, however, like the Convention, the Model law does not come up with the explanation of the meaning of public policy defense. Why is it necessary to adopt this Model law; is it not enough just to ratify or accede to the Convention? Although ratification of or accession to the Convention by a country causes the provisions in the Convention to bind the country, it is unlikely that the country does not want to fully stick to the provisions because of its “disobedient” implementing regulation. As mentioned above, this is true with regard to Indonesian law which has “converted” the postenforcement bias of the Convention to the non-postenforcement one by means of the Supreme Court Regulation, the implementing regulation of this country’s accession. By adoption of the Model Law, a country makes the law that is really compliant with the Convention because the Model law is the “voice” of the Convention.

The adoption does not mean the making of the exactly same law as the Model Law. A country may adopt the Model Law with variations as is the case in Egypt. This country has made two variations: first, the tribunal is obligated to interpret or correct an award if a party so requests, and, second, the parties need not agree to the request that tribunal interpret the award. It is also possible that countries only take the “spirit” of the Model Law. This is true in England, Germany, and Sweden that have incorporated many significant features of the Model Law’s defense to arbitration into their legislation.

V. CONCLUSION

When parties choose an arbitration as a method of disposing of their disputes, they certainly hope that the award arising out of the arbitration can readily be enforced everywhere. In international context, there has been a presumption that foreign arbitral awards are valid and enforceable as long as not rebutted. This is subscribed to by the New York Convention that has been expected to play a central role in buttressing the enforcement of foreign-arbitral awards.

The presumption of enforceability of foreign arbitral awards, however, may be at stake of being quashed easily due to the non-enforceability and public policy defenses. The New York Convention has allowed (signatory) countries to employ their own laws in invoking the two defenses. Because the laws pertaining to the non-enforceability and public policy concept may differ from country to country, this issue is not a simple one. The country whose law is hostile to arbitration will tend to use the two defenses effortlessly. This may engender the nullity of the presumption leaving foreign arbitral awards without force and effect.

The two defenses have apparently weakened the presumption. While it is difficult to harmonize the two defenses, it is possible, even necessary, that countries, especially East Asian, relax their concept of the two defenses in order to rectify the weakness of the presumption. Although the presumption has been weakened, the presumption itself is inevitable unless foreign arbitral awards will be refused everywhere. Therefore it is necessary that the countries harmonize their laws so as to uphold the presumption.

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American Arbitration Association, Arbitrati-
Black, Henry Campbell, Black's Law Dic-
Buzaré, Eloise Henderson, Texas Interna-
tional Law Journal, the University of Texas at Austin School of Law Publica-
tions, Inc. USA (Winter 1993).
Craig, Laurence, Some Trends and Develop-
ments in Laws and Practice of Interna-
Hornby, Oxford Advanced Learner’s Dic-
tionary, Oxford University Press, Eleven.
Impression (1993).

MENBAR HUKUM

Mehren, Robert R., From Vymor’s Case to Mischtsch: the Future of Arbitration and Public Law, Commercial Law and Practice Course Handbook Series, Prac-
ticing Law Institute, Brooklyn, USA (October 1988).
Sever, Jay R, “The Relaxation of Inhabi-
trability and Public Policy Checks on US
and Foreign Arbitration: Arbitration Out
Stewart, Terence F, et al., The Growth
Triangle of Singapore, Malaysia, and
Indonesia, Georgia Journal of Inter-
national and Comparative Law, Georgia,
USA (Spring, 1993).
The Economist Intelligence unit, EIU
Business Asia, at 9, (October 11, 1993); Reuter Textline, Business Times, Singa-
apore (January 19, 1995).
Trumble, Laurie A, “Vacating Arbitrators’ Awards Under The Public Policy Excep-