

'PRO ENFORCEMENT BIAS' UNDER ARTICLE V OF THE NEW YORK CONVENTION IN INTERNATIONAL COMMERCIAL ARBITRATION: COMPARATIVE OVERVIEW

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Abstract

This article explores the main features of exceptions to enforcement under Article V of the NYC, including its exhaustive and discretionary natures. It then specifically provides an overview of narrow judicial control over the grounds for refusing enforcement under the Article V of the NYC. It points out the fundamental principles of the provision in determining the enforceability of international arbitral awards. Then this article will occasionally refer to international arbitral cases in some jurisdictions, such as the United States, France and Switzerland. It is noted that courts and legislatures in those jurisdictions have moved towards pro-enforcement policy to questions of recognition and enforcement arising under Article V of the NYC. Therefore, this approach is a good signal and a promising development to promote the finality and enforceability of foreign arbitral awards in international commercial arbitration. This approach can also be a good lesson for the Indonesian judiciary system in relation to the enforcement and recognition of international arbitral awards in the future.

Keywords: international commercial arbitration, Article V of the NYC, refusal of enforcement, pro enforcement bias, finality and enforceability, foreign arbitral award.

Abstrak

Artikel ini menganalisis tentang alasan-alasan penolakan pengakuan dan pelaksanaan putusan arbitrase internasional yang diatur di dalam Pasal V Konvensi New York 1958, termasuk sifat limitatif dan diskresi dari ketentuan tersebut. Beberapa putusan pengadilan di berbagai negara seperti Amerika Serikat dan Perancis menunjukkan adanya tendensi untuk menerapkan ketentuan Pasal V Konvensi New York secara restriktif. Fenomena ini mencerminkan adanya kecenderungan dari berbagai negara untuk menerapkan prinsip 'pro enforcement' terhadap pelaksanaan putusan arbitrase internasional sehingga lebih memberikan jaminan kepastian hukum terhadap pengakuan/pelaksanaan putusan arbitrase internasional di berbagai negara yang telah meratifikasi Konvensi New York. Penerapan prinsip 'pro enforcement' juga dapat memberikan paradigma baru bagi Pengadilan di Indonesia terkait dengan pengakuan dan pelaksanaan putusan arbitrase internasional.

Kata kunci: arbitrase komersial internasional, Pasal V Konvensi New York, penolakan pelaksanaan putusan arbitrase internasional, prinsip 'pro enforcement', finalitas dan kekuatan mengikat putusan arbitrase internasional.

I. Introduction

The exceptions to the enforcement under Article V of the New York Convention 1958 regarding Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: the NYC) were potentially a source of serious concern. The court's expansive interpretations of these exceptions gave rise to an abrupt denial of the finality of an award. It was generally agreed that exclusive exceptions to enforcement under Article V of the Convention and the recognition of the finality and enforceability of the awards under Article III exemplify the pro-enforcement policy. Further, Article IV of the Convention promotes restrictive procedure of enforcement by discouraging erroneous conditions of enforcement and establishing *prima facie* evidence of the enforceability of the awards. This means that the defences opposing enforcement should be construed narrowly and exhaustively in favour of enforcement.¹

The pro-enforcement policy prevents the abuse of court's process domestically. Merits review of an award is an abuse of court's process because it undermines the finality and enforceability of the award. The prevention of the abuse of court's discretion generally promotes honor for the arbitral tribunals' role in deciding and terminating disputes. Increased pro-enforcement policy leads to decreased court's interventions and ultimately an increase in the finality and enforceability of foreign awards. This will also promote and support the implementation of the competence-competence principle.

Privileging the pro-enforcement policy will ensure award enforcement, lower national or parochial inclination and local protectionism. Thus, it will promote the delocalization of awards as an impact of internationalization and globalization. The ongoing challenge for the national courts is to put in place a harmonious and effective interaction between the pro-enforcement policy and enforcement controls of arbitral awards. Accordingly, this paper examines the judicial approach regarding residual discretion to enforce foreign awards notwithstanding the existence of the public policy exception. It then analyzes Indonesian courts and other jurisdiction approaches in enforcing foreign awards on the grounds of public policy. Prior to addressing these issues, it is convenient to examine the preliminary issue of whether Article V of the Convention indicates that the pro-enforcement policy favours the presumptive enforceability of foreign awards.

II. Article V of The New York Convention – Enforceability of Foreign Awards and Exceptions to Enforcement

A. Discretionary Nature of Article V of the NYC

The discretionary nature of Article V complements the pro-enforcement bias of the NYC. The 'permissive' nature of this provision demonstrates that it is not mandatory thus it preserves the courts' discretion to enforce the awards. This is exemplified from the use of the term 'may' instead of 'shall' under Article V of the Convention. The existence of grounds for refusal of enforcement may not necessarily lead to non-enforcement of the awards. The court has discretionary power to allow or refuse enforcement. Only if the existence of the grounds for non-enforcement would seriously injure fundamental justice and the morality of the enforcement, the state

¹ Richard Garnett, "International Arbitration Law: Progress towards Harmonization," *Melbourne Journal of International Law* Vol. 3 Issue 2 (September-December 2002): 400.

may suffice to justify non-enforcement.

The discretionary nature of Article V of the NYC exemplifies an autonomy sphere of courts to exercise a certain level of personal judgment and assessment.² The courts' discretionary power is derived from the given standards of the grounds for non-enforcement under Article V.³ The absence of a standard definition and scope of grounds for challenging the enforcement of arbitral awards under Article V has led to vague and abstract standards of application. Discretion can also be deliberately promoted by a vague linguistic structure, such as when a rule contains open texture words requiring an element of judgment before they can be applied such as 'public policy.' This may leave room for the courts applying the rule to exercise discretion.

However, does this also mean that the discretionary powers of the municipal courts are unlimited? Although judges have discretionary power to refuse enforcement or annul the awards, they are nevertheless not obliged to assume that their discretion is unlimited. The court's discretion is not absolute since it is related to the interpretation of a given standard within a legal rule in order to apply it. Accordingly, in exercising its discretion, the court must take into consideration some factors in order to achieve justice and fairness. With regard to the defect of procedure as the grounds for refusal enforcement, 'the seriousness of the defect'⁴ should be taken into account in the application of the discretion to set aside or to not enforce the awards.⁵ Further, the judges may also refuse to apply discretionary power to refuse enforcement or set aside an award if it could create a 'procedural injustice' or 'unjustifiably erode the binding force and finality of the awards'.⁶ In *MINE v. Guinea*,⁷ the court may require contravention of the material justice in order to justify the court's discretion in a decision on annulment and enforcement of awards.⁸ Other cases also suggest that the court has discretionary power to determine whether the violation of public policy exception may justify non-enforcement. In *MGM Production Group, Inc. v. Aeroflot Russian Airlines*,⁹ the court required contravention of the most basic notion of morality and justice to justify non-enforcement based on the public policy exception.¹⁰

B. Basic Concepts of the Exhaustive Nature of Article V of the NYC

It has been accepted that the procedural defence to oppose enforcement under

² Parsons & Whittemore Overseas Co. Inc. (USA) v. Societe Generale de L'Industrie du Papier (RAKTA) (Egypt), 508 F.2d 205 (2nd Cir. 1974), United States Court of Appeals, Second Circuit, 23 December 1974, Yearbook Commercial Arbitration 1 (1976).

³ D J Galligan, *Discretionary Powers* (USA: Clarendon Press Oxford, 1986), p. 14.

⁴ Carolyn B. Lamm and Frank Spoorenberg, "The Enforcement of Foreign Arbitral Awards under The New York Convention, Recent Development," <http://www.steelbee.net/THE%20ENFORCEMENT%20OF%20FOREIGN%20ARBITRAL%20AWARDS%20UNDER%20THE%20NEW%20YORK%20CONVENTION.pdf>, accessed 24 June 2014.

⁵ *Ibid.*

⁶ United Nations Conference on Trade and Development (UNCTAD), Dispute Settlement, International Centre for Settlement of Investment Disputes, Post-Awards Remedies and Procedures (United Nations: New York and Geneva, 2003), .p. 14, accessed 24 December 2014, http://www.unctad.org/en/docs/ed-mmisc232add7_en.pdf.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ MGM Production Group, Inc. v. Aeroflot Russian Airlines, WL234871 2004 (2nd Cir (NY) cited in A Redfern, *et.al.*, International Arbitration (USA: Oxford University Press, 2009), p. 457.

¹⁰ See Parsons & Whittemore, cited in Gary Born (1), *International Commercial Arbitration : Commentary and Materials* (Netherlands: Kluwer Law International, 2001), p. 825.

Article V of the NYC is exhaustive. Accordingly, the grounds for enforcement refusal that are enshrined in Article V of the Convention are exclusive. Thus, judicially created grounds for non-enforcement is inadmissible.¹¹ This also complements the pro-enforcement policy of the Convention. The grounds for challenging the enforcement of an award, as prescribed in Article V of the New York Convention, embodies three basic features: (1) the grounds are exhaustive; (2) there is no review of the merits of the award; (3) the burden of proof is upon the respondent.¹² With regard to pro-enforcement bias of the Convention, a narrow approach to the grounds for refusing enforcement could discourage 'unnecessary' refusal of enforcement of international awards.¹³ No additional grounds for non-enforcement or annulment are permitted to be provided by the parties in international arbitration agreement.

The exhaustive nature of Article V of the Convention also means that the defence to oppose enforcement should not be onerously applied with regard to the enforcement of international awards. The exclusive grounds for challenging enforcement under Article V complements the NYC's pro-enforcement policy. Accordingly, additional basis beyond the scope of Article V of the Convention may not justify non-enforcement. This leads to the perception that while arbitration acknowledges freedom of contract principle the exclusivity of Article V is nevertheless a significant limit on the parties to contractually expand the grounds for challenging enforcement or setting aside the awards. Accordingly, neither the courts nor the parties of an international arbitration have legal authority to create or modify a new ground for non-enforcement which is not provided for under the NYC. The parties have no rights to contractually modify grounds for non-enforcement and annulment of international awards.¹⁴ Therefore, the judicially created grounds for the refusal of enforcement under the guise of the public policy exception will undermine the exclusivity of Article V of the Convention and the pro-enforcement bias.

With regard to the scope of review of international awards, the exhaustive nature of Article V of the NYC also means that the scope of judicial review cannot be expanded or modified by the enforcement courts. Since arbitration is based on a contractual agreement and party autonomy principle, neither expandable judicial review authority nor supplemental review should be permitted because the basic principle of arbitration is party autonomy.¹⁵ Accordingly, no review of the merits of the awards is permissible under the exclusive nature of Article V of the Convention. Although the exceptions under Article V (1) (a) have to be proven by the respondent, their application should be construed narrowly and mostly concerned with serious cases only. A restrictive approach to Article V is designed to promote the pro-enforcement

¹¹ The phrase 'may be refused ...only if' under Article V of the NYC constitutes limitation enumeration of the grounds for refusal enforcement of arbitral awards. Accordingly, the enforcement court may not refuse enforcement on the basis of a ground that is not enshrined in the Convention. See Albert Jan van den Berg (1), "Enforcement of Arbitral Awards Annulled in Russia, Case Comment on Court of Appeal of Amsterdam," *Journal of International Arbitration Vol. 2 No. 27* (2010): 185, accessed 24 June 2015, http://www.arbitration-icca.org/media/0/12771025582040/ajb_in_joia_27-2_2.pdf.

¹² Albert Jan Van den Berg (2), "Why Are Some Awards Not Enforceable?" in *New Horizons in International Commercial Arbitration and Beyond*, edited by Albert Jan Van Den Berg, (ICCA International Arbitration Congress, The Hague : Kluwer International Law, 2005), pp. 291-292.

¹³ *Agrimex SA v. J.F. Braun & Sons Inc.*, Decision No. 88, p. 269. (Areios Pagos Supreme Court 1977), Yearbook Commercial Arbitration IV (1979).

¹⁴ Phillipe Pinsolle, "Recent Significant French Judicial Decisions Involving International Arbitration," in *Contemporary Issues in International Arbitration and Mediation, The Fordham Papers*, edited by Arthur W. Rovine, (The Netherlands: Martinus Nijhoff, 2008), pp. 109, 118-119.

¹⁵ Galligan, *op.cit.*, pp. 385, 8-9.

policy of the NYC in order to achieve the finality and enforceability of the awards.

The exhaustive nature of Article V (1) can be seen in the case of *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica*,¹⁶ in which the appeal court held that the grounds for enforcement refusal on the basis that the arbitrators' exceeded their power was inadmissible since this ground was not included as the exclusive grounds for refusing enforcement under Article V of the NYC.¹⁷ However, in certain cases, the courts found it difficult in applying the Convention's fundamental principle that it supersedes domestic law concerning the enforcement of foreign awards.¹⁸ Consequently, they do not directly refer to the NYC but prefer to refer to grounds under their own domestic law, later confirmed by corresponding grounds enumerated in Article V of the Convention. This would leave no room of reference for expansive grounds denying enforcement under the law of the forum. Accordingly, this may challenge the exhaustive nature of Article V of the Convention.

The exhaustive list of grounds for non-enforcement, as set forth in Article V of the NYC, exemplifies restrictive or limited exceptions to enforcement. This raises two points. Firstly, the parties cannot expand the grounds for judicial review based on contractual agreement. Secondly, it implies restrictive judicial intervention of the grounds for reviewing an award. Judicial review with regard to non-enforcement and annulment of the awards is extremely limited, thus it cannot be expanded by the parties' agreement and the broad scope of judicial intervention. Accordingly, no additional exceptions to enforcement can be imposed under the guise of the public policy exception. From this point, what pertains to public policy does not necessarily include other grounds, which are not covered by Article V of the Convention. For instance, manifest disregard of the law may not fall within the public policy exception. A restrictive scope of review of the public policy exception discourages the court to refuse enforcement of international awards on the basis of arbitrator's error of law or of fact or manifest disregard of the law. An open texture of public policy exception should be applied narrowly in order to uphold the finality and enforceability of international awards.

Although defences opposing enforcement¹⁹ have been internationally standardised²⁰ and adopted in a national statutory basis, they should be construed narrowly. Mere violations of procedural defence²¹ and of substantive defence²² may not necessarily justify non-enforcement. The exhaustive list of grounds opposing enforcement means that the application of these defences are limited to specific grounds, which can be deemed a 'serious defect' in the enforcement of the awards.²³

¹⁶ *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica*, 403 F. 3d 85 1136-1143 (2nd Cir, 2005), Yearbook Commercial Arbitration XXX (2005).

¹⁷ *Ibid.*

¹⁸ Albert Jan Van den Berg (3), *The New York Arbitration Convention 1958: Towards a Uniform Judicial Interpretation* (Netherlands: Kluwer Law International, 1981), p. 268.

¹⁹ This consists of two major challenges: the challenge for refusing enforcement; and the challenge to set aside an award.

²⁰ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York, 10 June 1958, United Nations Treaty Series, Vol. 330, No. 4739, art. 5.

²¹ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, art. 5 (1).

²² *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, art. 5 (2).

²³ Any exceeding power and legal error made by the arbitrator would not always justify non-enforcement. In *Lesotho Highlands v. Impreglio*, the court held that mere error of law, i.e. error about the currency of the award, may not be justified as an excess of power. See, William W Park (1), "The Nature of Arbitral Authority: A Comment on *Lesotho Highlands*," *Arbitration International* 21 (2005): 483,485, accessed 24

The contravention of public policy may only be accepted in 'serious cases only'.²⁴ Accordingly, not all public policy falls within the concept of public policy exception.²⁵ In *Renusagar Power Co Ltd. (India) v. General Electric Co. (USA) and the International Chamber of Commerce, Paris*²⁶, for example, the Indian court held that mere violation of the law of India could not be deemed as contravention of public policy. The enforcement of foreign awards would be refused on the basis of the public policy exception if it contravenes: (i) the fundamental policy of Indian law; (ii) the interests of India; (iii) justice or morality. This decision is in favour of restrictive standards of review of the public policy exception.

In *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*²⁷, the US courts also applied a restrictive approach to the public policy exception. In this case, the meaning of public policy is construed narrowly and applied only where enforcement would violate the most basic notions of morality and justice. Similarly, in *Libyan American Oil Company (LIAMCO) v. Socialist People's Libyan Arab Republic Jamahirya, (formerly Libyan Arab Republic)*,²⁸ the US District Court held that mere violation of state's public policy may not necessarily justify non-enforcement based on the public policy exception. In other cases, public policy only pertains to 'explicit public policy' that is well defined and dominant, thus the determination of public policy should be based on the legal precedents instead of from general consideration of supposed public interests.²⁹ The French court also adopted a similar standard, requiring the violation of international public policy instead of domestic public policy. Although the concept of international public policy under Article 1502 (5) of the French Code of Civil Procedure can only refer to the French conception of international public policy³⁰, it is confined to a restrictive concept of the public policy defence opposing enforcement. In *Societe Thales Air Defense v. GIE Euromissile et al.*,³¹ for example, the court held that the violation of public policy must be 'flagrant, effective and real'³² in order to justify non-enforcement of foreign awards. Accordingly, not all contravention of public policy falls within the scope of the public policy exception and mere violation of domestic public policy may not suffice to justify non-enforcement.

June 2015, <http://arbitration.oxfordjournals.org/content/21/4/483>.

²⁴ Oberlandesgericht of Hamburg, 3 April 1975, in Van den Berg (3), *op.cit.*, p. 365.

²⁵ Hebei Import and Export Corporation v. Polytek Engineering Co.Ltd, 2 HKC 205, 1 HKLRD 652 (HCFA 1999), online <http://www.judiciary.gov.hk> (website of the Judiciary of the Hong Kong Special Administrative Region of the People's Republic of China). Also reported in (1999) XXIV Yearbook Commercial Arbitration. The court held that the violation of public policy exists if the award is fundamentally offensive to the enforcement state's basic notion of justice.

²⁶ *Renusagar Power Co Ltd. (India) v General Electric Co. (USA) and the International Chamber of Commerce, Paris*, 681-738 (Supreme Court of India 1993), Yearbook Commercial Arbitration XX (1995).

²⁷ *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F. 3d 310, 315 (2nd Cir. 1988).

²⁸ *Libyan American Oil Company (LIAMCO) v. Socialist People's Libyan Arab Republic Jamahirya, (formerly Libyan Arab Republic)*, 248-250 (United States District Court, District Court of Columbia 1980), Yearbook Commercial Arbitration VI (1981).

²⁹ *Industrial Risk Insurers v. M.A.N. Gutenhoffnungshutte GmbH*, 141 F.3d 1434, 1445-46 (11th Cir. 1998), Yearbook Commercial Arbitration XXIVa (1999).

³⁰ E. Gaillard and J. Savage, *International Commercial Arbitration* (Netherlands: Kluwer Law International, 1999), p. 1648.

³¹ *Societe Thales Air Defense v. GIE Euromissile et al.*, 94 (2003), Rev.Arb. No 1 (2004).

³² *Ibid.*

III. Grounds for Setting Aside Arbitral Awards – Standard of Review of Arbitral Awards?

Despite the fact that foreign awards are final and enforceable, they are also subject to scrutiny restricted of procedural and substantive issues.³³ The refusal of enforcement and the setting aside of the award implies a judicial control over the awards by the municipal courts of the enforcing states. However, does this mean that the municipal court can freely review the merits of the awards? For this point, the right of appeal and the review of the awards should be distinguished. Despite the fact that both standards aim at reversing the awards, they do have distinct concepts. The former requires the courts to review the merits of the award, while the latter involves limited proceeding with regard to whether the procedure applied was formally correct.³⁴

A. Restrictive Grounds of Review

Article V of the NYC expressly refers to recognition and enforcement, but it is not specifically confined to the proceeding of setting aside the arbitral awards.³⁵ The NYC does not specifically set forth grounds for vacating the awards. It has been argued that exhaustive approach to the grounds for challenging enforcement under Article V of the Convention does not necessarily be applied to setting aside proceedings.³⁶ Does this mean that the courts are expansively allowed to independently review the error of facts of the arbitral proceedings? Despite the fact that both the NYC and the UNCITRAL Model Law remain silent with regard to the judicial review for errors of fact, the pro-enforcement bias of Article III of the NYC is fundamentally confined to a limited scope of judicial review of the awards.³⁷

However, the absence of an underlying international standard of exhaustive grounds for setting aside the award has led to more erroneous grounds for vacating the awards in various jurisdictions. In the US, for instance, the grounds for setting aside the awards are not exhaustive since the courts can expansively interpret them. Section 10 (a) (4) of the Federal Arbitration Act (FAA), for instance, may expand the grounds for vacating the awards on the basis of manifest disregard of the law. However, it is uncertain whether 'manifest disregard' is meant to name a new ground of review of arbitral awards or it may be shorthand for Section 10 (a) (3) or Section 10 (a) (4) of FAA which authorizes vacatur when arbitrators are 'guilty of misconduct' or have 'exceeded their powers.'³⁸ Does this mean that Section 10 of the FAA provides the judicial review of the errors of fact? Although the FAA does not expressly set forth this issue, Section 10 (a) (3) of the Act seems loosely open to the possibility for the

³³ Tibor Varady, John J. Barcelo III and Arthur T. von Mehren, *International Commercial Arbitration: A Transnational Perspective*, 2nd ed. (USA: Thomson/West, 2002), p. 709.

³⁴ *Ibid.*

³⁵ Grounds for setting aside arbitral awards is adopted in Article 34 of the Model Law which are identical to the grounds for a refusal to enforce and a foreign arbitral award under Article V of the NYC. See Michael S.C. Hwang and Shaun Lee, "Survey of South East Asian Nations on the Application of the New York Convention," *Journal of International Arbitration Vol. 25 Issue 6* (2008): 885.

³⁶ *Ibid.*

³⁷ Mitchell H. Rubinstein, "Altering Judicial Review of Labor Arbitration Award," *Michigan State Law Review Vol. 2* (2006): 235, 252.

³⁸ Robert M. Hall, "Manifest Disregard of the Law As A Basis to Vacate Arbitral Awards After Hall Street Associates," (2009), accessed 24 June 2015, <http://www.robertmhall.com/articles/ManiDisregardArt.pdf>.

judicial review of facts of arbitral awards.³⁹ This Section provides that:

(a) *In any of the following cases the US court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:*

[...]

(3) *where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced.*

(4) *where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.*

Thus, it would seem that the courts owe any deference to the findings of the decision that they have reached at after adversary arbitral proceedings. However, in *Lapine Technology Corp. v. Kyocera Corp. (Kyocera I)*,⁴⁰ the US District Court denied the claim of the Kyocera based on errors of fact and of law.⁴¹ Further, in pursuing the narrow approach to the grounds for judicial review of the awards, the US court held that the review could only be applied in exceptional circumstances. This also means that the grounds to challenge enforcement would be successful only in ‘extreme cases’ which have created ‘substantial injustice’.⁴² For example, with regard to error of law or excess of arbitrators’ power, these grounds may not justify non-enforcement unless the tribunal has been so erroneous in its conduct that fundamental justice calls for it to be corrected.⁴³ Accordingly, the lack of substantial evidence of the tribunal’s findings of fact and error of law did not justify non-enforcement. Similarly, in *Kyocera Corp v. Prudential Bache Trade Services Inc.*,⁴⁴ the US court held that the contractual agreement to expand the grounds for judicial review of the award beyond the scope

³⁹ *Ibid.*

⁴⁰ *Lapine Technology Corp. v. Kyocera Corp. (Kyocera I)*, 130 F 3d 884 (9th Cir. 1987). See also *Kyocera Corp. v. Prudential Bache Trade Services Inc.*, 341 F.3d 987 (9th Cir. 2003), in Varady, Barcelo III and von Mehren, *op.cit.*, pp. 770–771.

⁴¹ *Ibid.*, p. 771. In this case, the Kyocera claimed that ‘(1) the tribunal’s finding of facts were not supported by substantial evidence; (2) the Tribunal had made errors of law, and (3) there existed various statutory grounds for vacatur or modification under the FAA’.

⁴² In *Karaha Bodas v. Pertamina*, 1009-1023 (2nd Cir. 2007), Yearbook Commercial Arbitration XXXIII (2008), the court held that merely violation of procedural defence, i.e.: (1) the arbitration panel was improperly constituted; (2) the arbitration procedures were not otherwise in accordance with the agreement; (3) Pertamina was deprived of its right to present its case; and (4) the arbitral award violated US public policy may not necessarily justify non-enforcement. See the decision of the US Court Appeals, Second Circuit, 7 September 2007, Yearbook Commercial Arbitration XXXIII (2008), pp. 1009–23.

Jonathan Cotton and Caroline Edward, “Just How Final is “Final and Binding?” http://www.slaughterandmay.com/media/39697/just_how_final_is_final_and_binding.pdf, accessed 26 June 2015.

⁴³ John Burritt Mc Arthur, “Growing Pains: Building Arbitrator’s Legitimacy Through Everyday Arbitral Decision, Responding to Hall Street and The Arbitration Fairness Act: Bolstering Legitimacy Through Everyday Arbitral Decisions” http://works.bepress.com/cgi/viewcontent.cgi?article=1008&context=john_mcarthur, accessed 24 June 2015. It is argued that ‘the parties cannot expand the scope of judicial review by agreement and that courts cannot devise a common law ground for vacating awards for manifest error of law in dispute falling under the Federal Arbitration Act (FAA)’.

⁴⁴ *Kyocera Corp v. Prudential Bache Trade Services Inc.*, *op.cit.* 987 (9th Cir. 2003), in Varady, Barcelo III and von Mehren, *op.cit.*, pp. 436, 770–771.

of the FAA was inadmissible.⁴⁵ The expansion of grounds for vacating the award was based on: (a) the lack of substantial evidence for the findings of facts of the arbitral tribunal and (b) conclusion of law were deemed erroneous.⁴⁶ However, the exhaustive approach to the grounds for vacating the awards was not consistently applied by the courts. In *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*,⁴⁷ the court enforced the parties' agreement to expand the grounds for setting aside an award based on error of law by the arbitrators.⁴⁸ Moreover, in *Hoefst v. MVL Group, Inc.*,⁴⁹ the court held that the parties could not restrict the grounds for review under the FAA⁵⁰ and could not exclude the implied ground of 'manifest disregard of the law'.⁵¹

Similarly, in the United Kingdom, the Departmental Advisory Committee's (DAC) Report on the Arbitration Bill February 1996 Report endorsed 'substantial injustice'⁵² as the test for determining a 'serious irregularity'⁵³ with regard to the arbitral proceedings.⁵⁴ This suggests that the court's review based on 'serious irregularity' of the arbitral proceeding should be 'designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in the conduct of the arbitration that justice calls out for it to be corrected'.⁵⁵ *BTC Bulk Transport Corporation v. Glencore International AG*⁵⁶ is an example of using substantial injustice as a criterion for determining whether the due process of law can justify non-enforcement. The court held that 'where one party had expected a hearing to take place on one basis and that expectation was clear to the tribunal, it was substantial injustice for the hearing to take place on an altogether different basis'.⁵⁷ Thus, it was considered a contravention of the duties of arbitral tribunal. This case demonstrates that unfair proceeding of arbitration process can be deemed a serious irregularity under Section 68 of the Arbitration Act 1996. Similarly, in *Petroships Pte Ltd of Singapore v. Petec Trading and Investment Corporation of Vietnam and Others*⁵⁸, an arbitral award can be challenged on

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993 (5th Cir. 1995).

⁴⁸ *Ibid.*

⁴⁹ *Hoefst v. MVL Group, Inc.*, 343 F.3d 57 (2nd Cir. 2003).

⁵⁰ See Section 10 of the Federal Arbitration Act (FAA).

⁵¹ The grounds for setting aside the award under Section 10 of the FAA, particularly Sub-Section (3) regarding the guilty and misconduct of the arbitrators and the exceeded of powers of the arbitrators have led to an expansive grounds for review of an award.

⁵² This means that 'a court's review on the grounds of 'serious irregularity' is only available in extreme cases where the arbitral tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.' See Cotton and Edward, *op.cit.*, p. 4.

⁵³ Redfern, *et.al.*, *op.cit.*, p. 149. This is one of the grounds of challenge of the arbitral award, which is prescribed in Section 68 of the Arbitration Act 1996 of the United Kingdom. What can be characterised as irregularity has been enumerated in Article 68 (2) of the Arbitration Act 1996, including: (1) failure to comply general duties of the arbitral tribunal; (2) exceeding of power; (3) fraud or the violation of public policy; (4) uncertainty or ambiguity of the award; and (5) irregularity in the conduct of arbitral proceeding.

⁵⁴ Bruce Harris, Rowan Planterose and Jonathan Tecks, *The Arbitration Act 1996: A Commentary*, 3rd ed., (USA: Blackwell, 2003), p. 328. See also Redfern, *et.al.*, *op.cit.*, pp. 148-149.

⁵⁵ DAC Report February 1996, paragraph 280, in S.R. Luttrell, "Bias Challenges in International Commercial Arbitration, The Need for 'Real Danger' Test," (Dissertation, Murdoch University, Australia, 2008), p. 41, accessed 24 June 2015, <http://researchrepository.murdoch.edu.au/698/2/02Whole.pdf>.

⁵⁶ *BTC Bulk Transport Corporation v Glencore International AG*, (2006) EWHC 1957 (Comm), in Cotton and Edward, *op.cit.*, p. 7.

⁵⁷ Christoph Liebscher, *The Healthy Award: Challenge in International Arbitration* (The Netherlands: Kluwer Law International, 2003), p. 148.

⁵⁸ *Petroships Pte Ltd of Singapore v. Petec Trading and Investment Corporation of Vietnam and Others*, EWHC. Comm. 418 (22 May 2001); [2001] Lloyd's Rep. 348, Queen's Bench Division (Commercial Court),

the basis of alleged serious irregularity under Section 68 of the Arbitration Act 1996. It is held that where serious irregularity affects the proceedings of the arbitration process, it is alleged to also cause substantial injustice to one of the disputing parties. However, there was no clear distinction between the concept of serious irregularity and the substantial injustice. Since the test of substantial injustice involves the court's interference with arbitral proceedings, it preserves the court's power to intervene in arbitration proceedings.

The Swiss Federal Court adopted a more restrictive approach in *Transport en Handelsmaatchappij 'Vekoma' B.V. (Netherlands) v. Maran Coal Corp. (USA)*.⁵⁹ It held that the judicial review of facts should only be limited to 'substantiated objection on the basis of non-observance of procedural guarantees set by law or incompatible with procedural *ordre public*.'⁶⁰ In that case, the defendant stated that as the buyer (Maran) did not meet the 30-day contractual deadline for resorting to arbitration, this confined the lack of jurisdiction of the arbitrators.⁶¹ The court also held that the absence of factual (empirical) examination of the cargo contract had authorised the court's legal control over the award.⁶² This case demonstrated that the court owes deference to the findings of facts of the arbitrators in the arbitral proceedings.⁶³ This is reasonable since Article 190 (2) of the Federal Statute on Private International Law (twelfth chapter: International Arbitration) provides the action of jurisdiction over the award.⁶⁴ Article 190 (2) of the Federal Statute on Private International Law provides that:

1. if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;
2. if the arbitral tribunal wrongly accepted or declined jurisdiction;
3. if the arbitral tribunal decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;
4. if the principle of equal treatment of the parties of the right of the parties to be heard was violated; or
5. *if the award is incompatible with public policy*.⁶⁵

Principally, this provision concerning the lack of jurisdiction as the legal basis of the application for annulment is parallel with that in the French CCP. This is based on the exhaustive nature of Article 1502 of the CCP providing that:

An appeal against the decision, which grants recognition or enforcement, will be available only in the following cases:

1. if the arbitrator has ruled upon the matter without an arbitration agreement or based on a void and lapsed agreement.

May 22, 2001, (2001) 2 Lloyd's Law Report 348, available at <http://www.simic.net.cn/upload/2008-0-C.7/20080701105032238.pdf>.

⁵⁹ *Transport en Handelsmaatchappij 'Vekoma' B.V. (Netherlands) v. Maran Coal Corp. (USA)*, 673 (Swiss Fed. Trib. 1995), 1996 (4) ASA Bull. For a detailed commentary on this decision, see Varady, Barcelo III and von Mehren, *op.cit.*, p. 761.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ Varady, Barcelo III and von Mehren, *op.cit.*, p. 761.

⁶⁵ Article 190 (2) of the Federal Statute on Private International Law—Twelfth Chapter: International Arbitration regarding Finality, Actions for annulment.

2. If the arbitration tribunal has been unlawfully constituted or the sole arbitrator has been unlawfully designated;
3. if the arbitrator has ruled upon the matter contrary to the assignment given to him;
4. if the adversarial principle has not been respected;
5. if the recognition or enforcement is contrary to public international order.

The important issue is sub-section (5) of this article. Under Article 1502 (5) of this Act, the violation of international public order has become the sole grounds for refusal of enforcement of international awards. This provision seeks to minimize the court's judicial review upon the facts and law as found by the arbitral tribunal.⁶⁶ Accordingly, a court which has to decide whether an award violates international public policy has no authority to review the merits of the award.⁶⁷

B. No Merits Review⁶⁸ of Arbitral Awards

Broadly speaking, the non-enforcement of awards is justifiable only if there are serious procedural defects but not further into the substance of the dispute.⁶⁹ Article V of the NYC is confined to a broad scheme of procedural review⁷⁰ based on procedural fairness and arbitral impartiality instead of substantive review.⁷¹ This means that the court's review of awards is not designed to deal with the substance of the awards.⁷² However, does this also mean that judicial review on the merits of the award should be totally excluded? Despite the fact that an international award is final and conclusive, judicial review on the merits of the award remains.⁷³ Although merits review is inconsistent with the principle of party autonomy as the fundamental basis of arbitration, it would seem unavoidable with regard to substantive grounds for challenge of enforcement.⁷⁴ It is arguable that since arbitration is a contractual agreement, thus the supremacy of party autonomy should be left to the party to decide whether they do or do not want judicial review of the merits.⁷⁵ Accordingly,

⁶⁶ Jean Louis Devolve, Gerald Pointon and Jean Roche, *French Arbitration Law and Practice, A Dynamic Civil Law Approach to International Arbitration* (The Netherlands : Kluwer Law International, 2009), pp. 254-255.

⁶⁷ *Ibid.*, p. 256.

⁶⁸ It mostly concerns the issue of whether the arbitrator has a mistake of fact or of law in issuing the award. See Varady, Barcelo III. and von Mehren, *op.cit.*, p. 231.

⁶⁹ *Ibid.*

⁷⁰ This review closely deals with the procedure of arbitral proceeding, which has been enumerated in Article V (1) of the NYC.

⁷¹ This review relates to subject matter of the award, but it is limited to arbitrability and the public policy exception.

⁷² Substantive review of the award is only based on the public policy exception and non-arbitrability, which are prescribed in Article V (2) of the NYC. It should be distinguished from the judicial review with regard to the requirement of natural justice and the judicial review concerning the merits of the award. See Margaret L. Moses (1), *The Principles and Practice of International Commercial Arbitration* (UK: Cambridge, 2012), p. 231.

⁷³ Article 10 of the Federal Arbitration Act (FAA) provides statutory grounds for judicial review on the vague concept of corruption, fraud or undue means, misconduct of arbitrators, or arbitrator's exceeding power.

⁷⁴ The substantive defence in the form of arbitrability (Article V (2) (a) of the NYC) and public policy (Article V (2) (b) of the NYC) are confined to merits review since it is difficult to examine the enforcement of an award that would be contrary to both defences without examining the merits of the award.

⁷⁵ Moses (1), *op.cit.*, p. 237.

the court has been permitted to reassess the fact of the case if the contravention of those substantive defences would not be apparent from a mere review of the award.⁷⁶ In the US, for example, the challenge of awards based on 'corruption, fraud or undue means,'⁷⁷ 'partiality,'⁷⁸ 'misconduct of arbitrator,'⁷⁹ and 'exceeding power of arbitrator'⁸⁰ has inevitably triggered the court to review the merits of the awards. It is argued that non-statutory grounds for challenge e.g. 'manifest disregard the law' have also been negatively deemed as a disguise means of imposing the merits review of the awards. Similarly, the vague concept of 'serious irregularity' under Section 68 of the English Arbitration Act 1996 may also lead to the merits review of the awards. Since the examination of these grounds for challenge involves the substance of evidence, merits review seems to be inevitable. *Commonwealth Coatings Corp. v. Continental Casualty Co.*⁸¹ demonstrated merits review based on alleged 'partiality' as grounds for setting aside the award. In this case, the US Supreme Court vacated the award based on alleged partiality notwithstanding that the arbitrator was entirely fair and impartial.⁸²

In France, however, the scope of judicial review of an international award on public policy ground has undergone a significant shift. The court has adopted a very limited scope of judicial review of international awards. In *SNF SAS SA v. Dutch Company Cytec Industries BV (Cytec)*⁸³, the court only had extrinsic control in determining the violation of international public policy. Therefore, there was no need for merits review of the award. This decision exemplifies a strong *prima facie* evidence of the finality and enforceability of international awards. This approach is also adopted by the Federal Court of Australia.

C. Statutory Basis versus Non-statutory Basis for Setting Aside of Arbitral Awards

How does the enforcement court verify the existence of the grounds for challenging enforcement? In most jurisdictions, statutory ground provisions have become major sources of the basic standard of judicial review.⁸⁴ Apart from this statutory provision, it has been argued that contractual agreement has also significantly influenced the scope of judicial review.⁸⁵ Within this context, the parties have tried to contractually expand

⁷⁶ International Law Association (ILA) Resolution 2002, Recommendation 3 (c).

⁷⁷ Section 10 (a) (1) of the FAA.

⁷⁸ Section 10 (a) (2) of the FAA.

⁷⁹ Section 10 (a) (3) of the FAA.

⁸⁰ Section 10 (a) (4) of the FAA.

⁸¹ *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 US 145,149 (1963).

⁸² *Ibid.*

⁸³ *SNF SAS SA v Dutch Company Cytec Industries BV (Cytec)*, Court of Appeal, Paris, First Chamber, 23 March 2006, Yearbook Commercial Arbitration XXXII (2007) pp. 282-9, cited in Emmanuel Gaillard, "Extent of Court Review of Public Policy" New York Law Journal Vol. 237 No. 5 (April 2007): 2, http://www.shearman.com/files/Publication/6ce97c62-ca6f-4bb0-807e-af4bedc1ea4b/Presentation/PublicationAttachment/ec0e73f8-6fe4-48e6-a689-b35c94886708/IA_NYLJ%20Extent%20of%20Court%20Review_040308_16.pdf.

⁸⁴ Statutory basis for refusing enforcement of arbitral awards in most countries mainly adopts Article V of the NYC. Non-statutory grounds for setting aside arbitration awards are distinguished from judicially created grounds for vacating the award. See Christopher R. Drahozal, "Codifying Manifest Disregard," *Nebraska Law Journal Vol. 8* (2007-2008): 234.

⁸⁵ See *Gateway Technologies v. MCI Telecommunication Corp.*, *loc.cit.*, in which the US Court held the additional non-statutory grounds for annulment based on error of law.

the scope of judicial review beyond the state's statutory provisions.⁸⁶ This exemplifies a legal tension between freedom of the contract principle and preservation of the integrity of the arbitral process. This shows that the court, in some circumstances, has allowed the review of the award based on additional non-statutory grounds for vacating the award.⁸⁷ In the US, for example, different positions have been taken by the courts in determining whether judicial review can be altered by the parties.⁸⁸ The emergence of non-statutory grounds for judicial review stems from, or at least reflects, freedom of the contract principle.⁸⁹ Nevertheless, it seems desirable to restrict the grounds for vacating the award in order to avoid an excessively wide approach to the scope of review.⁹⁰ For instance, the US court requires 'explicit language'⁹¹ and 'clear intention'⁹² of the application of non-statutory standard of review based on the parties' agreement.

D. Case Illustration: Public Policy Exception vs. Manifest Disregard of the Law

The arbitrator's manifest disregard of the law has undermined the exhaustive nature of Article V of the NYC. Neither the Model Law nor the NYC has expressly adopted this ground for non-enforcement or annulment of the awards. However, its application may overlap with an expansive approach to the public policy exception. Accordingly, the parties may raise arbitrator's manifest disregard of the law under the guise of public policy exception of Article V (2) (b) of the NYC. It may also be raised under the due process exception, particularly the arbitrator's excess of power. In this regard, two important issues are identified: firstly, does mere error of law suffice to justify non-enforcement under the ground of manifest disregard of the law? Secondly, is manifest disregard considered as a separate ground for review or it is merely derived from statutory grounds for non-enforcement or annulment of the award? It is suggested that a narrow approach to the public policy exception and pro-enforcement policy of the NYC discourages the courts to conduct merits review of the awards on the basis of arbitrator's manifest disregard of the law. In this regard, mere arbitrator's

⁸⁶ This exemplifies a legal tension between the freedom of contract principle and the preserving of the integrity of arbitral process.

⁸⁷ In *Wilko v. Swan*, 346 US 427 (1953), for example, judicially created basis for setting aside an arbitral award known as manifest disregard of the law is exist in addition to the statutory basis listed in the FAA. See Robert M. Hall, "Manifest Disregard of Law or Fact or Both?" <http://www.robertmhall.com/articles/ManDisrArt.htm>.

⁸⁸ See *Cable Connection v DIRECTV Inc., No 147767, Cal. LEXIS*, 25 August 2008, in which the US Court held that error of law had been used as a non-statutory standard of judicial review of an award. Compared to *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992 (8th Cir. 1998); See also *Crowell v Downey Cmty. Hosp. Found.*, 115 Cal. Rptr 2d 810 (2002), in which the US Courts prohibited the expansion of judicial review of awards. See Eric Van Ginkel, "Reframing the Dilemma of Contractually Judicial Review: Arbitral Appeal v Vacatur," *Pepperdine Dispute Resolution Law Journal Vol. 3, No. 2* (2003): 164; See *Hall Street Associates L.L.C. v. Mattel Inc.*, 552 US, 128 S. Ct. 1396, 1404-5 (2008), in which the US Court held that the parties could not expand judicial review beyond the statutory standard of Article 10 of the FAA, cited in Michael Geibelson and David Martinez, "California Supreme Court Expands Judicial Review of Arbitration Awards," <http://www.rkmc.com/California-Supreme-Court-Expands-Judicial-Review-of-Arbitration-Awards.htm>, accessed 25 June 2015. These cases demonstrated inconsistent approach to the application of non-statutory grounds for judicial review of awards.

⁸⁹ There has been legal tension between freedom of contract principle and the integrity of international arbitration.

⁹⁰ Compared to the case of *Wilko v. Swan*.

⁹¹ *Ibid.*

⁹² *Ibid.* See also *MACTEC Inc. v. Gorelick*, 427 F.3d 821 (10th Cir. 2005).

error of law or of fact may not suffice to justify non-enforcement unless it may lead to serious procedural irregularities. An exhaustive nature of Article V of the NYC also discourages municipal courts to consider manifest disregard of the law as additional grounds for review of the awards.

The following cases illustrate a comparison of the Indonesian court's approach with other countries' approach.

1. The Indonesian Approach

The Indonesian Arbitration Law i.e. the Law No. 30 of 1999 has not comprehensively pertained to the adoption of the competence-competence principle. This means that the intervention of courts as regard to the recognition and enforcement of foreign arbitral awards continues to exist.⁹³ In addition to this issue, Article 70 of the Law also allows judicial review of the award on the basis of forgery, concealment of documents, falsification.⁹⁴ However, the problem that continues to exist is whether the grounds for annulment of the award based on the Article 70 represents an exhaustive list or not.⁹⁵ Does this mean that the courts have legal authority to review the award based on error of law? The Indonesian arbitration law does not expressly provide grounds for appeal based on error of law or of fact.⁹⁶ Ironically, in practice, it may provide judicial review of the award on the grounds that an arbitrator made a manifest disregard of the law. This can be noted from the court's decision in the *Karaha Bodas* case.⁹⁷

In *Karaha Bodas v. Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina)*⁹⁸, one of the underlying rationales of the Indonesian annulment of the Geneva award is manifest disregard of the law.⁹⁹ The Indonesian District Court of Central Jakarta annulled the award and considered manifest disregard of the law as a ground for review. The court held that an error of arbitral tribunal to interpret the concept of '*force majeure*' under the Indonesian Civil Code as the governing law of the contracts e.g. JOC and ESC was contrary to both Indonesian law and the parties' agreement, constituted contravention to Indonesian mandatory rules or illegality, and therefore fell within the public policy exception.¹⁰⁰ The arbitrator's manifest disregard of the law was also raised under the guise of the due process exception, in particular arbitrator's excess of power, at least to the extent of the overlap between this exception and the public policy exception.¹⁰¹ This implies that the arbitrator's manifest disregard of the law was incorporated into the public policy exception. In

⁹³ See article 66 point (d) and (e) of the Indonesian Arbitration Act.

⁹⁴ Sudargo Gautama, *Arbitrase Luar Negeri dan Pemakaian Hukum Indonesia* (Bandung: Citra Aditya Bakti, 2004), p. 347.

⁹⁵ *Ibid.*, p. 348. See also the general elucidation of the Indonesian Arbitration Act providing that Chapter VII regarding the grounds for annulment of arbitral awards under this Act is non-exhaustive.

⁹⁶ *Ibid.*

⁹⁷ In this case, the District Court of Central Jakarta granted the vacatur of the Geneva award on the basis of manifest disregard of the law since the issuance of the Geneva award did not comply with the Indonesian Contract Law (*Burgerlijk Wetboek*). The failure of the arbitral tribunal in interpreting the term *force majeure* under the Indonesian Civil Code as the governing law of the contracts had been considered manifest disregard of the law, thus the arbitrators had exceeded their power and it also violated Indonesian public policy because it was contrary to Indonesian substantive law. See the rationale of the Decision of the District Court of Central Jakarta No 86/PDT.G/2002/PN.JKT.PST, in Gautama, *op.cit.*, pp. 274-278.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, pp. 276-277.

¹⁰¹ *Ibid.*

doing so, the court effectively broadened the meaning of public policy in the context of annulment, thus departing from an exhaustive nature of the grounds for non-enforcement under Article 66 of the Indonesian Arbitration Act and Article V of the NYC.

The District Court of Central Jakarta did not distinguish the concept of manifest disregard of law from a mere error of law or failure to apply the law – for instance, ‘where the tribunal consciously ignored the law by reaching legal conclusions beyond the principles of Indonesian law as the governing law of the contracts. They tend to equate the concept of manifest disregard of the law and mere error of law. The Indonesian annulment of the award exemplifies the expansion of public policy in the context of annulment. Specifically, the court has legal authority to interfere with international awards which manifestly disregard the Indonesian substantive law. This also illustrates the open ended and non-exhaustive nature of public policy in Indonesia. By establishing the arbitrator’s manifest disregard of law as new grounds within the grounds for annulment, the court has broadened the scope of public policy as ground for annulment and non-enforcement. In this context, the arbitrator’s manifest disregard of the law has been used as a basis to review an international award and influenced award finality in Indonesia.

In the *Karaha Bodas*, the Indonesian District Court held that the arbitral tribunal did not only make an error of law in reaching the award, but it ‘manifestly disregarded’¹⁰² the Indonesian substantive law as the governing law of the contract.¹⁰³ Not only did this case concern itself with the question of whether there was substantial evidence or reasons supporting a conclusion of law of the arbitrator’s decision, but it was also confined to manifest disregard of the law of the tribunal:¹⁰⁴

*“The tribunal did not make a mistake in applying or construing Indonesian law but that the tribunal consciously ignored that law, substituting its own rules and reaching legal conclusions that were not and could not be supported by the controlling principles of the Indonesian law. Accordingly, it also violated the parties’ agreements.”*¹⁰⁵

Accordingly, the enforcement of the Geneva award would be contrary to public policy due to its contravention to the mandatory provisions of Indonesian substantive law.¹⁰⁶ The decision of the District Court of Central Jakarta in *Karaha Bodas* case is an example of judicially created ground for reviewing an award based on ‘manifestly disregard of the law’,¹⁰⁷ which was equated with the violation of public policy exception.¹⁰⁸ This case also exemplifies the expansive approach to the judicial review

¹⁰² A similar approach is also adopted in *Wilko v. Swan*, 346 US 427 (1953), in which the US court added ‘manifest disregard of the law’ as a basis for setting aside an arbitral award. See William W. Park (2), ‘Amending the Federal Arbitration Act,’ *American Review of International Arbitration Vol. 13* (2002): 9-10.

¹⁰³ Gautama, *op.cit.*, p. 348.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*, Pp. 349–350.

¹⁰⁶ Based on Article 1337 of the Indonesian Civil Code (*Burgerlijk Wetboek*), a contract which is in contrary to law, public order and good morals can be deemed invalid because it contains illegal cause (unlawful purpose). Accordingly, it cannot be enforced in Indonesia.

¹⁰⁷ Based on this concept, ‘a party seeking to establish manifest disregard of the law sufficient to warrant setting aside an arbitral award must demonstrate that the arbitrators appreciated the existence and applicability of a controlling legal rule but intentionally decided not to apply it.’ See Christopher R. Drahozal, *op.cit.*, p. 237.

¹⁰⁸ Gautama, *op.cit.*, pp. 349-350. This means that the Swiss arbitral tribunal did not only make an error of law in reaching the award, but it explicitly disregarded it notwithstanding the arbitrator knew that

of the awards since the court's decision allows the award to be challenged based on a standard approach legal error. Consequently, the courts have also challenged the exhaustive nature of Article 66 of the Indonesian Arbitration Law stating that an arbitrator's manifest disregard or error of law may fall within the public policy exception in Article 66 (c) and grounds for annulment in Article 70 of the Act. The lack of exclusivity of Article 70 and Article 66 (c) of the Indonesian arbitration law has been interpreted broadly to allow awards to be challenged if they violate substantive provisions of law. The authority to review the merits under these provisions may lead the enforceability of international awards in Indonesia to be more uncertain.

2. The International Approach

By way of comparison, some jurisdictions other than Indonesia generally adhere to the restrictive standards of review of arbitration awards. This approach is significantly different from the Indonesian approach. In the US, for example, the courts tend to eliminate the judicial created ground for review such as 'manifest disregard of the law based on exhaustive nature of the grounds for vacating an award and the finality of award.'¹⁰⁹ In *Wilko v. Swan*¹¹⁰, the US court held that mere error of law is not sufficient to justify non-enforcement unless an error is so extreme that it amounts to manifest disregard of the law.¹¹¹ "The interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretations."¹¹² The US court delimited and narrowly construed the scope of judicial review of error of law by distinguishing between mere error of law and manifest disregard of the law.¹¹³ This also means that not all of the arbitrator's error of law qualify as manifest disregard of the law.

*Manifest disregard "clearly means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator."*¹¹⁴

Similarly, in *Hall Street Association v. Mattel, Inc.*,¹¹⁵ the US court held that the grounds for vacating an award under the FAA is exhaustive, thus it should be construed narrowly and that non-statutory grounds for vacating an award did not sufficiently constitute a ground for refusing enforcement.¹¹⁶ The court's decision in this case

the parties had chosen the Indonesian Law as an applicable law of the contract. Compared to the distinction between 'error of law' and 'manifest disregard of law' in *Puerto Rico Telephone Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 32 (1st Cir. 2005).

¹⁰⁹ *Wilko v. Swan*, *loc.cit.*.

¹¹⁰ *Ibid.*

¹¹¹ Margaret L. Moses (2), "Arbitration Law : Who's in Charge ?" *Seton Hall Law Review Vol 40* (3 March 2010): 165-166, <http://ssrn.com/abstract=1287303>.

¹¹² Robert N Rapp, "The Manifest Disregard Standard for Vacatur: Is Hall Street One Way?" http://works.bepress.com/robert_rapp/1, accessed 26 December 2014.

¹¹³ See *Stolt-Nielsen S.A. Et Al v. Animal Feeds International Corp.*, Supreme Court of the United States, Certiorari to the United State Court of Appeals for the Second Circuit, No 08-1198, April 21, 2010, <http://www.supremecourt.gov/opinions/09pdf/08-1198.pdf>, p. 5.

¹¹⁴ Michael H LeRoy, "Are Arbitrators Above the Law ? The "Manifest Disregard of the Law" Standard" *Boston College Law Review Vol. 52* (2011): 187, accessed 24 June 2014, <http://ssrn.com/abstract=1755066>.

¹¹⁵ *Hall Street Association v. Mattel, Inc*, 128 S. Ct. 1396. (2008), in Gary Born (2), "Manifest Disregard After Hall Street," <http://kluwerarbitrationblog.com/blog/2009/03/09/manifest-disregard-after-hall-street/>, accessed 25 June 2015.

¹¹⁶ *Ibid.*, p. 139.

illustrated that parties could not contractually expand judicial review. Although the court in *Hall Street* case held that manifest disregard of the law is beyond the scope of exclusive FAA grounds for judicial review of awards, it did not obviously reject manifest disregard of the law as an independent ground for review generally.¹¹⁷ The court had not clearly decided the legal status of manifest disregard of the law.¹¹⁸ The issue of whether manifest disregard was included in the grounds for vacatur under the FAA or as an independent ground for review had not been decided by the courts.¹¹⁹ This approach was also adopted in *Citigroup Global Markets Inc. v. Bacon*,¹²⁰ in which the US Court of Appeals abandoned manifest disregard of the law as non-statutory ground for reviewing an award due to the exclusivity of the FAA.¹²¹ In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*¹²², however, the US Court vacated an award because the arbitral tribunal erroneously made a decision regarding class arbitration procedures without referring to the contractual basis of the parties.¹²³

*The arbitral tribunal failed to perform choice of law analysis to identify and apply a contractual rule of decision for resolving the issue. The award authorizing class arbitration should be vacated because the arbitration panel had merely imposed its own policy choice rather than identifying and applying a rule of decision derived from either the FAA or maritime of New York Law as the governing law of the dispute.*¹²⁴

The court held that such an error was sufficient to vacate the award under Section 10 (a) (4) of the FAA. This provision enables the district court to vacate an arbitral award due to the arbitrators exceeding their authority.¹²⁵ Therefore, since the arbitration clause of the contract was silent with respect to class arbitration i.e. no agreement had been concluded on that issue, the arbitral tribunal was manifestly disregard of the law i.e. the award was made in manifest disregard of choice of law requirement and of contract principles under maritime law.¹²⁶ The tribunal decision regarding class arbitration procedures could not be inferred because of the in-existence of contractual basis regarding class actions. Hence, the arbitration panel's ruling must be reversed.¹²⁷ While the courts' decisions in *Wilko* and *Hall Street* declined to decide the status of manifest disregard, the court in *Stolt-Nielsen* did make clear that the arbitrator's manifest disregard of the law was considered as a ground for vacatur. This case illustrates that there is judicial recognition that the arbitrator's error of law may constitute arbitrators' exceeded of power, which is grounds for review of awards under the FAA.

Although the arbitrator's manifest disregard of law may be grounds or vacatur, it is nevertheless construed narrowly. The underlying rationales for such restrictive approach appear threefold. Firstly, the vacatur of an award may be successful if it

¹¹⁷ Rapp, *op.cit.*, p. 2.

¹¹⁸ Carlos F Concepcion and Scott A. Burr, "Stolt-Nielsen S.A. v. Animalfeeds International Corp.: Important Supreme Court Ruling Concerning Class Action Arbitrations and the Scope of Judicial Review in the Context of Domestic and International Arbitration," accessed 25 June 2014, http://www.cfclaw.com/Files/r_20109217331.pdf.

¹¹⁹ *Ibid.*, p. 4.

¹²⁰ *Citigroup Global Markets Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009).

¹²¹ Rapp, *op.cit.*, p. 5.

¹²² *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S Ct. 1758 (2010).

¹²³ Rapp, *loc.cit.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

suffices the requirements as follows: (1) the arbitrators are aware of a governing legal principle but choose to ignore it or refuse to apply it; (2) the law which is not applied is well defined, explicit and clearly applicable to the case.¹²⁸ This means that the US courts are reluctant to merits review of awards. Secondly, the exhaustive nature of the NYC and FAA indicates that arbitrator's manifest disregard of law is not a separate or additional ground for vacatur.¹²⁹ Accordingly, non-statutory grounds for setting aside an award must be abandoned. Thirdly, the arbitrator's manifest disregard of law does not rise to the level of contravening public policy, but it is more likely shorthand for a statutory ground under the FAA, in particular Section 10 (a) (4) which allows a court to set aside on the basis of the arbitrators exceeded their powers.¹³⁰

In *M & C. Corp. v. Erwin Behr GmbH & Co.*,¹³¹ the US courts claimed that 'review for a manifest disregard of the law' could not be pigeonholed into the 'violation of public policy basis for refusal to confirm an award contained in Article V (2) (b) of the NYC.'¹³² This case suggests that the US court may not view 'manifest disregard of the law' as falling within the public policy exception, thus it provides for judicial review on more restrictive grounds. In *Oil & Natural Gas Corporation Ltd. v. Saw Pipes*,¹³³ however, the Indian courts expanded the scope of judicial review of the awards by equating review on public policy grounds to an error of law or manifestly illegal (patent illegality).

Similarly, the United Kingdom (UK) Arbitration Act 1996 expressly provides an appeal on point of law. Article 69 of this Act provides that 'unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings'. Consequently, judicial review of the award on the basis error of law is admissible. However, it is only applied in extreme cases, whereby the decision of the arbitral tribunal is obviously wrong or open to serious doubt (substantial injustice).¹³⁴ A mere error of law or of fact may not fall within the concept of manifest disregard of the law. In the case of *Lombard-Knight & Anor v. Rainstorm Pictures Inc*¹³⁵ the English Court of Appeal refused challenge of the award under the ground of formalism. In other words, the court refused non-enforcement purely on the basis of form instead of substance. This decision demonstrates the limitation of discretionary power of courts in refusing enforcement of foreign awards. This also exemplifies the adoption of pro-enforcement of the New York Convention.

In Australia, the International Arbitration Act (IAA) 1974 adopts more exhaustive

¹²⁸ *Comedy Club, Inc. v. Improv West Assoc.*, 553 F.3d 1277 (9th Cir.2009).

¹²⁹ *Rapp, loc.cit.*

¹³⁰ *Ibid.*, p. 4.

¹³¹ *M & C. Corp. v. Erwin Behr GmbH & Co.*, 87F.3d 993-1000 (6th Cir. 1996), *Yearbook Commercial Arbitration* XXII (1997).

¹³² Stephen K. Huber, "State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by States Courts," *Cordozo Journal of Conflict Resolution* Vol. 10 (2009): 521-523.

¹³³ *Oil & Natural Gas Corporation Ltd. v. Saw Pipes*, 2003 (5) SCC 705. The court held that award is opposed to public policy and could be set aside if it is contrary to : (a) fundamental policy of Indian law; (b) the interest of India; (c) justice or morality; or if, in addition, it is : (d) patently illegal; or (e) so unfair or unreasonable that it shocks the conscience of the court.

¹³⁴ *Petroships Pte Ltd. of Singapore v. Petec Trading and Investment Corporation of Vietnam and Others*, (2001) EWHC Comm. 418 (May 22nd, 2001), in Michael W. Buhler and Thomas H. Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (UK: Thomson, Sweet Maxwell, 2005), p. 171.

¹³⁵ [2014] EWCA Civ 356, cited in Craig Tevendale and Vanessa Naish, "The English Court of Appeal refuse a challenge to the enforcement of a New York Convention award founded on "hollow formalism", <http://hsfnotes.com/arbitration/2014/04/03/the-english-court-of-appeal-refuse-a-challenge-to-the-enforcement-of-a-new-york-convention-award-founded-on-hollow-formalism/>, accessed 1 August 2015.

grounds for setting aside the awards. Section 34 of the Act adopts the UNCITRAL Model Law on International Commercial Arbitration.¹³⁶ This provision provides no right of appeal against international awards. In regards to domestic awards, however, the state commercial arbitration (Commercial Arbitration Act 1984 [CAA]) provides more expansive grounds for judicial review such as manifest error of law, misconduct of arbitrators and inadequate reasons of the awards.¹³⁷ In *Oil Basins Limited v. BHP Biliton Ltd.*,¹³⁸ for instance, the Court of Appeals vacated the domestic award based on error of law and misconduct due to the failure of the majority of the arbitrators to give adequate reasons.¹³⁹ This case exemplifies the expansive standards of review of domestic arbitration award by adopting inadequate reasons as grounds for setting aside the award. France, as a European civil law state, provides for exhaustive grounds for setting aside the award on the basis of the violation of fundamental rights and of public international order.¹⁴⁰ Even if an award is applied for annulment, the court of appeal has no competent authority to review the merits of the arbitrators' findings of fact or of law.¹⁴¹ Manifest error of the reason of an award does not necessarily render the vacatur of the award. The narrow approach to the public policy exception has discouraged substantive review of an award.¹⁴² Thus, it will also promote the finality and enforceability of the awards. A mere error of facts/law cannot justify non-enforcement of foreign awards. This can be noted from the case of *Uganda Telecom Ltd v. Hi-Tech Telecom Pty Ltd*¹⁴³, in which case the Federal Court of Australia held that enforcement of foreign award could only be refused in very limited grounds. In other words, this approach exemplifies the *prima facie* approach to the enforceability of foreign award. The Federal Court of Australia adopts the principle of no merits review. Therefore an international arbitral award will be enforced in Australia without the need to reopen the substance of the dispute in court.

Non-interventionist and pro-enforcement approaches to the enforceability of foreign awards are also adopted by the Singapore Appeal Court. In the case of *BLC and others v. BLB and another* (30 July 2014) (*BLC v. BLB*),¹⁴⁴ the Singapore Court of

¹³⁶ This provision is in line with Article V of the NYC concerning the grounds for refusing recognition or enforcement.

¹³⁷ Article 38 sub-section (5) of the Commercial Arbitration Act (CAA) provides that the Supreme Court shall not grant leave under sub-section (4) (b) unless it considers that:

1. having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement; and
2. there is:
 1. a manifest error of law on the face of the award; and
 2. strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law.

¹³⁸ *Oil Basins Limited v. BHP Biliton Ltd*, (2007) VSCA 255.

¹³⁹ Damian Sturzaker and Megan Valsinger Clark, "Oil Basins v. BHP: Blurring the Line between Arbitration and Litigation?" *ADR Bulletin of Bonds University DRC Vol. 10 No. 7* (2008): 143-144.

¹⁴⁰ See Article 1504 of the French Code of Civil Procedure.

¹⁴¹ Devolve, Gerald and Roche, *op.cit.*, pp. 208-209.

¹⁴² *Ibid.*

¹⁴³ [2011] FCA 131, cited in Chartered Institute of Arbitrators, "Case Note: *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd*," <https://www.ciarb.net.au/resources/international-arbitration/case-note-uganda-telecom-ltd-v-high-tech-telecom-pty-ltd/>, accessed 2 August 2015.

¹⁴⁴ [2014] SGCA 40, cited in Chanaka Kumarasinghe, "Singapore Court of Appeal Continuous to Support Non-Interventionist Approach to Arbitration," *International Arbitration Quarterly* (December 2014): 6, accessed 3 August 2015, <http://www.hfw.com/downloads/HFW-International-Arbitration-Quarterly-Bulletin-December-2014.pdf>.

Appeal reversed the Singapore High Court's decision to set aside an arbitral award on the grounds of a breach of natural justice. This decision demonstrates that there is minimal court's intervention in the enforcement of foreign awards and therefore strongly supports the pro-enforcement of the New York Convention.

IV. Conclusion

This article finds that the most fundamental basis of the NYC refers to the pro-enforcement policy. This means the prevailing view is that the scope of judicial review of foreign arbitral awards is confined to an extremely limited judicial review in order to minimize parochialism and chauvinism. A broad scope of judicial review may impose more onerous conditions to the enforcement of international awards, which is in conflict with Article III of the NYC. Despite the fact that the NYC does not expressly specify the grounds for setting aside the awards, the scope of judicial review may vary in different states. The lesson that can be learnt from this study is that international practices of commercial arbitration has implemented more restrictive grounds of review of arbitral awards. Interestingly, most of the international cases analyzed in this article demonstrate a restrictive/exhaustive grounds for vacating an award. Therefore, the shift of many jurisdictions approach to the pro enforcement policy is a significant signal and a promising development to promote the finality and enforceability of the arbitral awards.

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