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DISCRIMINATORY ARBITRATOR APPOINTMENT AND PUBLIC POLICY: A COMPARISON OF THE US, UK AND INDONESIA

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Abstract

This paper explores the intersection of arbitrator appointment and public policy by examining whether identity-based discrimination, specifically based on gender, religion, or race, can invalidate an arbitral award under the public policy exception in the 1958 New York Convention. Although party autonomy is a foundational principle in arbitration, there are issues over discriminatory practices in arbitrator selection. The purpose of this paper is to assess whether such discrimination violates public policy in member states of the New York Convention. Using a qualitative normative legal method, this study analyzes statutory frameworks, case law, and legal publications from the United States, United Kingdom, and Indonesia. A comparative approach is applied to determine whether anti-discrimination values are integrated into the definition and application of public policy. The findings suggest that while public policy may serve as a basis to refuse recognition and enforcement of arbitral award, the discriminatory arbitrator appointment does not necessarily violate public policy in the UK but the same is still untested in the US and Indonesia.

1. INTRODUCTION

Arbitration as an alternative dispute resolution has many distinct characteristics compared to a court dispute settlement. One of the particular characteristics of arbitration is the freedom of the disputing parties to choose the person who will adjudicate their dispute or the arbitrator. Once parties choose their arbitrator, the arbitrators will have the duty to be independent and impartial. The duty to be independent and impartial is imposed on arbitrators by most arbitration laws and institutional rules. As long as arbitrators are independent and impartial, there is, theoretically, no other restrictions in choosing arbitrators.

Despite this theoretical rule, there are concerns regarding the practice of discrimination of in the appointment of arbitrators based on race, religion or gender. The 2022 Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings

issued by the International Council for Commercial Arbitration shows that, although showing an increasing trend since 1990, only 26.1% appointed arbitrators are women as per 2021. In the United States, Asian and non-white arbitrators registered in Judicial Arbitration and Mediation Services and American Arbitration Association receive fewer cases than their proportional share (Chandrasekher, 2024). With these phenomena, arbitration scholars and practitioners are calling for equality in the appointment of arbitrators.

Notwithstanding the call for equality in the appointment of arbitrator, the lack of legal ground would make it challenging to argue that one shall not discriminate against race, religion and sex when choosing an arbitrator. After all, the principle of party autonomy, including autonomy to choose arbitrators, is the foundational principle of arbitration itself. This is reflected, among others, in the UK Supreme Court's decision in Jivraj v. Hashwani case (which will be explained further later) which upheld that an arbitration agreement is valid even though it contains religious requirement of the arbitrator.

Nevertheless, the authors argue that protection against discrimination in appointing arbitrators may be brought by reason of public policy. As Article V(2)(b) of the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**) stipulates, violation of public policy would result in refusal of recognition and enforcement of arbitral award. This means that if discrimination based on race, gender, and religion is deemed as violation of public policy in a member state of New York Convention, then any foreign award that contains such discrimination may not be enforced and recognized.

Given this, this paper intends to become an initial discussion towards such argument by reviewing and comparing compare rules regarding public policy in three New York Convention member states i.e. US, UK and Indonesia. To this end, the first part of this paper discusses public policy under New York Convention. Furthermore, the remaining parts will each discuss public policy rule under the US, UK and Indonesia. The objective is to see whether under the New York Convention and under the law of the three countries discussed, discrimination based on gender, race and religion is a violation of public policy.

2. RESEARCH METHODOLOGY

This article uses qualitative normative legal methodology, focusing on the analysis of statutes, legal norms, doctrines, and case law relevant to the arbitrator appointment and public policy. It also applies a comparison approach to examine the different legal frameworks of the United Kingdom (UK), United States (US) and Indonesia.

Primary legal sources include New York Convention, national arbitration laws, judicial decisions and public policy of each nation. Secondary sources such as academic journals, legal commentaries, and arbitration rules issued by international institutions are analyzed to support legal interpretation.

3. DISCUSSION

3.1. Public Policy under the New York Convention

New York Convention has been around since 1985 and currently has 172 parties. In relation to public policy, Article V(2)(b) of the New York Convention provides that recognition and enforcement of an arbitral award may be refused if it is contrary to the public policy of the enforcing state. However, the Convention does not define "public policy," leaving interpretation to national courts. It is emphasized that public policy can reflect a state's evolving legal order, including its international human rights obligations and constitutional values such as equality and non-discrimination (Kessedjian, 2020; Ferrari & Kroell, 2021). Courts may increasingly consider whether awards that result from discriminatory arbitrator appointments or that disregard gender, religious, or racial equality violate their public policy frameworks (Carlevaris, 2022).

In practice, a court may find a clause mandating arbitrator be of a specific religion or gender contradicts the country's anti-discrimination laws, thereby invoking the public policy exception. Particularly with international consensus around anti-discrimination and human rights protections, such identity-based restrictions in arbitrator appointments can be considered contrary to fundamental public policy. According to the IBA Report (2015), a growing number of legal systems consider identity-based exclusions to be incompatible with public policy, particularly where they restrict access to justice or reflect systemic bias. While courts continue to apply the public policy exception cautiously, identity-based arbitrator selection poses a credible risk of triggering it where the discrimination is clear, unjustified, and impacts procedural fairness. Thus, the exception serves as a safeguard against enforcing awards that undermine equal participation and human dignity in international arbitration.

Among the three jurisdictions compared in this article, public policy is interpreted differently by the relevant national court. Firstly, the United States applies public policy based on the New York Convention exception narrowly, requiring a clear and fundamental violation of national legal principles. In the case of Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier, 508 F.2d 969 (2d Cir. 1974), the Second Circuit held that the public policy defense under Article V(2)(b) of the New York Convention must be based on a strong and well-defined national interest. The court further ruled that public policy exceptions must reflect the most fundamental notions of morality and justice (Restatement, 1971.Secondly, Indonesia has invoked this exception in cases where arbitrator appointments did not meet national interest particularly when arbitrator appointment involve foreign nationals or candidates perceived as incompatible with Indonesian legal or cultural standards (Yusuf, 2021). Lastly, the UK, as party to the New

York Convention, mentions in Section 103 of the Arbitration Act 1996 that violation of public policy may be a ground to refuse recognition and enforcement of foreign arbitral award. While public policy is also not defined under the UK law, the Court of Appeal in *Deutsche Schachtbau- and Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co.,* Shell Intl Petroleum Co. Ltd. opines that contrary to public policy is anything that is "injurious to the public good" or which "enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public".

3.2. US' Public Policy relating to the Discrimination in Appointment of Arbitrators

a) Rules on the Appointment of Arbitrators in the US

In the US, the appointment of arbitrators is primarily governed by the FAA, along with the procedural rules of leading arbitration institutions such as the American Arbitration Association (AAA) and the International Centre for Dispute Resolution (ICDR). These institutions emphasize impartiality, independence, and competence, while upholding party autonomy in the selection process (Born, 2021). However, if the parties impose discriminatory criteria in their selection of arbitrators, such provisions may be scrutinized under anti-discrimination statutes and struck down as contrary to public policy (Kaufmann-Kohler and Rigozzi, 2015).

The US legal framework on discrimination in a broad sense ensures that arbitrator appointments are consistent with public policy values. Consequently, clauses that exclude candidates based on race, religion, or gender are likely to face legal challenges.

b) National Law on Discrimination in the US

Anti-discrimination law in the United States is grounded in several federal statutes, most notably the Civil Rights Act of 1964. Title VII of the Act prohibits discrimination in employment based on race, color, religion, sex, or national origin. However, its principles have been applied to arbitration cases where discrimination is alleged.

Statutes such as 42 U.S.C. § 1981 bans racial discrimination in contracts which highlights that the U.S. anti-discrimination laws extend to independent contractors. In the situation where arbitrator appointment is regarded as an independent contract, Courts have held that Section 1981 applies to arbitration agreements, meaning that racially discriminatory arbitrator selection clauses could be invalidated under federal law (Dasteel, 2012).

Furthermore, state and municipal laws, such as those in New Jersey and New York City, prohibit discrimination in contracting, extending protections to independent contractors. For instance, the New York City Human Rights Law specifically bans religious discrimination in contracting, which could be used to challenge arbitration agreements that require arbitrators to be of a particular religion.

These legal frameworks suggest that an arbitration agreement excluding arbitrators based on race, religion, or gender would likely be unenforceable under U.S. public policy, making it distinct from the UK and other pro-arbitration jurisdictions.

c) Discrimination as Violation of Public Policy in Arbitrators Appointment under US Law

The United States adopts a common law legal system in which public policy plays a critical but narrowly construed role in arbitration. The foundational law governing arbitration in the U.S. is the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, which ensures the enforceability of arbitration agreements and minimizes judicial intervention in arbitral proceedings. According to this framework, arbitration agreements and awards are valid, irrevocable and enforceable unless they violate public policy (Born, 2021). While party autonomy is given, the freedom to appoint arbitrators may be challenged as accord to U.S. anti-discrimination laws when discriminatory selection criteria is imposed.

In U.S. jurisdiction, arbitrators are considered neutral adjudicators rather than employees. This distinction, affirmed in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), separates arbitrators from the scope of most employment-based anti-discrimination statutes (Dasteel, 2012). However, U.S. law diverges from the UK position in *Jivraj v. Hashwani* [2011] UKSC 40, because the U.S. extends anti-discrimination protection to independent contractors. Therefore, discriminatory clauses affecting arbitrator appointments may still fall under legal scrutiny.

Public policy in the United States supports protecting statutory rights even in the face of binding arbitration agreements. In *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), the U.S. Supreme Court held that the Equal Employment Opportunity Commission (EEOC) could pursue a discrimination claim in court despite the existence of an arbitration agreement. This reinforces that arbitration cannot override statutory protections, including anti-discrimination principles (EEOC, 2002). Accordingly, arbitrator appointments that impose identity-based restrictions may be challenged as violating both federal public policy and the neutrality principles embedded in the FAA (Dasteel, 2012).

3.3. Indonesia's Public Policy relating to the Discrimination in Appointment of Arbitrators

a. Rules on the Appointment of Arbitrators in Indonesia

Arbitration in Indonesia is governed by Law No. 30 of 1999 on Arbitration (as amended) (**Indonesia Arbitration Law**). In relation to individuals who can be appointed as arbitrators, Article 12 of the Law stipulates that only individuals who (i) has capacity to conduct legal action; (ii) is at least 35 years old; (iii) does not have family relationship by blood or marriage, up to second degree, with one of the disputing parties; (iv) does not

have any financial interest or other interest over the arbitral award; and (v) have experience, as well as active master his/her sector for at least 15 year, can be appointed as arbitrators. Furthermore, the Indonesian National Arbitration Board (**BANI**) governs arbitration proceedings in Indonesia, providing clear guidelines on the appointment of arbitrators (BANI, 2021). Under BANI rules, arbitrators must be impartial, independent, and competent, with expertise in the relevant field of dispute resolution. While BANI permits the appointment of foreign arbitrators, parties often face restrictions under sector-specific regulations, particularly in disputes involving state-owned enterprises, natural resources, and financial arbitration.

Indonesian arbitration rules emphasize party autonomy, allowing disputing parties to select arbitrators based on qualifications and experience. However, challenges arise when parties insert restrictive conditions related to religion, gender, or nationality (Wibowo, 2020). While there is no legal framework preventing the appointment of female arbitrators, the preference of male arbitrators with extensive legal experience continues to shape arbitration in Indonesia (Mahmud, 2020). There is limited representation of female arbitrators in Indonesia, highlighting the broad discriminatory challenge faced by women in the legal sector. The interaction between public policy and anti-discrimination laws requires reforms to ensure great inclusiveness in arbitrator selection.

b. National Laws on Discrimination in Indonesia

There is no specific law that prohibits discrimination in choosing arbitrators under Indonesian laws. Generally, however, Indonesia's constitutional framework and statutory laws prohibit discrimination based on religion, gender, race, or nationality, principles that naturally extend to arbitral appointments. Law No. 39 of 1999 on Human Rights outlines protections against discriminatory practices, ensuring that individuals have equal rights and opportunities in legal and professional spheres. Additionally, Law No. 7 of 1984 on the Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) reinforces gender equality commitments.

These laws should apply to arbitration appointments, preventing restrictions that exclude arbitrators based on religion, sex, or nationality (Wijaya, 2020). However, as Indonesia is a country with diverse culture and with the influence of religious laws, the arbitral appointment is affected more by socio-cultural aspects than the national laws. This inconsistency can become an obstacle in challenging the appointment of arbitrators based on the New York Convention.

c. Discrimination as Violation of Public Policy in Arbitrators Appointment under US Law

Indonesia's legal system, shaped by its civil law tradition, emphasizes public policy

considerations to ensure that arbitrations align with national interests, legal stability, and socio-cultural values. The Indonesia Arbitration Law establishes the foundation for arbitration, granting party autonomy in selecting arbitrators while ensuring such appointments adhere to fundamental principles of fairness and equality. Public policy plays a significant role in determining the enforceability of arbitration agreements, particularly in matters related to the appointment of arbitrators. However, restrictions persist, particularly concerning religious, nationality, and gender factors, which can impact party autonomy and raise questions of anti-discrimination compliance (Rachman, 2021). Although party autonomy is a fundamental principle of arbitration, overly restrictive appointment conditions can lead to legal challenges.

Indonesia's diverse cultural and religious makeup complicates such matters, as courts often grapple with balancing party autonomy, fairness, and anti-discrimination principles (Rasyid, 2020). Indonesian public policy is based on legal integrity, justice standards, and public interest. However, judicial interpretation of public policy in 2022 has effects on arbitral appointments, with maintaining the authority of Indonesian courts to intervene when appointments are deemed contrary to national interests or violate fundamental rights (Yusuf, 2021). The interpretation broadens the meaning of public policy to include legal, economic and socio-cultural aspects of Indonesia, mainly affecting the enforcement of arbitral awards, with some effects on arbitral appointment itself. Indonesia public policy favors domestic socio-cultural aspects which can have effects on the arbitrator selection. That said, how Indonesian court interprets violation of public policy, especially relating to arbitrator appointment, remains subject to future discussion as the case relating to this topic is limited, if not none.

3.4. UK's Public Policy relating to the Discrimination in Appointment of Arbitrators

a. Rules on the Appointment of Arbitrators in the UK

In the UK, arbitration is governed under the Arbitration Act 1996. The appointment of arbitrator is specifically regulated under Section 16 of the Arbitration Act 1996 where its paragraph (1) mentions that the parties are free to agree on the procedure of appointment of arbitrator or arbitrators as well as chairman or umpire. The said provision emphasizes that the appointment of arbitrator is based on party autonomy, similar to any other countries, with no written limitation on the autonomy itself including prohibition of appointment based on race, age, and religion.

b. National Laws on Discrimination in United Kingdom

There is no specific rule on anti-discrimination in relation to appointment of arbitrator. Both the Equality Act 2010 and the Arbitration Act 1996 do not specifically prohibit discrimination in the selection of arbitrators. There is, however, the Employment

Equality (Religion or Belief) Regulations 2003 (**Employment Equality Regulation**) (which is now a part of the Equality Act 2010) which has the purpose to eradicate *discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation.* The Employment Equality Regulation is derived from European Commission Council Framework Directive 2000/78/EC of 27 November 2000. The Directive applies to all persons in relation to conditions for various employment access by all persons in public and private sectors.

The closest to avoiding discriminatory treatment in appointment of arbitrator may come from the arbitration institutional rule. The homebred arbitration institution in the UK, London Court of International Arbitration (**LCIA**) sets out a rule in relation to the nationality of the arbitrator. Under Article 6 of the LCIA Rule, sole arbitrator or the presiding arbitrator cannot have the same nationality or citizenship as the parties in the dispute, unless the parties agree in writing. Other than ensuring the independence and impartiality of the arbitrator, this rule may also be a way to prevent parties to the dispute choosing only a certain nationality as their appointed arbitrators as well as widening the pool of options for arbitrator selection. However, this does not address the discriminatory treatment based on religion, race and gender.

A reform on the Arbitration Act 1996 towards recognition of equality when choosing arbitrators, however, is not yet in sight. In 2023, the Law Commission issued a report on the Review of the Arbitration Act 1996. Although the topic of discrimination in the arbitrator's appointment came up, the recommendation from the Law Commission is that the Arbitration Act 1996 should not be amended to prohibit discrimination in the appointment of arbitrators. The reasons are, among others, the Equality Act 2010 should still be sufficient to prevent discrimination in the context of who can be nominated for arbitral appointments and that an arbitration agreement can still be rendered unenforceable when it is contrary to the Equality Act 2010.

c. Discrimination as Violation of Public Policy in Arbitrators Appointment under UK Law

Notwithstanding the Equality Act 2010, the UK arbitration law do not recognize the application of such Act in arbitrator appointment context. This view is shaped by the landmark the decision of the UK Supreme Court in *Jivraj v. Hashwani* [2011] UKSC 40.

In *Jivraj*, the arbitration agreement mentions that each party to the arbitration agreement is allowed to choose one arbitrator, but all the chosen arbitrators shall be "respected members of the Ismaili community" and holder of high office within the community. Mr. Hashwani (respondent) claimed that he is not bound to the agreement to choose an arbitrator from a certain religious background and that such requirement is

discriminatory and violates Human Rights Act 1998 so that such requirement shall be void.

In relation to this, the Court of First Instance and the Court of Appeal opined differently. When presented with question on whether the Employment Equality Regulation may apply in the relevant case, the Court of First Instance opined that arbitrators are not "employee" in the context of the said law. Under Employment Equality Regulations, *'employment'* means *"employment under a contract of service or of apprenticeship or a contract personally to do any work, and related expressions shall be construed accordingly…"* According to the Court, the relationship between arbitrator and the party who appoints them does not constitute as "employment". Because of this, prohibition on discrimination under the Employment Equality Regulation does not apply in this situation. However, the Court of Appeal later dismissed this view by opining that the appointment of an arbitrator is a contract for the provision of services which constituted "a contract personally to do any work". Hence, the relationship between arbitrators and the party who appoints them, according to the Court of Appeal, is "employment". Therefore, the Employment Equality Regulations, including its prohibition on discrimination, applies to the case and thus requirement to appoint arbitrator from the Ismaili community is an unlawful discrimination on religious grounds.

That said, the UK Supreme Court sided with the Court of the First Instance with some important points that clarify the UK arbitration law. Firstly, arbitrator is not an employee of the party who appoints them. Under Section 33 paragraph (1) of the Arbitration Act 1996, the tribunal has the obligation to act fairly and impartially. With this basis, an arbitrator cannot be said as performing "services" for the party who appoints them. Given this, the Employment Equality Regulations, and thus its prevention of discrimination to employee, cannot apply to arbitrators. Secondly, the Supreme Court assessed whether choosing an arbitrator based on a religion is violating English law. To this, the Supreme Court brought back the principle of party autonomy under the Arbitration Act 1996 and found that appointment of arbitrator based on the arbitrator's religion and believe is a part of party autonomy. At the end of the day, this particular decision of UK Supreme Court shapes the English arbitration law in that choosing arbitrators based on aspects such as religion, and possibly other aspects such as gender and ethnicity, is allowed and will not render the arbitration agreement invalid.

4. CONCLUSION

In conclusion, discriminatory practices of choosing arbitrators based on their gender, religion and race is taken differently in each jurisdiction that is the subject of this article. In the US, discrimination in choosing arbitrators may be deemed as violation of public

policy based on their discrimination laws. In Indonesia, discrimination is also a part of its national laws and violation to this will be contrary to public policy. Despite this, there are no cases yet in the US and Indonesia that put this understanding to test. On the contrary, the UK has a clearer standard in this matter. Even though discrimination is a part of its national law, if it is in the context of arbitrator's appointment, the UK Supreme Court in *Jivraj* clarifies that such discrimination is not against English law and it will not render the arbitration agreement invalid. Hence, among the three jurisdictions of the New York Convention state parties observed in this article, only UK gives us clarity of the implementation of public policy exception in the practice of arbitrator appointment. We can draw a conclusion that that any arbitration agreement that puts requirement of race, gender and religion in their selection of arbitrators can be enforced in the UK.

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