

‘MODERN ARBITRATION LEGISLATION’: A COMPARISON BETWEEN AUSTRALIAN AND INDONESIAN LAWS*

Rina Shahriyani Shahrullah**

Program Studi Ilmu Hukum, Fakultas Hukum Universitas Internasional Batam, Batam
Jalan Gajah Mada, Baloi Sei Ladi, Batam, Kepulauan Riau 29445

Abstract

This research analyzes Law No. 30 of 1999 of Indonesia to ascertain whether this Indonesian law constitutes modern arbitration legislation in the context of international commercial arbitration. Law No. 30 of 1999 will be compared with the International Arbitration Act 1974 (Cth) and the International Arbitration Amendment Act 2010 (Cth) of Australia. In this research, the author finds the Model Law should be adopted by Indonesia to modernize the country's arbitration law in order for it to more acceptable in the practices of international commercial arbitration to day. Furthermore, the adaption of the Model Law also assists to clarify the Indonesian approach to the application of public policy principle which can be used to reset arbitral awards in Indonesia.

Keywords: international commercial arbitration, Australia, Indonesia.

Intisari

Penelitian ini mempelajari Undang-Undang Nomor 30 Tahun 1999 untuk mengetahui apakah hukum di Indonesia tergolong ke dalam aturan arbitrase modern dalam arbitrase komersial internasional. Penulis membandingkan Undang-Undang Nomor 30 Tahun 1999 dengan *International Arbitration Act 1974 (Cth)* dan *International Arbitration Amendment Act 2010 (Cth)* di Australia. Dalam penelitian ini, penulis menemukan bahwa *Model Law* dapat diadopsi oleh Indonesia untuk memodernisasikan hukum arbitrasenya agar dapat lebih diterima dalam praktek arbitrase niaga internasional. Diadopsinya *Model Law* dapat juga membantu mengklarifikasi pendekatan Indonesia terhadap aplikasi kebijakan publik yang dapat dipergunakan untuk menentang putusan arbitrase di Indonesia.

Kata Kunci: arbitrase komersial internasional, arbitrase, Australia, Indonesia.

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** Alamat korespondensi: rina@uib.ac.id.

A. Background

Disagreements in commercial relationships may occur at any time and these may result in legal disputes.¹ Nationals of Australia and Indonesia who participate in international commercial relationships may be aware of this possible circumstance. Hence, parties to international commercial disputes generally stipulate or at least anticipate a method of dispute resolution.²

Litigation may be one of the dispute resolution methods chosen by Australian and Indonesian parties to settle their commercial disputes, but in the context of international business, litigation may not be advisable for a number of reasons.³ Litigation in national courts may be slow⁴ and their decisions lack confidentiality since they may be published.⁵ Furthermore, not all countries wish to enforce foreign judgments in their national territories. Up to the present, there is no worldwide convention specifically regulating the recognition and enforcement of court judgments.⁶ Therefore, it may be beneficial for the disputing parties to settle their disputes before an international arbitral panel rather than by resorting to litigation.⁷

Arbitration is less formal than litigation⁸ and because the proceedings are usually not open to the public, the confidentiality of disputes is generally assured.⁹ Furthermore, international arbitral awards are enforceable in Indonesia and Australia and in most countries of the world¹⁰

pursuant to bilateral or multilateral conventions such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereafter in this report referred to as the New York Convention).

However, international arbitral awards are not automatically recognized and enforced by enforcing states (the term 'country' and 'state' is used interchangeably because the New York Convention adopts the term 'country', whereas the Model Law adopts the term 'state'). Each enforcing state, including Australia and Indonesia has its own national laws regulating the process of recognition and enforcement of the awards and these laws may impose different conditions and approaches to such process.¹¹ In order to minimize strong differentiations pursuant to the process of recognition and enforcement of international arbitral awards among enforcing states, the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) was adopted.

The Model Law aims to harmonize divergent national laws on international commercial arbitration¹² by providing 'a more uniform and modern pro-arbitration approach' (referred to as 'pro-enforcement approach').¹³ Berger¹⁴ points out that the Model Law serves 'as a matrix for many reforms of national arbitration laws thus giving further momentum to the worldwide modernization movement'. Redfern and Hunter¹⁵

¹ Sally A. Harpole, "Factors Affecting the Growth (or Lack Thereof) of Arbitration in the Asia Region", *Journal of International Arbitration*, Vol. 20, Issue 1, February 2003.

² Ade Maman Suherman, 2002, *Aspek Hukum Dalam Ekonomi Global*, Ghalia Indonesia, Jakarta.

³ Bobette Wolski, "Recent Development in International Commercial Dispute Resolution: Expanding the Option", *Bond Law Review*, Vol. 13, Issue 2, January 2001.

⁴ Edward R. Leahy, *et al.*, "The Changing Face of International Arbitration", *Journal of International Arbitration*, Vol. 17, Issue 4, 2000.

⁵ Klaus Peter Berger, 2000, *Understanding International Commercial Arbitration*, Transnational Dispute Management.

⁶ *Ibid.*

⁷ Marcus Jacobs, 1992, *International Commercial Arbitration in Australia: Law and Practice*, Law Book Company, Sydney.

⁸ Ronald Fitch, 1989, *Commercial Arbitration in the Australian Construction Industry*, Federation Press, New South Wales.

⁹ Tony Budidjaja, 2002, *Public Policy as Grounds of Recognition and Enforcement of Foreign Arbitral Awards in Indonesia*, Tatanusa, Jakarta.

¹⁰ Wetter J. G., "The Present Status of the International Court of Arbitration of the ICC: An Appraisal: Reason for Prescribing Arbitration in Lieu of Litigation", *American Review of International Arbitration*, Vol. 91, Issue 1, 1990.

¹¹ Edward R. Leahy, *Loc.cit.*

¹² Reziya Harrison, *et al.*, 2000, *International Commercial Arbitration: Developing Rules for the New Millennium*, Jordan Publishing Ltd, United Kingdom.

¹³ Sally A. Harpole, *Loc.cit.*

¹⁴ Klaus Peter Berger, 2000, *Loc.cit.*

¹⁵ Alan Redfern, *et al.*, 1999, *Law and Practice of International Commercial Arbitration*, Thomson, United Kingdom.

argue that ‘it is difficult to imagine that any state in the future would introduce legislation in relation to arbitration without first looking at the Model Law and its legislative history’. It is apparent that in the context of international commercial arbitration today, the Model Law is frequently used as an indicator to determine whether or not national arbitration laws falls within the category of ‘modern laws’.¹⁶ Modern laws on arbitration are referred to as laws that are culturally neutral, promote legal protection and certainty, and adopt ‘modern pro-arbitration approach (‘pro-enforcement approach’).¹⁷

Modern arbitration laws are required in international commercial arbitration today in order to facilitate the process of settling disputes arising out of international commercial relationships.¹⁸ A study has shown that there is a coherent and strong link between the quality of the arbitration legal framework of a country and the decision to engage in international commercial activities in that country.¹⁹ Reforms of national arbitration law have been undertaken by a number of countries to comply with the requirements of international commercial arbitration today. Since the Model Law accommodates divergent legal systems, it minimizes various national biases in order to promote uniformity of international commercial arbitration.²⁰ Hence, the Model Law is relied upon to reform national arbitration law.²¹

The capacity of the Model Law to strike a balance between the needs of party autonomy in arbitration, the demands for a ‘simple, clear, and concise’ arbitration regime²² and the adaptability of the Model Law in the development of an

arbitration culture today²³ has justified the adoption of the Model Law to modernize Australian arbitration law.²⁴ The Model Law is incorporated into the International Arbitration Act 1974 (Cth). The International Arbitration Act 1974 (Cth) has been amended by the International Arbitration Amendment Act 2010 (Cth).

The Indonesian government has also reformed Indonesian arbitration law by issuing *Undang-Undang Republik Indonesia Nomor 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa* (Law of the Republic Indonesian Number 30 of 1999 on Arbitration and Alternative Dispute Resolution). Law No. 30 of 1999 (referred to as Law No. 30 of 1999) was issued on the ground that ‘the prevailing laws and regulations for the resolution through arbitration are no longer suited to the development of business and law generally’.²⁵ The question here is whether Law No. 30 of 1999 in the absence of the Model Law can be categorized as ‘modern arbitration legislation’ in the sense that it meets the needs of ‘pro-enforcement approach’ in the context of international commercial arbitration today. Hence, the title of this research is “A Comparative Legal Study between Australian and Indonesian Arbitration Legislation”.

This research raises a number of questions as follows: (1) Is Law No. 30 of 1999 of Indonesian still regarded as “an outdated arbitration legislation” in the context of international commercial arbitration today since the Law which aims to reform arbitration law of Indonesia fails to adopt or rely upon the Model Law? (2) Since the International Arbitration Act 1974 (Cth) and the International Arbitration Amendment Act

¹⁶ Pieter Sanders, 1999, *What May Still be Done in the World of Arbitration?*, Kluwer Law International, Netherlands.

¹⁷ Erman Rajagukguk, “Economic Law: Legal Reform in Indonesia”, in R. M. Talib Puspokusumo, 2000, *Reformasi Hukum di Indonesia: Sebuah Keniscayaan*, Tim Pakar Hukum Departemen Kehakiman dan HAM RI, Jakarta.

¹⁸ Guy Spooner, *et al.*, “Arbitration in Asia”, *Corporate Counsel Asia Pacific*, Vol. 27, June 2001.

¹⁹ Fabien Gelin, “Arbitration and the Global Economy: The Challenges Ahead”, *Journal of International Arbitration*, Vol. 17, Issue 4, 2000.

²⁰ James Rodner, “International and National Arbitration: A Fading Distinction”, *Journal of International Arbitration*, Vol. 19, Issue 5.

²¹ Marcus Jacobs, *Loc.cit.*

²² Klaus Peter Berger, *Loc.cit.*

²³ Pieter Sanders, *Loc.cit.*

²⁴ Marcus Jacobs, *Loc.cit.*

²⁵ Tony Budidjaja, *Loc.cit.*

2010 (Cth) of Australia adopt the Model Law, it is questioned whether the Australian legislation is regarded as “a modern arbitration legislation”? (3) Should the Model Law be adopted by Indonesia to modernize that country’s arbitration law in order for it to be more acceptable in the practices of international commercial arbitration today? (4) Should the Indonesian arbitration law adopt the approaches of the Australian legislation to the implementation of the Model Law? The questions may only be answered if Law No. 30 of 1999 of Indonesia and the International Arbitration Act 1974 (Cth) and the International Arbitration Amendment Act 2010 (Cth) of Australia are examined, compared, contrasted and analyzed.

B. Research Methods

This research is a normative legal research which uses the methods of comparative law with its main function to compare the Australian and Indonesian arbitration legislations to ascertain their similarities and differences.²⁶ In addition, the comparative legal methods also aim to find out which arbitration legislation being compared is better and how to adopt the better law’s approaches to reform the other one.²⁷

Since this research is a normative legal research. It relies mostly on secondary data; therefore the object of this research is legal documents of Australia and Indonesia, particularly the International Arbitration Act 1974 (Cth) and the International Arbitration Amendment Act 2010 (Cth) of Australia, Law No. 30 of 1999 of Indonesia, the Model Law and the New York Convention. Secondary data used by this research is comprised of: (1) primary legal materials: the International Arbitration Act 1974 (Cth) and the International Arbitration Amendment Act

2010 (Cth) of Australia, Law No. 30 of 1999 of Indonesia, the Model Law and the New York Convention; (2) secondary legal materials: journal, books, reports and internet-based sources; (3) tertiary legal materials: Law Dictionary and Oxford Paperback Thesaurus.

This research utilizes a qualitative method in analyzing data to examine the research object. This research particularly adopts the methods of finding law to obtain accurate meanings from the legal sources,²⁸ namely Text Interpretation, Systematic Interpretation, Legislative-History Interpretation, Comparative Interpretation, and Analogy Interpretation.

C. Results and Analysis

1. The Criterion of Modern Arbitration Legislation

In the context of international commercial arbitration today, the modernity of arbitration legislation may be measured by the capacity of the legislation to facilitate and promote legal protection and certainty in the process of recognition and enforcement of arbitral awards without questioning where the awards are rendered. Legislation can be categorized as ‘modern arbitration legislation’ if it meets the needs of ‘pro-enforcement approach’ in the context of international commercial arbitration today.

In order to meet the needs of ‘pro enforcement approach’, the legislation should be: 1) ‘Culturally neutral’ as it removes ‘territorial limitations’ to promote legal protection and certainty²⁹ in the process of implementing arbitral awards; and 2) Facilitating and promoting legal protection and certainty in the process of recognition and enforcement of arbitral awards. Therefore, grounds to refuse the recognition and enforcement of arbitral awards should be limited.

²⁶ Emmanuel Gaillard, “The Use of Comparative Law in International Commercial Arbitration”, in Pieter Sanders, 1989, *Arbitration on Settlement of International Commercial Disputes Involving the Far East and Arbitration on Combined Transport*, Kluwer Law and Taxation Publishers, Deventer.

²⁷ Michael Bogdan, 1994, *Comparative Law*, Kluwer Law, Deventer.

²⁸ Sudikno Mertokusumo, 1986, *Mengenal Hukum (Suatu Pengantar)*, Liberty, Yogyakarta.

²⁹ Erman Rajagukguk, *Loc.cit.*

2. Similarities and Dissimilarities between the Australian and Indonesian Legislation on International Commercial Arbitration

a) Similarities

Both Australia and Indonesia have similar objectives, that is, to encourage the use of an international commercial arbitration mechanism in international business relationships and to facilitate the recognition and enforcement of arbitral awards rendered under this mechanism. In order to achieve these aims, both countries have ratified and incorporated international instruments on international arbitration, namely the New York Convention and the ICSID Convention, into their national arbitration laws. In addition, arbitration Legislation of Indonesia and Australia adopt the principles of 'public policy, in the process of examining international arbitral awards in their jurisdiction. The violation of public policy may lead to the refusal of the awards. Both of Indonesian and Australian arbitration laws provide no clear definition as to what constitutes 'public policy' because of the relative nature of public policy that may change from time to time and from place to place (referred to as relativity in 'time and space').

b) Dissimilarities

The International Arbitration Act 1974 (Cth) of Australia incorporates the New York Convention without any declaration of the reciprocity and commercial reservations. Unlike this Act, Presidential Decree No. 34 of 1981 that ratified the New York Convention adopts the reciprocity and commercial reservations of the New York Convention. The Australian arbitration law adopts the Model Law and incorporates this Law into the International Arbitration Act 1974 (Cth) with both opting-out and opting-in bases. Indonesian arbitration law has not adopted the Model Law or relied on this Model Law for the purpose of reforming

arbitration law in Indonesia. As a result, the approaches of the New Indonesian Legislation relating to international commercial arbitration are different from those of the International Arbitration Act 1974 (Cth). The New Indonesian Legislation merely deals with the process of the recognition and enforcement of international (foreign-rendered) arbitral awards, whereas the International Arbitration Act 1974 (Cth), because of the adoption of the Model Law, governs a broader scope of international commercial arbitration from the earlier stage of arbitration such as the selection of arbitrators until the final stage of arbitration, namely the recognition and enforcement of arbitral awards.

Due to the incorporation of the Model Law into the International Arbitration Act 1974 (Cth), the term 'international' is well defined in the context of international commercial arbitration in Australia. On the contrary, Law No. 30 of 1999 fails to define the term 'international'; therefore there is no provision in Law No. 30 of 1999 for or any clue in the Elucidation about defining the term 'international'. The adoption of the Model Law by the International Arbitration Act 1974 (Cth) classifies arbitral awards in Australia into 'foreign awards' and 'domestic awards with international nature' (international arbitral awards). Arbitration law of Indonesia has not adopted the Model Law, yet Law No. 30 of 1999 adopts the term 'international arbitral awards'. However, there is a different approach to the meaning of 'international arbitral awards' adopted by arbitration laws of Australia and Indonesia. 'International arbitral awards' under Indonesian arbitration law are merely 'foreign arbitral awards' according to Australian arbitration law. This is because even though arbitration law of Indonesia has been reformed by the issuance of the New Indonesian

Legislation, this New Legislation continues to adopt 'foreign jurisdiction criteria' to determine the internationality of arbitral awards. These criteria are adopted by the International Arbitration Act 1974 (Cth) for 'foreign arbitral awards' only. 'International arbitral awards' in Australia refer to awards that are made, and for which recognition and enforcement are sought in that country under the Model Law. Such awards in Indonesia are categorized as 'pure domestic arbitral awards'. The different approach to the classification of arbitral awards in the two countries is caused by the absence of the Model Law from Indonesian arbitration law.

The application of the public policy principle in Australia is governed by the International Arbitration Act 1974 (Cth) in which the Model Law and the New York Convention are incorporated. The Act adopts the approaches of the two international instruments to the public policy principle, and consequently 'public policy' in Australia is also divided into 'international' and 'domestic' public policy. Only 'international public policy' and the elements of public policy under s 19 of the International Arbitration Act 1974 (Cth) may be used by the Australian enforcing court to examine international arbitral awards. The New Indonesian Legislation does not distinguish between 'international' and 'domestic' public policy as is required by the New York Convention although the Convention is enforceable in that country. The principle of public policy continues to be interpreted broadly and differently by the Indonesian enforcing court when examining international (foreign-rendered) arbitral awards.

3. Is Law No. 30 of 1999 of Indonesian Still Regarded as "Outdated Arbitration Legislation"?

The answer to this question is affirmative. It has been elaborated previously that a legislation may be considered as a 'modern arbitration legislation' if it meets the demands of international commercial arbitration today. The most ultimate demand is that arbitration legislation should integrate a 'pro-enforcement approach'. 'Pro enforcement approach' is characterized by its culturally neutral approach. This neutrality may be met if an arbitration legislation removes 'territorial limitations' in the process of enforcing arbitral awards.

Law No. 30 of 1999 continues to adopt territorial criteria to determine the 'internationality' of an arbitration. In *Pertamina v. Patuha Power Ltd., Perusahaan Listrik Negara ("PLN"), and Minister of Finance of the Republic of Indonesia*³⁰ the parties stipulated in their contract that any dispute arising among them should be referred to arbitration in Jakarta using the UNCITRAL Rules if the parties failed to settle such dispute amicably. The parties' arbitration was still classified as 'domestic arbitration' in Indonesia³¹ because Jakarta (Indonesia) was selected as the seat of arbitration, although the UNCITRAL Rules were applied to the dispute. A similar approach was adopted in *Pertamina v Himpurna California Energy Ltd., Perusahaan Listrik Negara ("PLN") and the Minister of Finance of the Republic of Indonesia*.³² Hence, it may be concluded that parties' arbitration is 'domestic' if the seat of arbitration is Indonesia even though one of the characteristics of 'international nature' exists.

In addition, modern arbitration legislation should facilitate and promote legal protection and certainty in the process of recognition and

³⁰ Decision No. 271/PDT.G/1999/PN.JKT.PST.

³¹ Karen Mills, "Enforcement of Arbitral Awards in Indonesia: Issues Relating to Arbitration and the Judiciary", *Jurnal Hukum Bisnis*, Vol. 21, 2002.

³² *Ibid.*

enforcement of arbitral awards. Thus, grounds to refuse the recognition and enforcement of arbitral awards should be limited. Law No. 30 of 1999 may still be regarded as an ‘outdated arbitration legislation’ because it still adopts ‘domestic public policy’ in the context of international commercial arbitration. It should be noted that the ratification of the New York Convention by Presidential Decree No. 34 of 1981 does not always make Indonesia conform to the Convention. For example, the interpretation of public policy adopted by the New York, namely ‘international public policy’ is not implemented by Law No. 30 of 1999. The interpretation of the term ‘public policy’ becomes a significant issue in the context of international arbitration in Indonesia, particularly because this term may be used as a defence to refuse the recognition and enforcement of international (foreign-rendered) arbitral awards according to Art. 66 (c) of the New Indonesian Legislation. The failure of the New Indonesian Legislation to define the term ‘public policy’ means this term may be interpreted broadly or narrowly depending on how the Indonesian courts examine each case. However, based on the approach of the New York Convention that was ratified by Indonesia, the term ‘public policy’ should not be interpreted too broad particularly in the context of international arbitration,³³ to facilitate the recognition and enforcement of arbitral awards.

The Indonesian courts have not established a definition of public policy that best clarifies the meaning of public policy in that country³⁴. The courts have adopted different meanings of ‘public policy’. In *Perusahaan Pertambangan Minyak dan Gas Bumi Negara & PT.PLN (Persero) v Karaha Bodas Company, L.L.C.* (referred to as the *KBC case*),³⁵ the District Court of Central Jakarta questioned whether the award made for Karaha Bodas Company (KBC) was not against the

Indonesian public policy under the New Indonesian Legislation. The District Court of Central Jakarta in the *KBC case* was of the opinion that the term ‘public policy’ is identical to the term ‘welfare’.

The Court here apparently overused the public policy defense because any matter that hampered the welfare of Indonesia could be considered as the violation of public policy. It is also obvious that the interpretation of the public policy defense in this case was construed broadly and the Court did not adopt the approach of the New York Convention to the application of ‘international public policy’. Hence, it may be concluded that the approach of the Court violated the approach of the New York Convention that requires a narrow interpretation of the public policy defense (referred to as ‘international public policy’). The Court was also of the opinion that the violation of existing laws in Indonesia was automatically against the public policy of that country. This interpretation may not be appropriate in the context of international arbitration because not all existing laws are ‘so fundamental’ that they can be categorized as ‘public policy’ in the context of international commercial arbitration.

In *Bankers Trust Company & Bankers Trust International Plc. v PT. Mayora Indah, Tbk.* (referred to as the *Bankers Trust case*)³⁶ the Supreme Court in 2000 established another interpretation of the term ‘public policy’. The Supreme Court in *Bankers Trust* denied the request for the execution of the international (foreign-rendered) arbitral awards. The Supreme Court reasoned that if the awards were granted, such awards would violate the ‘public policy’ principle as stipulated under Art. 66 (c) of the New Indonesian Legislation. The violation of public policy in that case was referred to the violation of ‘the prevailing legal order’, particularly ‘the procedural legal order’ of Indonesia.

³³ Statement of the Chairman of the Working Party No. 3: UN Doc E/CONF.26/SR.17 (1958).

³⁴ Tony Budidjaja, *Loc.cit.*

³⁵ Decision No. 86/PDT.G/2002/PN.JKT.PST.

³⁶ Decision No. 001/Pdt/Arb.Int/1999/PN.JKT.PST. *vide* No. 002/Pdt/Arb.Int/1999/PN.JKT.PST. *vide* No. 02/Pdt.P/2000/PN.JKT.PST.; Decision No. 02 K/Ex'r/Arb.Int/Pdt/2000.

4. Is the International Arbitration Amendment Act 2010 (Cth) of Australia Regarded as a "Modern Arbitration Legislation"?

The International Arbitration Act 1974 (Cth) of Australia adopts the Model Law of 1985 to modernize Australian arbitration law and to respond to the demands of a 'pro-enforcement approach' in international commercial arbitration today. When the 1985 Model Law was amended by the United Nations Commission on International Trade Law on 7 July 2006, Australia also amended the International Arbitration Act 1974 (Cth) to be the International Arbitration Amendment Act 2010 (Cth). Amendments to articles 1 (2), 7, and 35 (2), a new chapter IV A to replace article 17 and a new article 2 A were adopted by UNCITRAL on 7 July 2006. The revised version of article 7 is intended to modernize the form requirement of an arbitration agreement to better conform with international contract practices. The newly introduced chapter IV A establishes a more comprehensive legal regime dealing with interim measures in support of arbitration. As of 2006, the standard version of the Model Law is the amended version.

The Model Law as amended by the United Nations Commission on International Trade Law on 7 July 2006 aims to modernize international commercial arbitration to better conform with international contract practices. The amendment of the International Arbitration Act 1974 (Cth), namely be the International Arbitration Amendment Act 2010 (Cth) also aims to modernize the Australian arbitration legislation to conform with the 2006 Amended Model Law. Hence, the International Arbitration Amendment Act 2010 (Cth) can be regarded as 'a modern arbitration legislation'. The aims of this Act are clearly stipulated as follows:³⁷

- (a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes;

and

- (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and
- (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and
- (d) to give effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting; and
- (e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006; and
- (f) to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by Australia on 24 March 1975.

5. Should the Model Law be Adopted by Indonesia to Modernize Its Arbitration Law?

The Model Law adopts a 'pro-enforcement approach' to international commercial arbitration because this Law not only governs and harmonizes the entire conduct of international commercial arbitration, but also facilitates the recognition and enforcement of international arbitral awards regardless of where the awards are made. Hence, the Model Law is frequently utilized as an indicator to ascertain whether national arbitration laws adopt a 'pro-enforcement approach'. In the context of international commercial arbitration today, national arbitration laws with 'a pro-enforcement approach' is commonly referred to as 'modern national arbitration laws'.

³⁷ The International Arbitration Amendment Act 2010 (Cth): 2D: Object of this Act.

Law No. 30 of 1999 does not adopt or rely upon the Model Law. The incorporation of the Model Law into Indonesian arbitration law may assist in clarifying the Indonesian approach to the application of the public policy principle. The principle is still the most controversial and popular ground for refusing the recognition and enforcement of international (foreign-rendered) arbitral awards in Indonesia. Up to date, there is still no clear concept as to what constitutes the term ‘public policy’, and consequently this term is interpreted differently by different judges in that country.

According to the approach of the Model Law, only the elements of public policy internationally recognized (referred to as ‘international public policy’) may be used to resist the recognition and enforcement of arbitral awards in the international arbitration sphere. The interpretation of the term ‘international public policy’ under the Model Law may be discovered from the extrinsic materials of this Law or may be obtained from the judicial decisions of the Model Law’s countries. It is true that the extrinsic materials and other countries’ judicial decisions are not part of the Indonesian legal sources on arbitration. However, the materials and the decisions may provide valuable knowledge to Indonesian judges to approach the meaning of ‘international public policy’ in the process of establishing ‘the judge-made law’. Hence, the extrinsic materials and judicial decisions may indirectly be utilized by the Indonesian judges to interpret the term ‘international public policy’. If the Model Law was adopted by Indonesia and incorporated into Indonesian arbitration law, the Indonesian enforcing court could adopt the grounds for refusal to recognize or enforce arbitral award under the Model Law and apply them when examining international (foreign-rendered) arbitral awards. This approach is possible because the Model Law may also be applied to ‘foreign arbitral awards’. However, if Indonesian arbitration law did not apply the Model Law’s approaches to ‘international (foreign-

rendered) arbitral awards’, the grounds for refusal to recognize or enforce arbitral awards under Law No. 30 of 1999 could be used to resist the awards. Meanwhile, the grounds for refusal to recognize or enforce arbitral awards under the Model Law would be applied to ‘arbitral awards’ (international arbitral awards) rendered and seeking enforcement in Indonesia.

Law No. 30 of 1999 merely concentrates on the process of recognition and enforcement of international (foreign-rendered) arbitral awards rather than governing the entire conduct of international commercial arbitration. Law No. 30 of 1999 is not a complete set of international arbitration legislation, not only because of its failure to deal with the process of international arbitration from the early stage such as the selection of arbitrators, or at the middle stage of arbitration such as the conduct of arbitral proceedings, but more significantly Law No. 30 of 1999 fails to determine when an arbitration is considered as ‘international’.

The definition of ‘international’ under Art. 1 (3) of the Model Law introduces a new type of award, namely ‘domestic awards’ with international nature. This award is alien to Indonesian arbitration law because although Art. 1 (9) of Law No. 30 of 1999 defines the term ‘international arbitral awards’, these awards are only another name for ‘foreign arbitral awards’. This circumstance occurs because Law No. 30 of 1999 only adopts ‘foreign jurisdiction criteria’ to determine ‘the internationality’ of arbitral awards. As a result, any arbitration held in the jurisdiction of Indonesia applying either Indonesian law or any law other than Indonesian law is still regarded as ‘pure domestic arbitration’. Consequently arbitral awards rendered under this type of arbitration are merely ‘pure domestic arbitral awards’. This approach may no longer be appropriate in the context of international commercial arbitration today because the criteria of ‘foreign jurisdiction’ may no longer be adopted to attest the internationality of an arbitration. The more acceptable

approach to determining the internationality of an arbitration today is to adopt the criteria of 'international' according to the approaches of Art. 1 (3) of the Model Law. Accordingly, arbitral awards rendered and enforced in the same country may be regarded as 'international arbitral awards' if the awards meet the criteria of the internationality of an arbitration under the Model Law. Since Indonesian arbitration law has not adopted the Model Law, it may be said that there are no real international arbitral awards in Indonesia as recognized in the context of international commercial arbitration.

Foreign parties who conclude an international contract with Indonesian nationals may be surprised to know that their arbitral award does not constitute an international arbitral award, only because they select the seat of arbitration in Indonesia. On the contrary, an arbitral award rendered for a dispute arising out of a pure domestic contract may turn out to be an international arbitral award simply because disputing parties select the seat of arbitration overseas. These circumstances occur due to the narrow approach of the New Indonesian Legislation to the term 'international arbitral awards'. Hence, it is suggested in this research that the Model Law should be adopted by Indonesia and incorporated into Indonesian arbitration law. Since the Model Law is not 'a convention', the incorporation of the Model Law into Indonesian arbitration law may be adjusted or modified to fit the Indonesian legal system, culture and philosophy.

The Model Law should be adopted by Indonesia and incorporated into Indonesian arbitration law to modernize that country's arbitration law, in order for it to be more acceptable in the practices of international commercial arbitration today. The 'foreign jurisdiction criteria' under the New Indonesian Legislation to determine the internationality of arbitral awards may no longer be suitable because of the demands of the practices of international commercial to facilitate the recognition and enforcement of arbitral awards

regardless of in which countries the awards are made.

6. Should Indonesian Arbitration Law Adopt the Approaches of the Australian Legislation to the Implementation of the Model Law?

Their main difference between Australian and Indonesian arbitration law is that the Australian legislation on international arbitration incorporates the Model Law, whereas Law No. 30 of 1999 does not adopt this international Model Law. The arbitration law of Indonesia could follow the International Arbitration Act 1974 (Cth) of Australia in adopting the Model Law in the sense that the Model Law would govern the conduct of international commercial arbitration in Indonesia. If this was done Law No. 30 of 1999 and the New York Convention would remain applicable for the process of recognition and enforcement of arbitral awards made outside the jurisdiction of Indonesia.

The incorporation of the Model Law into the International Arbitration Act 1974 (Cth) provides a clear approach to determining whether an arbitration is 'international' or 'purely domestic'. Yet it does not mean that disputing parties must apply the Model Law because the Act incorporates with the Model Law an opting-out provision (s 21 of the Act) as a consequence of which parties are free to opt out of the Model Law even though they select the Act to govern their arbitration. This notion evidences that the Australian arbitration legislation implements the general principle of arbitration, that is the principle of party autonomy. However, the opting out of the Model Law may give rise to a number of complications in the process of recognition and enforcement of international arbitral awards in Australia because apart from the Model Law, there is no other statutory procedure provided by the International Arbitration Act 1974 (Cth) to deal with the recognition and enforcement of awards in that country. It is suggested by a number of Australian

legal scholars that the Australian domestic arbitration laws should be applied to resolve such complications. Yet this notion may cause the distinction between the jurisdiction of pure domestic arbitration and international arbitration to be difficult to determine since ‘pure domestic arbitration’ intervenes the area of international arbitration. The application of the principle of party autonomy in the Australian arbitration legislation is also manifested by the freedom of parties to opt into the Model Law. In this regard, parties may apply the Model Law in its entirety or combine it with the original provisions of the International Arbitration Act 1974 (Cth) under ss 23-27 of the Act.

Although Indonesia could follow the International Arbitration Act 1974 (Cth) of Australia in adopting the Model Law with an opting-in and opting out provision, it should be noted that Indonesia may also experience a number of complications in the process of recognition and enforcement of international arbitral awards in Indonesia. Therefore, Indonesian arbitration law should not permit the opting out of the Model Law in order to avoid similar complications in Australian arbitration law under the International Arbitration Act 1974 (Cth).

The first model is based on the approaches of the International Arbitration Act 1974 (Cth) with an opt in and opt out provision of the Model Law. Since the opting out of the Model Law may give rise to a number of complications in the process of recognition and enforcement of international arbitral awards, it is suggested that Indonesian arbitration law should not permit the opting out of the Model Law in order to avoid similar complications in Australian arbitration law.

The complications in Australian arbitration law lead to the controversy and debates. A controversial decision was established in *Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH v Australian Granites Ltd.*³⁸ Based on the opting

of the Model Law provided by the International Arbitration Act 1974 (Cth), the State-based Commercial Arbitration Acts applied to the case even though the case has international nature. This approach is not acceptable in the context of international commercial arbitration.

The controversy ended when the Australia government amended the International Arbitration Act 1974 (Cth) through the International Arbitration Amendment Act 2010 (Cth). The International Arbitration Amendment Act 2010 (Cth) is now the exclusive law governing international commercial arbitrations in Australia. The International Arbitration Amendment Act 2010 (Cth) now implements the Model Law in its entirety. It should be noted that the Model Law is consistent with the New York Convention.

If Indonesian arbitration law wishes to adopt the Model Law, it is suggested that the approaches of the International Arbitration Amendment Act 2010 (Cth) of Australia should be adopted for the following reasons:

1. The Model Law is applied in its entirety; consequently any conflicts between the Model Law and Indonesian arbitration legislation (Law No. 30 of 1999) may not occur.
2. Indonesia will have ‘international arbitration’ based on the approaches of the Model Law. The approaches are recognized in international commercial arbitration today.
3. In addition to domestic and foreign arbitral awards, international arbitral awards which are acknowledged under international commercial arbitration will come into existence in Indonesia.
4. Indonesian arbitration law will adopt the approach of the Model Law that only the elements of public policy internationally recognized (referred to as ‘international public policy’) may

³⁸ [2001] 1 Qd R 461 (*Eisenwerk*).

be used to resist the recognition and enforcement of arbitral awards in the international arbitration sphere.

The second model shows the methods of adopting the Model Law following the International Arbitration Amendment Act 2010 (Cth) of Australia. Based on the second Model, international arbitration and the recognition and enforcement of its awards will be governed by the Model Law. Domestic arbitration and recognition and enforcement of its awards will be governed by Law No. 30 of 1999. The recognition and enforcement of foreign awards will be governed by Law No. 30 of 1999. Yet, the requirements and interpretations of provisions under Law No. 30 of 1999 for the purpose of recognition and enforcement of foreign arbitral awards will adopt the Model Law's approaches. It is noted here that the Model Law is consistent with the New York Convention, accordingly the interpretations of provisions under Law No. 30 of 1999 will not violate the New York Convention.

D. Conclusions

Based on the comparison of the Australian and Indonesian legislation governing international commercial arbitration, it is found that both Australia and Indonesia have similar objectives, that is, to encourage the use of an international commercial arbitration mechanism and to facilitate the recognition and enforcement of arbitral awards rendered under this mechanism. In order to achieve these aims, both countries have ratified and incorporated international instruments on international arbitration, namely the New York Convention and the ICSID Convention, into their national arbitration laws. The main difference between the two countries approaches to international commercial arbitration is that the Australian arbitration law adopts the Model Law. Indonesian arbitration law has not adopted the Model Law or relied on this Model Law. The Australian arbitration law incorporates the Model Law into the International Arbitration Act 1974

(Cth) with both opting-out and opting-in bases. Since the opt-in and opt-out provision under the International Arbitration Act 1974 (Cth) raises a number of complications, the Act was amended in 2010 by the International Arbitration Amendment Act 2010 (Cth) which implements the Model Law in its entirety.

The Model Law adopts a 'pro-enforcement approach' to international commercial arbitration because this Law not only governs and harmonizes the entire conduct of international commercial arbitration, but also facilitates the recognition and enforcement of international arbitral awards regardless of where the awards are made. Hence, the Model Law is frequently utilized as an indicator to ascertain whether national arbitration laws adopt a 'pro-enforcement approach'. In the context of international commercial arbitration today, national arbitration laws with 'a pro-enforcement approach' is commonly referred to as 'modern national arbitration laws'. Hence, the answer of the first question addressed by this research as to whether Law No. 30 of 1999 of Indonesian is still regarded as "an outdated arbitration legislation" in the context of international commercial arbitration today since the Law which aims to reform arbitration law of Indonesia fails to adopt or rely upon the Model Law is affirmative.

'Pro enforcement approach' in the context of international commercial arbitration is characterized by its culturally neutral approach. This neutrality may be met if an arbitration legislation' removes 'territorial limitations' in the process of enforcing arbitral awards. This approach has not been adopted by Indonesian arbitration law under the current legislation, namely Law No. 30 of 1999. Law No. 30 of 1999 continues to adopt 'the old approach', namely the territorial criteria to determine the 'internationality' of arbitral award. In addition, Law No. 30 of 1999 does not recognize international arbitration since there is no definition of international arbitration under Law No. 30 of 1999. The only definition of

international arbitration appears under the Model Law. Furthermore, Law No. 30 of 1999 may still be regarded as an 'outdated arbitration legislation' because it still adopts 'domestic public policy' in the context of international commercial arbitration. The interpretation of public policy in the context of international commercial arbitration today is 'international public policy'. International public policy is adopted by the New York and the Model Law.

When the 1985 Model Law was amended by the United Nations Commission on International Trade Law on 7 July 2006, Australia also amended the International Arbitration Act 1974 (Cth) to be the International Arbitration Amendment Act 2010 (Cth). The amendments are intended to modernize the form requirement of an arbitration agreement to better conform with international contract practices. The Model Law as amended by the United Nations Commission on International Trade Law on 7 July 2006 aims to modernize international commercial arbitration to better conform with international contract practices. The amendment of the International Arbitration Act 1974 (Cth) also aims to modernize the Australian arbitration legislation to conform with the 2006 Amended Model Law. Hence, it can be concluded from this notion that that the International Arbitration Amendment Act 2010 (Cth) can be regarded as 'a modern arbitration legislation'.

Since the Model Law is frequently utilized as an indicator to modernize arbitration law of a State, it is questioned whether the Model Law should be adopted by Indonesia to modernize that country's arbitration law in order for it to be more acceptable in the practices of international commercial arbitration today. The answer to this question is affirmative. The adoption of the Model Law into Indonesia arbitration law is not only to modernize the Indonesian arbitration law, but it also assists to clarify the Indonesian approach to the application of the public policy principle which can be used to resist arbitral awards in Indonesia.

If the Model Law was adopted by Indonesia and incorporated into Indonesian arbitration law, the Indonesian enforcing court could adopt international public policy as the ground for refusal to recognize or enforce arbitral awards.

The adoption of the Model Law may make Law No. 30 of 1999 become a complete set of international arbitration legislation because in addition to domestic arbitration, international arbitration which is governed by the Model Law also exists in Indonesia. Hence, there would be three types of arbitral awards recognized by Indonesian arbitration law, namely domestic and foreign arbitral awards which are governed by Law No. 30 of 1999 and international arbitral awards which is specifically governed by the Model Law.

If the adoption of the Model Law is a condition to modernize Law No. 30 of 1999, it is further questioned whether the Indonesian arbitration law should adopt the approaches of the Australian legislation to the implementation of the Model Law. The answer is affirmative. Since there are two approaches of adopting the Model Law into Australia, namely the approaches of the International Arbitration Act 1974 (Cth) and the International Arbitration Amendment Act 2010 (Cth), it is questioned which approach is best for Indonesia.

The arbitration law of Indonesia could follow the International Arbitration Act 1974 (Cth) of Australia in adopting the Model Law in the sense that the Model Law would govern the conduct of international commercial arbitration in Indonesia. If this model was accepted, Law No. 30 of 1999 and the New York Convention would remain applicable for the process of recognition and enforcement of arbitral awards made outside the jurisdiction of Indonesia. Indonesia could follow the International Arbitration Act 1974 (Cth) of Australia in adopting the Model Law with an opting-in and opting out provision, but this model may not be suitable for Indonesia since it may cause a number of complications in the process

of recognition and enforcement of international arbitral awards. The complications may occur if parties choose to opt out of the Model Law, but their arbitration is international. In this regard, there will be no law governing the conduct of arbitration and enforcement process of international arbitral awards in Indonesia. This circumstance was once experienced by Australia prior to the amendment of the International Arbitration Act 1974 (Cth).

If Indonesian arbitration law wishes to adopt the Model Law, it is suggested that the approaches of the International Arbitration Amendment Act 2010 (Cth) of Australia. This approach is a second proposed model to the adoption of the Model Law in Indonesia. If this model was

accepted, then the conduct of international arbitration and the recognition and enforcement of its awards will be governed by the Model Law. Domestic arbitration and recognition and enforcement of its awards will be governed by Law No. 30 of 1999. The recognition and enforcement of foreign awards will be governed by Law No. 30 of 1999. Yet, the requirements and interpretations of provisions under Law No. 30 of 1999 for the purpose of recognition and enforcement of foreign arbitral awards will adopt the Model Law's approaches. The Model Law is consistent with the New York Convention, consequently the interpretations of provisions under Law No. 30 of 1999 will not violate the New York Convention.

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