

THE 1958 NEW YORK CONVENTION IN INDONESIA: HISTORY AND COMMENTARIES BEYOND MONISM-DUALISM

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Abstract

This Article recounts a complete history of Indonesia's implementation of the 1958 NY Convention. In particular, the elaboration and analysis focus on the comparison between related provisions in the 1999 Indonesian Arbitration Law and the Convention's provisions as well as on several key Indonesian court decisions on enforcement of foreign arbitral awards. Different than other writings in this area, this Article looks more closely at the practical issues which affect the way Indonesian courts apply or interpret the 1958 NY Convention, such as procedural hurdle and the judicial capacity to comprehend and understand basic concepts and principles of arbitration. The Article shows that those practical issues very much influence the implementation of the Convention in Indonesia while the courts oscillate between monism and dualism, and highlights the important role of doctrines in developing Indonesian jurisprudence on this area. In that vein, the conclusion here may also contribute in answering the wider question about the position of treaties under Indonesian law and how they are implemented in Indonesia beyond the superficial debate on monism-dualism.

Keywords: *New York Convention, international commercial arbitration, recognition and enforcement of foreign arbitral awards, annulment of arbitral awards, setting aside of arbitral awards, monism, dualism, Karaha Bodas, Astro case, Indonesian arbitration law*

Abstrak

Artikel ini menguraikan sejarah lengkap pelaksanaan Konvensi New York 1958 oleh Indonesia. Secara khusus, penjelasan dan analisis terfokus pada perbandingan antara ketentuan-ketentuan di UU Arbitrase 1999 dan ketentuan-ketentuan di Konvensi serta beberapa kasus-kasus pengadilan yang penting mengenai pelaksanaan putusan arbitrase asing. Berbeda dengan tulisan-tulisan lain yang membahas pelaksanaan Konvensi New York 1958 di Indonesia, Artikel ini menganalisis lebih lanjut masalah-masalah praktis yang mempengaruhi aplikasi dan penafsiran Konvensi tersebut oleh pengadilan Indonesia, misalnya hambatan prosedural dan kapasitas pengadilan untuk memahami dan menguasai konsep-konsep dan asas-asas dasar arbitrase. Artikel ini menunjukkan bahwa masalah-masalah praktis tersebut sangat mempengaruhi implementasi Konvensi New York 1958 di Indonesia sementara pengadilan mengambil posisi yang berbeda-beda antara monisme dan dualisme dalam putusan-putusannya, serta menyoroti peran sentral dari doktrin dalam mendorong pengembangan yurisprudensi di bidang ini. Dalam konteks yang lebih luas, kesimpulan dari tulisan ini dapat memberikan kontribusi terhadap perdebatan akademis mengenai posisi perjanjian internasional dalam hukum Indonesia dan bagaimana perjanjian-perjanjian internasional diimplementasikan di tataran yang lebih dalam daripada dikotomi antara teori monisme-dualisme.

Kata kunci: *Konvensi New York, arbitrase komersil internasional, pengakuan dan pelaksanaan putusan arbitrase asing, pembatalan putusan arbitrase, monisme, dualisme, Karaha Bodas, kasus Astro, hukum arbitrase Indonesia, UU arbitrase*

I. INTRODUCTION

This Article broaches the issue of the application of treaties in Indonesian legal system through the lens of Indonesian legislative and court practices on the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards [‘1958 NY Convention’ or ‘Convention’],¹ a convention under which a state party in principle undertakes to recognise and enforce foreign arbitral awards. The main purpose is to provide a complete historical account of the Convention’s implementation in Indonesia and related practical issues in particular regarding domestic capacity: to examine the factors which may affect the way that Indonesia, in particular its courts, apply or interpret the 1958 Convention directly. In that regard, this Article goes beyond passing a general judgment on Indonesia’s implementation of the Convention. The report card has been handed through numerous commentaries elsewhere, and it’s no breaking news to say that the grade is generally unsatisfactory.²

In the wider context of international law generally, the elaboration here will contribute in showing that those practical issues often are much more determinative in shaping a treaty’s domestic implementation and shed more light rather than dwelling in a never-ending conundrum of monism or dualism as the two theories so far dominating the discourse on the position and effect of international law in Indonesian legal order.

In his seminal article on the position of international law within the Indonesian legal system, Prof. Butt (tentatively) concluded:

“[...] Indonesia may well be monist, at least at law. Whether incorporation is necessary is likely a practical rather than legal matter, and depends on the nature of the international agreement and the types of rights and obligations it imposes.”¹ (ed.).

He further remarked:

“[...] if an international agreement introduces new legal concepts or contradicts pre-existing Indonesian law, then most police, prosecutors, public servants and even judges will not usually apply them directly without “transformation.” There are various possible practical explanations for this disinclination which I do not examine in this Article, including lack of knowledge about the agreement, politics, budgetary limitations, lack of initiative and bureaucratic insularity.”²

Picking up on the remarks above, the practical circumstances affecting the implementation of a treaty will be illustrated in the context of the 1958 NY Convention. In that vein, this Article again goes beyond the superficial issue regarding the incorporation or transformation (i.e. whether a treaty can be self-executing or needs to be transformed into a domestic legal instrument).

While the choice of focus on the 1958 NY Convention is indeed quite narrow, such choice is made because that Convention is probably one of the few treaties (if not the only one) with an abundant and easily identifiable trail of application by Indonesian courts. Law No. 30/1999 on Arbitration [‘1999 Arbitration Law’]³ provides for the exclusive jurisdiction of the Central Jakarta District Court on matters of recognition and enforcement of foreign arbitral awards.⁴ This results in a unique situation in Indonesian judicial practice where an area of law is dealt with exclusively by a single district court, with further legal recourse only exist in the form of cassation

¹ Simon Butt, “The Position of International Law within the Indonesian Legal System,” *Emory International Law Review* Vol. 28 (2014): 5 [‘Butt’]

² *Ibid.*, p. 11.

proceedings directly before the Supreme Court.⁸ Hence it is much easier to locate and gather a large body of jurisprudence compared to other areas of law.

Indonesian domestic courts may well deal with many cases touching upon those international law instruments. However, court decisions are not regularly and systematically published, indexed and annotated. There are only a few journal articles or commentaries comprehensively analysing Indonesian court practices on matters of international law.⁹ Therefore, the approach here is to focus on the 1958 NY Convention, while leaving it to further studies to test whether the conclusions can serve as the basis for further inquiry into possible extrapolation in other areas of law or in Indonesian law generally.

As the wider context of this Article is the position of international law in Indonesian legal system generally, the Article will first recount and summarise the more fundamental and general debate on the status and position of international treaties in Indonesian legal system – the battle between monism and dualism (section II). It will then turn specifically to the 1958 NY Convention, where the history of the Convention-related cases before Indonesian courts as well as a comparative examination between the Convention and relevant provisions in the 1999 Arbitration Law both show that Indonesia and its courts have been oscillating between dualism and monism (section III). The history will also reveal that there are more practical problems regarding how the Convention have actually been interpreted and applied by the courts irrespective of monism or dualism. Some of the practical backgrounds, causes and possible solutions will be examined in the last section (section IV) before the Article ends with the Conclusion.

II. MONISM AND DUALISM: THE INDONESIAN CONUNDRUM

Any discussion on the application of treaties in a given domestic law would invariably begin with the dichotomy between monism and dualism. Some domestic laws adhere to the paradigm of monism, taking the view that there is no distinction between international and domestic law and that national courts may rely on international law whenever necessary. Other states, meanwhile, adhere to dualism which regards international law and domestic law as inherently distinct and requires states to undertake certain actions (often a legislative act of implementation) before international law rules and principles may be relied upon in national courts.

These two concepts are not mandatory in nature, and neither prevails over the other. Due to state sovereignty, it is for individual states to decide for themselves how international law is to apply and have effects within their domestic legal systems. Hence some states have been known to be generally monist, while others dualist. However, the question can be difficult and there can be subtleties and complexities even within a given domestic law. For instance, in common law countries such as the United Kingdom and the United States, customary international law is directly applicable without more, while treaties must be incorporated into domestic legislation to have effects under domestic law.¹⁰ Several states clearly express their position in their constitution.¹¹ Several others may rely on universal and consistent domestic jurisprudence or legal commentaries which affirm the monist or dualist nature of their state.¹²

Indonesia has none. As such there is still a lively and endless debate on the position and force of international legal instruments within Indonesian law. The only provision in the Indonesian Constitution related to international law is Art. 11, which

essentially provides that the president declares war and peace as well as conclude treaties with other states. That provision does no more than conferring certain powers to the president pertaining to foreign or external affairs, and certainly does not clarify the position of international law within the Indonesian legal system one way or the other. Two legislative acts which are most directly related to international law, Law No. 24/2000 on Treaties³ and Law No. 37/1999 on Foreign Relations,⁴ do not address this particular question directly.

To the best of our knowledge, the Indonesian judiciary has never directly addressed this issue. In some cases, the courts refer to international treaties directly but without articulating its position on the monism-dualism debate. This most often occur in relation to the 1958 NY Convention (as elaborated further below). Apart from that, the Supreme Court referred to the 1961 Vienna Convention on Diplomatic Relation to affirm the immunity of the Saudi Arabia's embassy from enforcement of a court judgment in one case.⁵ While in another case, the Supreme Court referred to the 'precautionary principle' under Art. 15 of the Rio Declaration, holding that the principle constitutes *jus cogens* that can be applied as the governing rule in environmental tort claim.⁶ There are relatively more cases where international law instruments are referred to in the Constitutional Court,⁷ but again the court never clarified its view (if any) of the basic position of international law in Indonesia's domestic legal system. The closest that this issue had been addressed is in the *ASEAN Charter* case, where a group of NGOs challenged the constitutionality of Law No. 38/2008 ratifying the ASEAN Charter.⁸ In that case, the government presented an expert witness, Dr. Wisnu Dewanto, a strong proponent of dualism.⁹ However, Dr. Dewanto's views eventually were not addressed in the judgment. Hence the court, for better or worse, did not use the opportunity to clarify in principle the legal effect of treaties under Indonesian law.

Legal commentaries, meanwhile, have often addressed this issue but there is still no unanimity. For various reasons, some scholars take a monist view while some others are dualists.¹⁰ It is said that the balance tips for dualism. As observed by Prof. Butt:

*"Most Indonesian scholars conclude that Indonesia is dualist, at least in respect of treaties, observing that many ratified international treaties lie dormant and unenforceable until they are transformed into domestic law by statute or regulation."*¹¹

But as shown in the Introduction above, even Prof. Butt himself argued (at least tentatively) that Indonesia is monist at law, if not at practice. Furthermore, it should be noted that the main proponent of monism in Indonesia is also perhaps the most respected and renowned international law scholar in Indonesian history, Prof. Mokhtar Kusumaatmadja, former Minister of Foreign Affairs as well as former member of the International Law Commission.¹²

In conclusion, there is still no definitive position for international law in Indonesian legal system. A few Indonesian elder statesmen on international law and constitutional law have said in one occasion that they doubt the issue will be solved, at least for the foreseeable future, among others for lack of political will and conduciveness to amend the Indonesian constitution in that regard.¹³ So far, the discussion in this section concerns Indonesian law generally. The fog may somewhat clear when one turns to specific treaty or area of law. The section below provides such analysis as it pertains to arbitration and the 1958 NY Convention.

³ Butt, *op.cit.*, pp. 5, 11, citing Mochtar Kusumaatmadja and Etty Agoes, *Pengantar Hukum Internasional*, 2nd ed., (Bandung: Alumni, 2003), p. 94.

III. THE 1958 NY CONVENTION IN INDONESIA: A HISTORY

Prior to Indonesia's accession to the 1958 NY Convention, Indonesian civil procedural law did not recognise or enforce foreign arbitral awards.⁸ The accession was done through a presidential decree in 1981, with a reservation made pursuant to Art. 1(3) of the Convention which confines its application only to:

1. recognition and enforcement of foreign arbitral awards made in the territory of another State party (the so-called 'reciprocity reservation'); and
2. differences arising out of legal relationships that are considered commercial under Indonesian law (the so-called 'commercial reservation').⁹

Nevertheless, it would take a further decade before Indonesian courts began giving effect to the Convention by recognising and enforcing foreign arbitral awards. Afterwards, the application of the Convention has undergone various stages, each appeared to reflect the different paradigm of monism and dualism. Furthermore, there have been many instances where Indonesian courts did not appear to correctly comprehend the content of the Convention. These historical periods are dealt with in turn.

A. Dualist 1980s: the Convention in Abeyance

Understandably, the accession to the Convention by Indonesia in 1981 was welcomed as an important milestone in ushering a friendlier environment for international commerce and trade. The country was still enjoying an oil bonanza which had started in the 1970s, and the government was to embark on significant economic deregulation in the 1980s to boost manufacturing and other economic sectors. However, throughout the decade there was actually no recognition and enforcement of foreign arbitral awards at all. Then, the courts displayed a dualist stance as they refused enforcement of foreign awards in the absence of any implementing regulation.

In the 1980s, there were 2 widely known Indonesian cases regarding non-enforcement of foreign arbitral awards. In *Navigacion Maritime Bulgare v. Nizwar*,¹⁰ the Supreme Court held that the ratification of the 1958 NY Convention further requires a set of implementing regulations to enable recognition and enforcement of foreign arbitral awards. Thus, the foreign arbitral award in that case could not be enforced as there had been no such implementing regulation. The crux of the court's concern appeared to be that there was still no specific and concrete procedure for such recognition and enforcement. For instance: which district court should issue the *exequatur*? Is it the court where the award-debtor is domiciled or the district court where the assets are located? What if there are several assets located in different district court jurisdictions? There were views that the application for *exequatur* should be made directly to the Supreme Court, while some others suggested that a single district court should be vested with exclusive jurisdiction to recognise and enforce foreign arbitral awards.¹¹ Questions on procedural mechanism can even be more mundane such as 'which section or desk in the court's registrar office should handle an application for *exequatur*?'. One can go on.

Most notably, Prof. Gautama criticised the Supreme Court decision because in his opinion the 1958 NY Convention is 'self-executing' and does not require any implementing regulation.¹² But a few of those questions above, from the fundamental and complex issue of possible overlap of district court jurisdictions to the mundane ones, show that practical hurdles in a treaty implementation cannot be taken lightly. For instance, parallel enforcement proceedings in different district court may render different results. These are problems which cannot be solved simply by relying on

the theories of monism or dualism or the presumption of 'self-executing treaty'. Indeed, the Supreme Court later issued Regulation No. 1 of 1990 ['1990 Supreme Court Regulation'], specifically outlining the mechanism to recognise and enforce foreign arbitral awards in Indonesia to allow for the implementation of the 1958 NY Convention.

In another case, *Trading Corporation of Pakistan v. Bakrie & Brothers*,⁸ the Supreme Court refused the enforcement of a foreign arbitral award rendered in London – again because there had been no implementing regulation. Interestingly, the court also went out of its way to purportedly rely on the grounds of reciprocity to further support its decision. There, the court held that the award at issue falls outside the ambit of the 1958 NY Convention because the claimant in the arbitration is a Pakistani company while Pakistan at that time was not a state party to the Convention.⁹ This is obviously a misapplication of the reciprocity provision in Art I(2) of the Convention. The reciprocity reservation under the Convention, which was also replicated in Indonesia's own reservation, is to apply for awards "made [...] in the territory of another Contracting State." Hence the fact that Pakistan was not a contracting state of the Convention at the time was irrelevant; the relevant factor instead is the place where the award was made, namely the United Kingdom. This was probably the first instance of Indonesian courts erroneously applied the 1958 NY Convention. Several more were to come as will be elaborated below.

B. The 1999 Arbitration Law: Convention (mostly) not followed and ignored

Indonesia enacted its arbitration legislation in 1999 in the wake of the Asia-wide monetary crisis that also hit Indonesia badly and ended the long reign of president Suharto. This enactment was also in line with the trend toward the liberalisation and modernization of national arbitration laws, which took place in various parts of the world.¹⁰ In particular, the International Monetary Fund required a reform of the Indonesian arbitration law as part of its assistance package, making Indonesia 'a more investment-friendly environment'.¹¹ The 1999 Arbitration Law contains specific provisions in Arts. 65-69 laying out the mechanism as well as the grounds to recognise and enforce foreign arbitral awards. On the surface, much of these provisions appear to follow the contents of the 1990 Supreme Court Regulation.

Under the 1999 Arbitration law, a foreign arbitral award is to be recognised and enforced based on an application submitted to the Central Jakarta District Court as the district court with exclusive jurisdiction on the matter.¹² A decision by the President of the district court to issue an *exequatur* is final and not subject to any appeal, while a decision to refuse enforcement or *non-exequatur* is subject to cassation directly to the Supreme Court.¹³

The requirements for an enforceable foreign arbitral award are set out in art. 66 of the 1999 Arbitration Law, namely:

1. the award must be rendered in a country bound by a treaty concerning recognition and enforcement of foreign arbitral awards with Indonesia – the reciprocity requirement;
2. the award must fall within the scope of commercial law under Indonesian law – the 'arbitrability' requirement; and
3. the award must not be contrary to public order.¹⁴

Art. 67(2) then sets out the documents that the applicant for *exequatur* must submit, namely:

1. the original copy or certified true copy of the award and its Indonesian translation;
2. the original copy or certified true copy of the arbitration agreement and its Indonesian translation; and
3. declaration from the Indonesian diplomatic representative at the place the award is rendered certifying that both Indonesia and that country is bound by a treaty concerning recognition and enforcement of foreign arbitral awards.

Based on the overview of the provisions above, there are at least three discrepancies between the 1999 Arbitration Law and the 1958 NY Convention. *First*, the 1999 Arbitration Law appears to start from a position that foreign arbitral awards are not enforceable. Despite recognizing that arbitral awards in principle are final and binding upon the parties,⁴ the grounds set out in art. 66 above are 'grounds for enforcement'.⁵ This is different from the presumption, as reflected in the wording of Art. V the Convention, that a foreign arbitral award is enforceable unless there exist any ground to refuse enforcement.⁶

Second, the grounds to refuse enforcement under Art. V of the 1958 NY Convention are not replicated in the 1999 Arbitration Law. As a logical result of the contradicting presumption elaborated in the first point above, the 1999 Arbitration Law does not contain any particular provision enumerating the grounds to refuse enforcement. In such circumstances, Arts. 66 and 67(2) of the 1999 Arbitration Law (as elaborated above) in effect serve as grounds to refuse enforcement if any of the requirements in those provisions is not satisfied. In this sense, the 1999 Arbitration Law provides fewer grounds to refuse enforcement than Art. V of the Convention – only Art. V grounds related to arbitrability and public policy are reaffirmed.⁷ To some people, this may be considered as a welcomed application of the 1958 NY Convention and bring Indonesian arbitration law closer to the pro-enforcement policy underpinning the Convention. Nevertheless, as will be later elaborated, this would not stop Indonesian courts from directly relying on other grounds under Art. V of the Convention to refuse enforcement in subsequent cases – a right position to take.

Third, the declaration from the Indonesian diplomatic representative required for enforcement under Art. 67(2) of the 1999 Arbitration Law is problematic. As have been said elsewhere:

"This may potentially constitute a breach of art. III of NYC."⁴ "The question of whether there is a breach of art. III of NYC would hinge on whether the requirement to provide the embassy certificate is 'substantially' more onerous than the ones provided in the convention. On the one hand, the process of obtaining an embassy or consular certificate may not be too much of a hassle in terms of effort, time and expenses. However, in some situations this requirement may indeed become substantially burdensome. The most obvious example is if the foreign award is rendered in a country that have ratified the Convention but with which Indonesia does not have diplomatic relation (e.g. Israel)."⁵

It appears that the precursor of this requirement was Art. 5(4)(c) of the 1990 Supreme Court Regulation,⁸ which itself followed-up from the Supreme Court consideration in *Trading Corporation of Pakistan v. Bakrie & Brothers* (as discussed above). During those times before the internet and online resources were readily available (in particular the Convention's own dedicated website providing authoritative list of contracting states⁹), perhaps the Supreme Court felt the need for

⁴ Soemartono & Lumbantobing, *op.cit.*, p. 343.

⁵ *Ibid.*, p. 342.

an authentic proof of reciprocity from an Indonesian diplomatic representative. It is questionable whether this requirement should still be necessary in this day and age. Nevertheless, Art. 67(2) is an improvement over those previous precedents in that it correctly rests the test of 'reciprocity' on the place where the award is made (i.e. seat of arbitration), not on the origin of the applicant for enforcement.

The three discrepancies above occurred because, even on plain reading, the 1958 NY Convention appeared to be mostly ignored in the drafting of the 1999 Arbitration Law. While in the course of this research we unfortunately have not been successful in locating and obtaining the preparatory works (*travaux préparatoires* or, in Dutch, *memorie van toelichting*) or the academic draft of the 1999 Arbitration Law, such observation can be made on a *prima facie* basis from the fact that the 1958 NY Convention or the 1981 Presidential Decree (the instrument of Indonesia's accession to the Convention) was not mentioned anywhere in the texts or official elucidation of the law. It should also be noted that the UNCITRAL Model Law on International Commercial Arbitration also was not used or considered in the drafting of the 1999 Arbitration Law, another point of importance as will be elaborated further.

C. Monist 2000s: riding the Convention on a bumpy journey

Interestingly, a new phenomenon occurred after the enactment of the 1999 Arbitration Law: the courts turned monist by directly relying and citing the 1958 NY Convention's provision (sometimes even in the absence of corresponding provision in the 1999 Arbitration Law), albeit oftentimes with baffling or insufficient consideration. These cases may be classified and discussed in the context of three issues.

First, on the basic conceptual distinction between 'refusal of enforcement' and 'setting aside' (or annulment) of arbitral awards. This brings us to the notorious case of *Karaha Bodas*,⁸ where Pertamina brought an application to the Central Jakarta District Court both to set aside as well as refuse enforcement of an UNCITRAL award rendered in Switzerland. The first erroneous application of the 1958 NY Convention in the case concerns the use of Art V of the Convention as a basis to 'set aside' an arbitral award. This obviously conflated the setting-aside of an award with non-enforcement; the 1958 NY Convention itself only applies in enforcement action and not for setting-aside or annulment proceedings.⁹ Unfortunately, the district court made the same error in the judgment. Throughout the district court's consideration, it constantly relied on Art. V of the 1958 NY Convention as a basis to 'set aside' the UNCITRAL award while also declaring the same award as unenforceable in a single breath.¹⁰

Subsequent district court decision in one of the *Astro* cases have thankfully rectified this misunderstanding and very clearly distinguish setting aside proceedings from the one concerning enforcement.¹¹ The court wrote, "[...] in the opinion of the Court it is not correct if a demand for non-exequatur is joined or consolidated with a demand for annulment [...]".¹² The court based its consideration directly by quoting the opinion of noted scholars and arbitration practitioner: Prof. Hikmahanto Juwana, Dr. Tin Zuraida and Tony Budidjadja.¹³

Second, on the jurisdiction to set aside a foreign arbitral award. The 1999 Arbitration Law itself does not expressly and specifically deal with the setting aside of foreign arbitral awards. This is perhaps for good reason, because it is widely accepted (including under the 1958 NY Convention) that annulment of an arbitral award is subject to the jurisdiction of the court of the seat.¹⁴ Given the lacunae, the district court in *Karaha Bodas* directly relied on Art V(1)(e) of the 1958 NY Convention, which refers

to an annulment of arbitral award by “a competent authority of the country in which, or under the law of which, that award was made.” The court considered that it has the competence to set aside the Swiss award because the pertinent contracts between the parties are all governed by Indonesian law.⁶ While Indonesian law was without doubt the law governing the ‘substance’ of the dispute, the court did not specifically analyze or clarify whether Indonesian law is also the law governing the ‘procedure’ of the arbitration or the arbitral award.⁷ In the end, the district court asserted jurisdiction to set aside the *Karaha Bodas* award, a foreign award rendered in Switzerland.

Fortunately, the Supreme Court overturned the district court judgment on the basis that Indonesian courts do not have the jurisdiction to set aside foreign arbitral awards⁸ and furthermore issued an official guidance for all district courts expressly stating: “*The object of the application to set aside is for domestic arbitral award,*”⁶ Hence the Supreme Court reaffirmed the internationally recognised principle that the court with jurisdiction to set aside an arbitral award is the court at the seat of arbitration. In its decisions, the Supreme Court also referred directly to the 1958 NY Convention.⁹ Subsequent judgments have since followed this stance, including judgments by both the Supreme Court¹⁰ as well as the Central Jakarta District Court.¹¹

Third, and last one, on the application of ‘public policy’ under Art. 5(2)(b) of the 1958 NY Convention as a ground to refuse enforcement of a foreign arbitral award. The district court in *Karaha Bodas* held that the Swiss award was unenforceable after directly citing arts. V(1)(d) and (e) as well as art. V(2)(b) of NYC.¹² It is unclear, however, in what way the Court applied those grounds. After citing the provisions, the Court went on to consider that the award prejudiced the economic interest of the Indonesian state, that the arbitral tribunal disregarded Indonesian law, and that the composition of the arbitral tribunal was in violation of the parties’ agreement.¹³ The Court did not specify which particular provision of the Convention serves as the basis for each of those considerations. By taking such broad strokes, it appears that all those consideration (at the very least, a mere error of law without a particular showing of ‘manifest disregard of the law’) fall within the ambit of ‘public policy’ warranting *non-exequatur*.¹⁴ These were all considered by the district court without any reference to previous court decision, doctrine, or any other interpretative sources.¹⁵

Time and space do not permit a detailed and thorough discussion of this particular aspect, other than noting that it has been widely commented that Indonesian courts take a very expansive view of what constitutes ‘public order’ or ‘public policy’ which may often be inconsistent with the 1958 NY Convention.¹⁶

⁶ Indonesia, Supreme Court, *Pedoman Pelaksanaan Tugas dan Administrasi Pengadilan (Guidance on the Implementation of the Tasks and Administration of the Courts)* (2007), p. 178.

IV. BEYOND MONISM-DUALISM: WAYS TO ADVANCE A MORE HARMONIOUS TREATY IMPLEMENTATION

The elaboration in Chapter III above makes plainly clear that much of the issues in the application or interpretation of the 1958 NY Convention by Indonesian courts do not rest on the lack of affirmative monism or dualism position. In fact, practical issues such as procedural hurdles, or erroneous application of the Convention for lack of understanding of certain arbitration concepts and rules, would not have been remedied simply by Indonesia expressly choosing either monism or dualism. The question, then, is how to improve domestic treaty practice on the Convention and better align the implementation with the wording of the Convention as well as international practice.

Among others, Prof. Strong have highlighted less dogmatic approaches which have been used.² The approaches, which are meant to work in tandem with one another, are distinguished as 'vertical' and 'horizontal' approach.² The 'vertical' approach involves the issuance of a recommendation by an international body – typically the one initiating the respective convention or the one with an area of competence encompassing the subject matter of the convention – regarding the interpretation and application of a particular convention.² It is hoped that such recommendation may serve as a persuasive guide for implementation by national authorities or domestic courts, hence encouraging as much harmony as possible with the international commitments of the state. The most direct example in this context is the UNCITRAL Recommendation regarding Art II(2) of the 1958 NY Convention.² That provision concerns the definition of the term 'agreement in writing', which states are obliged to recognize (as far as arbitration agreement is concerned) under Art II(1) of the Convention. The Recommendation was put together because in practice there have been divergence in the interpretation of 'agreement in writing' by the courts of state parties - some domestic courts have very strictly required that an arbitration agreement take the form of a proper written contract while other domestic courts have been more liberal in finding for arbitration agreements in the absence of such express contract.²

The 'horizontal' approach involves the UNCITRAL Model Law on International Commercial Arbitration ['UNCITRAL Model Law'].² As far as recognition and enforcement of foreign arbitral awards is concerned, Art. 35 and 36 of the UNCITRAL Model Law were drafted based on Arts. III and V of the 1958 NY Convention (with identical wordings in many respects) to advance the provisions of the Convention and overcome problems regarding domestic arbitration laws deviating with the terms of the convention.² Therefore, it is hoped that once a state use the UNCITRAL Model Law as a basis in adopting its arbitration legislation (either in whole or with modifications), harmonious application of the Convention is also achieved.

The 'vertical' and 'horizontal' approach is all well and have been shown to work in many countries. UNCITRAL studies showed that its interpretative guide on Art II(2) of the 1958 NY Convention has been well-received in many jurisdiction, leading to a consolidation or reaffirmation of the recommended expansive approach.² Meanwhile, the UNCITRAL Model Law also has been a tremendous success with 80 states now considered as 'Model Law' states.²

However, both approaches have not, or do not appear to have, made headway in Indonesia. That situation may remain for a long time. The Indonesian Arbitration Law does not adopt the UNCITRAL Model Law, and in any case the Model Law also was

generally not considered as a starting point in drafting the 1999 Arbitration Law.⁷ As far as following recommendation or interpretative guide by international body is concerned, there are good reasons not to be optimistic. The attitude of Indonesian courts towards such guides can be uncertain and ambivalent.⁸ For instance, in one case the Indonesian Constitutional Court remarked “[...] *that international law instruments and the United Nations’ recommendation cannot in itself (an sich) be used as a marking stone in considering the constitutionality of the threshold for a child’s legal liability;*”⁷ Hence it appears that the court will not follow the ‘vertical’ approach without more bases rooted in Indonesian domestic law itself. At any rate, the success of either the ‘vertical’ or ‘horizontal’ approach ultimately hinges on the ability of the courts in interpreting legal instruments (in particular international instruments).

In that vein, we can note these astute observations from eminent figures in international law and Indonesian law, respectively. Prof. Higgins, former President of the International Court of Justice, wrote with regard to monism-dualism:

“Related to the great jurisprudential debate is a further reality not to be found in the textbooks, but which must be mentioned. This is the reality of legal culture. In some jurisdictions international law will be treated as a familiar topic, [...]. But I speak of very practical matters: the judge and lawyers in his court will have studied international law and will be familiar with it, [...]. But there is another culture that exists, in which it is possible to become a practicing lawyer without having studied international law, and indeed to become a judge knowing no international law. [...] But the lack of background in international law (which is why I speak of it as a legal culture, as much as a question of legal philosophy) manifests itself in various ways, for there are individual cultures as well as national cultures. Some judges are simply rather contemptuous of everything to do with international law, which they doggedly regard as ‘unreal’. Others are greatly impressed by international law, but feeling insufficiently familiar with it seek at all costs to avoid making determinations upon it: strenuous efforts are made not to decide points of international law, but to locate the ratio decidendi of the judgment on more familiar ground.”⁸

To the credit of Indonesian judges, they have not been hesitant to use and apply the provisions of the 1958 NY Convention. But then there is still the issue of knowledge and comprehension. Yahya Harahap, former Supreme Court justice, presciently remarked in the context of the 1990 Supreme Court Regulation as the implementing instrument of the Convention:

“The Regulation does not already fully guarantee that recognition and enforcement of foreign arbitral awards in Indonesia will go smoothly. [...] For that demands a comprehensive knowledge and understanding of various arbitration rules. At the very least there must be a sufficient understanding of the arbitration rules that have been recognized and incorporated into the national legal order.”⁹

⁷ Constitutional Court of the Republic of Indonesia, “Case No. 1/PUU-VIII/2010” p. 151; See also the remarks of the (then) president of the Constitutional Court: “Ketua MK: Jangan Sampai Hukum Internasional Menegasi Hukum Bisnis Indonesia (“Do not let international law to negate Indonesian law. Or international law influencing business law in Indonesia.”) <https://www.hukumonline.com/berita/baca/lt58b4b62e1b1d4/ketua-mk-jangan-sampai-hukum-internasional-menegasi-hukum-bisnis-indonesia/>, accessed 23 July 2019.

⁸ Rosalyn Higgins, *Problems & Process: International Law and How We Use It* (Oxford: Oxford University Press 1994), pp 206-207 [‘Higgins’].

⁹ Harahap, *op.cit.*, p. 337.

Thus, Harahap basically refers to one issue: capacity. In that context, 'capacity building' is often mentioned as a tool to enhance the quality of the judiciary. In the context of Indonesia, capacity building has often been done with foreign aid programs to update judges with new developments or to introduce new areas of law. Capacity building for the judiciary indeed must be done continuously, and it is very important because at the end of the day the judges themselves are the ones that decide the cases. However, it is argued here that capacity building cannot focus on the judiciary alone, especially in areas related to international treaty (or international practice) like commercial arbitration. There is a perfectly understandable reason that domestic court judges may not naturally or easily get acquainted with international instruments: they are not supposed to focus and are not expected to deal with such instruments to begin with. They are *domestic* court judges, and domestic law is their focus as it should be.

Another practical reason we cannot pin our primary hope for improved capacity on the judiciary is the reality of overwhelming court docket. As simple illustration, in 2018 the Supreme Court decided on a whopping 18.544 cases.⁹ There are currently 51 Supreme Court judges, which means that each judge on average decided around 364 cases.¹⁰ That is roughly one case per day. Granted, this is somewhat an oversimplification because the Supreme Court is divided into different chambers and there are also ad hoc judges. But overall the practical problem of overwhelming caseload and its effect in hindering more consideration of the 1958 NY Convention and its pertinent arbitration rules and principles is obvious.

That brings us to what I will call 'doctrinal capacity', for want of a better term. At least one crucial episode in the above history shows that the courts relied heavily on juristic commentaries: when the court reaffirmed the proper distinction between enforcement and annulment proceedings in the *Astro* case. This reflects the reality of Indonesia as a civil law jurisdiction. As observed by Prof. Bell, "[...] it remains the case that much of the leadership in developing the law in the civil law tradition remains with doctrine – the writings of law professors."¹⁰ To transpose Harahap's remark in this context: the capacity of the judiciary to better apply and interpret the 1958 NY Convention relies in no small part on the capacity of doctrine, or the commentaries and writings of Indonesian arbitration scholars and experts, to articulate the various aspects of the Convention and flesh out the intricacies of its application in the domestic sphere.

One case, albeit not directly applying the 1958 NY Convention, further illustrate the importance of doctrinal leadership in shaping the courts' arbitration jurisprudence. *Pertamina v. Lirik*¹¹ is a case concerning the distinction between 'international' and 'national' arbitration involving an ICC award rendered in Jakarta. The 1999 Arbitration Law defines an 'international arbitral award' as "an award rendered by an arbitral institution or individual arbitrator outside the territory of the Republic of Indonesia, or an award rendered by an arbitral institution or individual arbitrator which the law of the Republic of Indonesia deems to be an international arbitral award."¹¹ Leaving aside the circular language of the provision, it is clear that the provision primarily adheres to the territorial principle.¹² Nevertheless, there is a residual question of what other kinds of award (apart from those that are rendered abroad) can be considered as 'international'. Consistent with the expert opinion of Prof. Huala Adolf in the case,

¹⁰ Gary Bell, "The Importance of Private Law Doctrine in Indonesia" in *Indonesia: Law and Society*. 2nd ed., edited by Tim Lindsey (Melbourne: The Federation Press 2008) p. 363.

¹¹ 1999 Arbitration Law, *op.cit.* art. 1(9).

the district court reasoned, among others, that the ICC award in question is a foreign arbitral award because the ICC is based in Paris and that the currency in the contract and the language of the arbitration are all foreign.¹²

That *Pertamina v. Lirik* judgment has been rightly criticized, including by this author elsewhere, among others for its departure from the wording of the 1958 NY Convention.¹³ But if anything, that decision reinforces the idea that, at least in the field of arbitration, the opinion of prominent academics carry great weight with the court. This is in particular with regards to various basic concepts and general principles of arbitration.

VI. CONCLUSION

Prof. Crawford, currently a judge at the International Court of Justice, wrote on the apparent impasse of monism-dualism dichotomy:

*“it seems natural to seek to escape from the dichotomy of monism and dualism. Above all, neither theory offers an adequate account of the practice of international and national courts, [...] it seems desirable to leave behind the glacial uplands of juristic abstraction.”*¹²

This is not to say that the theories of monism and dualism do not matter at all, or that the debate on them is passé. I do agree with Prof. Higgin’s observation that it is right that *“the difference in response to a clash of international law and domestic law in various domestic courts is substantially conditioned by whether the country concerned is monist or dualist in its approach.”*¹³ The problem in Indonesia, of course, is that the law has not settled on either approach and there is every reason to expect that it will not be settled in the foreseeable future.

In the context of the 1958 NY Convention, this research shows that Indonesian legislation and courts have oscillated between dualism and monism through various junctures of the Convention’s implementation. Far from monism-dualism, the application and interpretation of the Convention in Indonesia has been influenced much more by various practical consideration, represented most clearly in questions about procedural mechanism on the ground that came to the fore in the *Maritime Bulgare v. Nizwar* case and the ensuing 1990 Supreme Court Regulation. But even an eventual choice between monism or dualism will not turn into a magical silver bullet for the issues surrounding domestic treaty implementation. Again drawing from the experience of the 1958 NY Convention in Indonesia, if a treaty is transformed into domestic legal instrument, at least two questions remain: (i) whether the transformation will be consistent with the treaty itself or whether, for whatever reason, the domestic instrument deviates from the treaty and give rise to erroneous application of the treaty; and (ii) whether Indonesian courts will pay regard to international sources in interpreting the domestic instrument. Meanwhile, the same two questions also apply *mutatis mutandis* in a monistic setting if a treaty is relied on directly by the courts.

Those questions relate very much to issues of domestic capacity. Indonesian court

¹² James Crawford, *Brownlie’s Principles of Public International Law* (Oxford: Oxford University Press 2019) p 47. A similar point - that the discussion and analysis on the position of international law within Indonesian law needs to move beyond the dichotomy of monism and dualism - was made in a recent Indonesian textbook. See Tristam Pascal Moeliono, *Hukum Internasional, Hukum Nasional, & Indonesia* (Bandung: Unpar Press 2018), Chapter III.

¹³ Higgins, *op.cit.* p 206.

practices on the 1958 NY Convention suggest that many of the questionable court judgments came about because of insufficient knowledge and understanding of the various concepts underpinning the Convention's provisions or of arbitration generally. But focusing capacity building on the judiciary may not be the most effective strategy to improve the situation.

A large part (although by no means a panacea) of the practical issues and questions posed in this Article may be solved through the so-called 'vertical' or 'horizontal' approach, namely by paying due regard to international interpretative instrument of the 1958 NY Convention such as those issued by UNCITRAL, or by a more sweeping overhaul of Indonesian arbitration law following the UNCITRAL Model Law.²¹ Alas, perhaps still a distant dream. But at least we can be more optimistic that domestic capacity – in our collective understanding of the 1958 NY Convention and arbitration in general – will continue to improve regardless. Based on examples from a few prominent cases such as *Pertamina v. Lirik* and *Astro*, I suggest here that doctrinal or academic leadership is required and is the most feasible way to push toward a more harmonious application of the Convention with international standard.

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