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Questioning the Validity of the New York Convention 1958 on Recognition and Enforcement of Foreign Arbitral Awards in Indonesia

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Abstract

This article questions the legal validity of the New York Convention of 1958 ("NYC 1958") on the recognition and enforcement of foreign arbitral awards. A critical review is conducted based on the principle of lex posterior derogat lex priori when the provisions of NYC 1958 are compared with Articles 65 to 69 concerning the enforcement of international arbitral awards in Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (Law 30/1999), which emerged approximately 18 years after (posteriori to) the ratification of NYC 1958 through Presidential Decree No. 34 of 1981. There appears to be—from the perspective of legal scholars—a paradigmatic difference between the two, namely that NYC 1958 places greater value on foreign arbitral awards, while Law 30/1999 is less appreciative of them, leading to the presumption that Law 30/1999 nullifies the legal validity of NYC 1958.

Can this perception be justified? The answer to this question shapes the judicial paradigm when faced with applications for the recognition and enforcement of foreign arbitral awards. This article, doctrinally, compares and links the paradigmatic nuances between NYC 1958 and Law 30/1999 with regard to the recognition and enforcement of foreign arbitral awards by closely examining the textual provisions of each regulation.

KEYWORDS *Arbitration, Foreign arbitral awards, Lex posteriori erogat lex priori, New York Convention 1958*

I. Introduction

Arbitration has become a preferred dispute resolution method for many business actors due to its numerous advantages, such as confidentiality,[1] the quality and integrity of arbitrators, speed, efficiency, and cost

[1] Nobumichi Teramura and Leon Trakman, "Confidentiality and Privacy of Arbitration in the Digital Era: Pies in the Sky?," Arbitration International 40 (October 7, 2024): 278, https://doi.org/10.1093/arbint/aiae017; Mitch Zamoff, "Safeguarding Confidential Arbitration Awards in Uncontested Confirmation Actions," American Business Law Journal 59, no. 3 (October 1, 2022): 506, https://doi.org/10.1111/ablj.12211; Pamela K Bookman, "Arbitral Courts," Virginia Journal of International Law 61, no. 2 (2021): 176; Avinash Poorooye and Ronán Feehily, "Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance," Harvard Negotiation Law Review 22 (2017): 277-278; Daniel R Bennett and Madeleine A Hodgson, "Confidentiality in Arbitration: A Principled Approach," McGill Journal of Dispute Resolution 3 (2016): 99; Bernardo M. Cremades and Rodrigo Cortes, "The Principle of Confidentiality in Arbitration: A Necessary Crisis," Journal of Arbitration Studies 23, no. 3 (2013): 27; Bert K. Robinson, "Arbitration: The Quest for Confidentiality," Lousiana Bar Journal 58, no. 3 (2010): 181; Michael Hwang and Katie Chung, "Defining the Indefinable: Practical Problems of Confidentiality in Arbitration," Journal of International Arbitration 26, no. 5 (2009); David AR Williams and Amokura Kawharu, "Arbitration and Dispute Resolution," New Zealand Law Review, 2012: 100; Andrew Tweeddale, "Confidentiality in Arbitration and the Public Interest Exception," Arbitration International 21, no. 1 (2005): 61, https://doi.org/https://doi.org/10.1093/arbitration/21.1.59; Anjanette H. Raymond, "Confidentiality in a Forum of Last Resort: Is the Use of Confidential Arbitration a Good Idea for Business and Society?," American Review of International Arbitration 16 (2005): 480; Leon Trackman, "Confidentiality in International Commercial Arbitration," Arbitration International 18, no. 1 (2002): 10; Francois Dessemontet, "Arbitration and Confidentiality," The American Review on International Commercial Arbitration 7, no. 3–4 (1996); Patrick Neill, "Confidentiality in Arbitration," Arbitration International 12, no. 3 (1996): 287, https://doi.org/https://doi.org/10.1093/arbitration/12.3.287.

transparency.[2] Globally, various arbitration institutions, such as the Singapore International Arbitration Centre (SIAC) and the International Chamber of Commerce (ICC), are widely chosen by business professionals, even when the subject is international and the business object is not located where the arbitration institution resides.[3] The primary issue that concerns business actors, however, does not lie in the arbitration body they select but in the enforcement of arbitration awards when they are not voluntarily fulfilled.[4] Numerous arbitration awards are either not honored by the responsible party or not recognized and enforced by the authorized court.[5]

Due to the sovereignty aspect of each country, which cannot be dictated by an arbitration body outside its jurisdiction, many nations have agreed through the United Nations (UN) forum to regulate the recognition and enforcement of foreign arbitration awards, even as early

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[2] Dewan Perwakilan Rakyat and President, "Undang-Undang Tentang Arbitrase Dan Alternatif Penyelesaian Sengketa," Pub. L. No. UU Nomor 30 Tahun 1999 (1999), see General Explanation; Rahmadi Indra Tektona, "Arbitrase Sebagai Alternatif Solusi Penyelesaian Sengketa Bisnis Luar Pengadilan," Pandecta 6, no. 11 (2011): 89, https://doi.org/https://doi.org/10.15294/pandecta.v6i1.2327; as another comparison, see Jennifer Kirby, "Efficiency in International Arbitration: Whose Duty Is It?," Journal of International Arbitration 32, no. 6 (2015): 689-690, https://doi.org/https://doi.org/10.54648/joia2015032.

[3] Tutojo, "Eksekusi Putusan Arbitrase Internasional Dalam Sistem Hukum Indonesia," Jurnal Penelitian Hukum Legalitas 9, no. 1 (2015): 15.

[4] Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts," in George A Bermann, et.al., "Recognition and Enforcement of Foreign Arbitral Awards The Interpretation and Application of the New York Convention by National Courts," ed. George A. Bermann (Cham: Springer, 2017), http://www.springer.com/series/11943.

[5] Muhamad Dzadit Taqwa and Maria Jasmine, "Faktor-Faktor Tidak Terlaksananya Putusan Arbitrase Internasional Di Indonesia," Indonesia Arbitration Quarterly Newsletter 14, no. 3 (2022): 3-6.

as 1927.[6] This agreement was formalized in the Geneva Convention of 1927 (GC 1927). Subsequently, with its various limitations, this convention was revised by the New York Convention of 1958 (NYC 1958), which is broadly regarded as more compelling for ratifying countries to recognize and support the enforcement of foreign arbitration awards.[7]

In the Indonesian context, issues surrounding the recognition and enforcement of foreign arbitration awards have also drawn considerable attention. Although Indonesia ratified the NYC 1958 in 1981, it has often been characterized, both officially and unofficially, as a jurisdiction that is not favorable to foreign arbitration awards.[8] In fact, there are several notable foreign arbitration awards that have neither been recognized nor enforced in Indonesia.[9] There is also suspicion that Indonesia's current paradigm aligns more closely with the spirit of the GC 1927. Such labeling

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6 The United Nations, "Convention on the The Execution of Foreign Arbitral Awards, Geneva" (1927); S U T Girsang, Arbitrase (Jakarta: Mahkamah Agung Republik Indonesia, 1992), 13.

7 The United Nations, "Convention on the Recognition and Enforcement of Foreign Arbitral Awards," Pub. L. No. The New York Convention 1958 (1958); Franco. Ferrari, Friedrich. Rosenfeld, and Charles T.. Kotuby, Recognition and Enforcement of Foreign Arbitral Awards : A Concise Guide to the New York Convention's Uniform Regime (Edward Elgar Publishing Limited, 2023), 1-2; Gary Born, "The New York Convention: A Self-Executing Treaty," Michigan Journal of International Law 40, no. 1 (2018): 116-119, https://doi.org/10.36642/mjil.40.1.new; Nandang Sutrisno, "Pengakuan Dan Pelaksanaan Putusan Arbitrase Asing Di Indonesia: Analis Permasalahan," Jurnal Hukum 1, no. 1 (1994): 43.

8 Huala Adolf, "The Urgency to Form Law on International Commercial Arbitration," Fiat Justisia Journal of Law 10, no. 2 (2016): 329, http://jurnal.fh.unila.ac.id/index.php/fiat; see footnotes in Bermann, "Recognition and Enforcement of Foreign Arbitral Awards The Interpretation and Application of the New York Convention by National Courts.": 31-35. As noted by Huala Adolf, an expert witness for the President, during the Constitutional Court hearing on August 26, 2014. See Constitutional Court Decision Number 15/PUU-XII/2014: 43-44.

9 Taqwa and Jasmine, "Faktor-Faktor Tidak Terlaksananya Putusan Arbitrase Internasional Di Indonesia.": 1-2.

is not advantageous for Indonesia, as enforcement issues with arbitration awards impact foreign investors' willingness to invest in the country.[10]

The recognition and enforcement of foreign arbitration awards in Indonesia have become a focal point for various legal scholars and practitioners who regularly engage with issues related to foreign arbitration awards. Despite numerous studies, no single work has yet evaluated this issue by examining the correlation between the NYC 1958 and Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (Law 30/1999). Other references provide descriptive insights into foreign arbitration awards and offer examples of cases where foreign arbitration awards have not been enforced in Indonesia.[11]

Thus, this research addresses two main issues: (1) whether there exists a conflict between the NYC 1958 and Law 30/1999, particularly regarding the compelling force to recognize and enforce foreign arbitration awards; and (2) if there is a conflict between the two, what the legal consequences are. The second section first elaborates on the comparison between the NYC 1958 and GC 1927 to highlight the legal nuances between the two. Subsequently, both the NYC 1958 and GC 1927 are compared with Law 30/1999 as the legal status quo governing arbitration in Indonesia. After

[10] Kamal Huseynli, "Enforcement of Investment Arbitration Awards: Problems and Solutions," Baku State University Law Review 3, no. 1 (February 2017), http://unctad.org/en/Docs/edmmisc232add8_en.pdf; as an additional reference, see King William and Moody Rizqy Syailendra, "Penyelesaian Sengketa Investasi Asing Melalui Arbitrase Internasional," Journal of Education Research 4, no. 4 (2023), https://www.dslalawfirm.com/id/pengertian-arbitrase/,.

[11] Mutiara Hikmah, "Pengakuan Dan Pelaksanaan Putusan Arbitrase Asing Di Indonesia," Jurnal Hukum Internasional 5, no. 2 (2008): 332.

completing this comparison and deriving conclusions on any conflicts between the NYC 1958 and Law 30/1999, the following section explains the resulting legal consequences based on the legal principle of *lex posteriori derogat lex priori*.

This article was stressed on the laws on recognition and enforcement of international/foreign arbitration awards, namely Law 30/1999 on Arbitration and Alternative Dispute Resolution, the New York Convention 1958, and the Geneva Convention 1927-which had been repealed by the NYC 1958. It is a critical study using the relevant books and journals as well as practical knowledge to answer the validity question of the NYC 1958 in Indonesia.

II. Nuance of Law No. 30 of 1999: More Aligned with NYC 1958 or GC 1927?

a. Comparsion between GC 1927 and NYC 1958

The Geneva Convention of 1927 (GC 1927) is an early convention addressing the recognition and enforcement of foreign arbitral awards globally. Thirty-one years later, this convention was revised by the New York Convention of 1958 (NYC 1958). Broadly speaking, the two conventions embody a paradigmatic difference. GC 1927 prioritizes state sovereignty as a key principle, while NYC 1958 underscores the importance of each state's respect for the

enforcement of foreign arbitral awards.[12] Indeed, from the outset in its "Introduction," NYC 1958 is driven by the intent to eliminate discrimination against foreign arbitral awards, aiming to ensure that an award recognized and enforced in the jurisdiction where it is applied becomes a common reality.[13]

In contrast, the paradigm emphasizing state sovereignty in addressing foreign arbitral awards is evident in the provisions of GC 1927.[14] Unlike NYC 1958, which initially addresses the scope of foreign arbitral awards and the recognition of arbitration agreements to displace local court jurisdiction, GC 1927 begins with various requirements for recognizing and enforcing such awards. Article 1 of GC 1927 contains five "necessary" conditions, each of which must be met.[15] Article 2 further stipulates that even

[12] Jonathan Hill, "The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958," Oxford Journal of Legal Studies 36, no. 2 (June 24, 2016): 309-310, https://doi.org/10.1093/ojls/gqv025; Florian Grisel, "Treaty-Making between Public Authority and Private Interests: The Genealogy of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards," European Journal of International Law 28, no. 1 (February 1, 2017): 74, https://doi.org/10.1093/ejil/chx008.

[13] Hill, "The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958"; Grisel, "Treaty-Making between Public Authority and Private Interests: The Genealogy of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards"; Tri Ariprabowo and Dan R Nazriyah, "Pembatalan Putusan Arbitrase Oleh Pengadilan Dalam Putusan Mahkamah Konstitusi Nomor 15/PUU-XII/2014 [The Nullifying of Arbitral Decision by Court in the Constitutional Court Decision Number 15/PUU-XII/2014]," Jurnal Konstitusi 14, no. 4 (December 2017): 706.

[14] C. Chatterjee and Anna Lefcovitch, "Recognition and Enforcement of Arbitral Awards: How Effective Is Article V of the New York Convention of 1958?," International In-House Counsel Journal 9, no. 36 (2016): 4.

[15] The five conditions mentioned include: (1) That the arbitral award has been rendered based on a legally valid submission to arbitration in accordance with applicable law; (2) That the subject matter of the award can be resolved through arbitration under the laws of the country where recognition of the award is sought; (3) That the award was rendered by an Arbitral Tribunal constituted as per the arbitration submission or established in a manner agreed upon by the parties and in accordance with the law governing arbitration procedures; (4) That the award has attained finality in the country

if Article 1 is satisfied, the competent court must refuse recognition and enforcement if any of the three additional conditions in Article 2 are met.[16]

In NYC 1958, however, the opposite perspective is evident: the criteria for refusing to recognize and enforce a foreign arbitral award are considerably stricter. This is reflected in Article 5(1), which states, "Recognition and enforcement of the award may be refused … **only if** that party furnishes to the competent authority where the recognition and enforcement is sought, proof that …".[17] This is a clear departure in nuance compared to GC 1927, which primarily creates obstacles to recognition rather than to refusal, as illustrated by phrases such as "To obtain such recognition or enforcement, it shall, further, **be necessary**" and "**Even if** the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied."[18]

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where it was issued, meaning it will not be considered final if it remains open to annulment, appeal, or cassation (under the procedure of the country where the award was made) or if there is proof that proceedings challenging the validity of the award are pending; (5) That recognition or enforcement of the award is not contrary to the public policy or legal principles of the country where the award is to be relied upon.

16 The three alternative grounds for refusing the recognition of an arbitral award include: (1) That the award has been set aside in the country where it was rendered; (2) That the party against whom the award is invoked was not given sufficient notice of the arbitration proceedings to enable them to present their case, or, if legally incapacitated, was not adequately represented; (3) That the award does not address the issues submitted for arbitration, deviates from the terms of submission, or includes decisions on matters outside the scope of the arbitration agreement.

17 A. J. van den Berg, The New York Arbitration Convention of 1958 (Alphen aan den Rijn: Kluwer International, 1981), 267-268.

18 Norton Rose Fulbright, "Issues Relating to Challenging and Enforcing Arbitration Awards: Grounds to Refuse Enforcement," August 2019,

Moreover, in the preceding article, Article 3 of NYC 1958, there is a firm emphasis on the obligation of ratifying states to recognize and enforce foreign arbitral awards. The term used in the article is "shall" rather than "may." Furthermore, foreign arbitral awards must not be subjected to burdensome or discriminatory conditions compared to domestic arbitral awards.

Another significant distinction derived from these nuanced differences is the regulation of double exequatur, a procedure widely regarded as time-consuming and inefficient.[19] Double exequatur is a requirement where a party seeking to enforce a foreign arbitral award must demonstrate that the award is final and binding in both the country where it was issued and the country where enforcement is sought. In GC 1927, this requirement is reflected in Article 1(d), which requires the arbitral award to be final (conclusive) in the country where it was issued. Conversely, Article 5(e) of NYC 1958 states that the foreign arbitral award only needs to be binding on both parties, with no equivalent of GC 1927's Article 1(d).

Finally, the conventions differ regarding the burden of proof. GC 1927 implicitly places the burden of proof on the party seeking recognition and enforcement of a foreign arbitral award, as indicated by the stipulation of requirements for recognition and enforcement. In contrast, NYC 1958 assigns this burden to the

https://www.nortonrosefulbright.com/en/knowledge/publications/ee45f3c2/issues-relating-to-challenging-and-enforcing-arbitration-awards-grounds-to-refuse-enforcement.

[19] Norton Rose Fulbright.

party seeking to oppose recognition and enforcement, as shown in the requirements for refusing recognition and enforcement. In other words, while both conventions affirm the possibility that foreign arbitral awards may be denied recognition and enforcement, the differing nuances in the mandatory force for such recognition and enforcement create a paradigmatic divergence in their provisions.

b. A Comparison between GC 1927 and Law 30/1999 on Arbitration and ADR

A fundamental aspect of comparison lies in evaluating the obligatory nature of recognizing and enforcing foreign arbitral awards. This aspect similarly shapes subsequent differences and similarities, as seen in the comparison between the Geneva Convention of 1927 (GC 1927) and the New York Convention of 1958 (NYC 1958). Law No. 30/1999 broadly governs arbitration matters in Indonesia, with the focus here solely on Part Two of Chapter VI, "Implementation of Arbitral Awards," covering Articles 66 to 69, which address international arbitration.

Neither the GC 1927 nor Law No. 30/1999 explicitly affirms a definitive position toward foreign arbitral awards, unlike the "Introduction" section in the NYC 1958.[20] Such a position can

[20] Pursuant to the Introduction New York Convention 1958, "*"...the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non domestic arbitral awards.*"

only be inferred from the wording of the provisions. The GC 1927, as previously noted, does not prioritize the recognition and enforcement of foreign arbitral awards. This is evident from (1) the establishment of multiple conditions for an award to be recognized and enforced and (2) placing the burden of proof on the party requesting recognition and enforcement of the foreign arbitral award.

These two elements also appear in the formulation of Article 66 in Law No. 30/1999. The language of Article 66 requires that certain conditions be met for a foreign arbitral award to be recognized and enforced, comprising four cumulative requirements and one conditional provision. Under this article, the burden of proof similarly rests on the party requesting recognition and enforcement.

However, the required conditions in Law No. 30/1999 are fewer than those in Articles 1 and 2 of the GC 1927. Article 66 of Law No. 30/1999 specifies four cumulative requirements: (a) the foreign arbitral award is made in a country that is a treaty partner with Indonesia concerning the recognition and enforcement of foreign arbitral awards; (b) the dispute falls within the scope of commercial law as specified in Article 5 of Law No. 30/1999; (c) the award does not violate public order; and (d) the foreign arbitral award has received an exequatur from the Head of the Central

Jakarta District Court, or, in cases where Indonesia is a party to the dispute, an exequatur from the Supreme Court.[21]

Meanwhile, Articles 1 and 2 of the GC 1927 list five cumulative conditions for recognition, along with three additional grounds for refusal, even if all cumulative conditions are met. The five conditions are: (a) the foreign arbitral award must be made under applicable law or arbitration rules;[22] (b) the subject of the dispute must fall within the absolute competence of arbitration under the law of the enforcement country; (c) the award must be rendered by an arbitral tribunal in accordance with the parties' agreement and the procedural rules of arbitration; (d) the award must be final in the country where it was issued, with no opposition from the parties and no challenge to its validity; and (e) the award must not conflict with the public policy or legal principles of the enforcement country.

Even if these five conditions are met, there are three mandatory grounds for refusing recognition and enforcement of a foreign arbitral award.[23] The first ground is that the foreign arbitral award has been annulled by a competent authority in the country where it was issued. The second concerns procedural flaws in

[21] Yuanita Permatasari, "Kewenangan Pengadilan Dalam Pembatalan Putusan Arbitrase Internasional Di Indonesia," Privat Law V, no. 2 (July 2017): 28.

[22] There is ambiguity as to whether "the law" referred to pertains to the law of the country where the award is to be enforced or the law of the country where the award was rendered.

[23] The United Nations, Convention on the The Execution of Foreign Arbitral Awards, Geneva, Art. 2.

arbitration, such as inadequate notification of the appointment of an arbitrator or information on the arbitration process, thereby preventing the opposing party from effectively presenting a defense. The last ground aligns with Article 1(b) of the GC 1927, where the award relates to a matter outside the absolute competence of arbitration under the law of the enforcement country.

The most immediately observable difference is that Law No. 30/1999 lacks explicit grounds for refusing recognition and enforcement of foreign arbitral awards. While both the GC 1927 and Law No. 30/1999 set forth conditions for foreign arbitral awards to be recognized and enforced, Law No. 30/1999 does not contain provisions akin to Article 2 of the GC 1927.

A second distinction can be noted between Article 1(d) of the GC 1927 and Article 66(d) of Law No. 30/1999. Article 1(d) of the GC 1927 states that the award must be considered final in the country where it was issued. In other words, the enforcement court must verify whether the country of origin deems the award final and free from further legal recourse; otherwise, the foreign arbitral award cannot be recognized and enforced, as this is a mandatory requirement. However, Article 66(d) of Law No. 30/1999 only necessitates an exequatur from the Head of the Central Jakarta District Court, with no concern for whether the award is final in the country of origin.

Additionally, Article 68 of Law No. 30/1999 governs legal recourse against decisions made by the Central Jakarta District Court regarding requests for recognition and enforcement of foreign arbitral awards. This article is significant as it reflects an implicit respect for foreign arbitral awards. According to Article 68(1), if the decision is to grant recognition and enforcement of the foreign arbitral award, no legal recourse is available. Conversely, if the Central Jakarta District Court denies the request, cassation to the Supreme Court is permitted. Article 68 reflects a nuanced respect for foreign arbitral awards by allowing further recourse to facilitate enforcement while eliminating avenues for appeal if the award is already recognized and enforced.

c. A Comparison between NYC 1958 and Law 30/1999 on Arbitration and ADR

The next point of comparison lies between the NYC 1958 (New York Convention) and relevant provisions within Indonesian Law No. 30/1999. The NYC 1958, a convention regarding the recognition and enforcement of foreign arbitral awards, was ratified by Indonesia through Presidential Decree No. 34 of 1981.[24] Eighteen years later, Indonesia established Law No. 30/1999, which also addresses the enforcement of foreign arbitral awards—referred

[24] See more elaborative explanations in Aan Danu Giartono, "Pelaksanaan Konvensi New York Tahun 1958 Di Indonesia" (Masters' Thesis, Universitas Diponegoro, 2003): 48.

to as "international arbitration awards" in this law.[25] A comparative analysis of these two frameworks is essential to identify which provisions regulate similar matters yet contain differences and which issues are addressed in one regulation but not the other. This comparison specifically aims to examine the level of deference to foreign arbitral awards.

An initial comparison can be made between Article 5 of the NYC 1958 and Article 66 of Law No. 30/1999. As discussed in the previous section, Article 66 of Law No. 30/1999 contains a formulation somewhat similar to Article 1 of the Geneva Convention of 1927, requiring cumulative conditions for an arbitral award to be recognized and enforced. In contrast, the NYC 1958 does not impose such cumulative requirements but instead provides alternative, restrictive conditions for refusing the recognition and enforcement of foreign arbitral awards.

This difference also affects which party bears the burden of proof. Under Article 66, the burden falls on the party seeking recognition and enforcement, as indicated by the phrase, "... shall only be recognized and enforceable ... if it meets the requirements…".[26] Conversely, Article 5 of the NYC 1958 places

[25] John Lumbantobing, "The 1958 New York Convention in Indonesia: History and Commentaries beyond Monism-Dualism," Indonesia Law Review 9, no. 3 (2019): 223, https://doi.org/10.15742/ilrev.v9n3.583.

[26] Muhamad Dzadit Taqwa, Tazkia Nafs Azzahra, and Maria Jasmine Putri Subiyanto, "The Ambiguity of Norms in Article 66 (C) of Law No. 30/1999 on Arbitration And Alternative Dispute Resolution: Causes, Implications And Resolutions," Jurnal Dinamika Hukum 22, no. 1 (June 23, 2022): 42, https://doi.org/10.20884/1.jdh.2022.22.1.3146.

the burden of proof on the party seeking to reject the award, as it states, "recognition and enforcement may be refused ... **only if** the party requesting refusal can prove that…."[27] This implies that under Article 5 of the NYC 1958, an international arbitration award should automatically be recognized and enforced in the country of enforcement, as explicitly stated in Article 3 of the NYC 1958. Those who object to this recognition must formally file a refusal.[28] However, under Article 66 of Law No. 30/1999, international arbitration awards are not automatically recognized and enforced but must be submitted to the court for recognition and enforcement.[29]

Despite these differences, it would be incorrect to conclude that Law No. 30/1999 lacks alignment with the spirit of the NYC 1958. As outlined in the previous section, the provisions of Law No. 30/1999 do show substantial respect for foreign arbitral awards. While Article 66 of Law No. 30/1999 sets forth conditions for the recognition and enforcement of foreign arbitral awards, the requirement that an award not contradict public order is arguably the most open to rejection, given its broad interpretative scope.

[27] Taqwa, Azzahra, and Subiyanto.

[28] Suhaidi Junandar Indra et al., "Analisis Yuridis Penolakan Eksekusi Putusan Arbitrase Internasional (Studi Kasus: Putusan Mahkamah Agung Nomor 808 K/Pdt.Sus/2011 Dalam Perkara Antara PT. Direct Vision Melawan Astro Group Malaysia)," USU Law Journal 3, no. 3 (2014): 55, https://media.neliti.com/media/publications/14281-ID-analisis-yuridis-penolakan-eksekusi-putusan-arbitrase-internasional-studi-kasus.pdf.

[29] A. Setiadi and Osman Kemal, Hukum Acara Pengakuan Dan Pelaksanaan Putusan Arbitrase Internasional/Asing Di Indonesia (Purbalingga: CV. Eureka Media Aksara, 2021), 40.

However, the public policy clause is also included in the NYC 1958, which does not, in practice, hinder the recognition and enforcement of foreign arbitral awards. Furthermore, Article 5 of the NYC 1958 includes grounds for refusing recognition and enforcement that address only fundamental errors in the arbitration process.

Through this comparative analysis, the nuances between the NYC 1958 and Law No. 30/1999 reveal the dual commitment of Indonesia to adhere to both international standards and national legislation, aiming to respect and implement foreign arbitral awards while still allowing room for judicial discretion within the bounds of public policy.

1) The Validity of NYC 1958 in Indonesia

The legal validity of a norm focuses on the question of whether it holds binding legal authority over the legal subjects to whom it applies. Generally, in the context of modern states within the Civil Law tradition—and increasingly in various Common Law countries—a norm is considered legally binding once it has been formally posited through a legislative process based on the foundational law of the state.[30] In Indonesia, this concretization occurs through publication in the state gazette by the Secretary of State.[31]

[30] Rahman Syamsuddin, Pengantar Hukum Indonesia (Jakarta: Prenada Media Group, 2019), 7.
[31] Wahjono Darmabrata, "Apa Dan Bagaimana Lembaran Negara Republik Indonesia," Jurnal Hukum & Pembangunan 6, no. 4 (1976): 301.

The first paragraph addresses how a provision that initially lacks legal binding force subsequently gains such force. Conversely, a provision that initially holds binding legal authority can also lose its validity through two alternative processes: legislative or judicial processes. A legal norm can lose its legal validity through the legislative process based on three principles, namely:[32]

1. The principle of *lex posteriori derogat lex priori*, or that later legislation repeals earlier legislation;
2. The principle of *lex specialis derogat lex generalis*, whereby legislation that addresses a specific issue supersedes legislation that regulates the same matter more generally; and
3. The principle of *lex superiori derogat lex inferiori*, meaning that higher-ranking legislation overrides lower-ranking legislation.

In contrast, in a judicial context, the revocation of legal validity can be performed by the Supreme Court or the Constitutional Court through a judicial review process.[33] This process is closely related to the third principle since such reviews use higher-ranking legislation as a basis. The Supreme Court has the authority to review legislation

[32] Nurfaqih Irfani, "Asas Lex Superior, Lex Specialis, Dan Lex Posterior: Pemaknaan, Problematika, Dan Penggunaannya Dalam Penalaran Dan Argumentasi Hukum," Jurnal Legislasi Indonesia 16, no. 3 (September 2020): 305-325.

[33] Simon Butt, "The Indonesian Constitutional Court: Reconfiguring Decentralization for Better or Worse?," Asian Journal of Comparative Law 14, no. 1 (July 1, 2019): 151–152, https://doi.org/10.1017/asjcl.2018.19; Georg Vanberg, "Constitutional Courts in Comparative Perspective: A Theoretical Assessment," Annual Review of Political Science (Annual Reviews Inc., May 11, 2015): 171-175, https://doi.org/10.1146/annurev-polisci-040113-161150.

below the level of *Undang-Undang* ("UU") against UU,[34] while the Constitutional Court is empowered to review laws against the 1945 Constitution of the Republic of Indonesia.[35]

The question of the legal validity of the New York Convention (NYC) 1958 should be examined chronologically, as follows: In 1958, when the NYC 1958 was issued by the United Nations, Indonesia had not yet ratified it. For any convention to have binding legal effect in Indonesia, it must first be ratified through a prescribed legal instrument.[36] Only in 1981, approximately 23 years later, did Indonesia ratify the NYC 1958 through Presidential Decree No. 34 of 1981, making all provisions within this convention officially part of Indonesia's positive law. Subsequently, during the financial crisis, Indonesian lawmakers enacted a law specifically regulating arbitration.[37] The matter of recognition and enforcement of foreign arbitral awards—referred to in the law as "international arbitration"—is regulated from Articles 65 to 69.

According to both Law No. 10 of 2004—regarding the formation of legislation, which came into force five years after Law No. 30 of 1999—and Law No. 12 of 2011 Annex II, Section C, the repeal of previously existing legislation must be explicitly stated.

[34] Majelis Permusyawaratan Rakyat Republik Indonesia, "Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Post-Amendment," Pub. L. No. UUD NRI 1945 (2002), Art. 24A.
[35] Majelis Permusyawaratan Rakyat Republik Indonesia, Art. 24C.
[36] Dewan Perwakilan Rakyat and President, "Undang-Undang Tentang Perjanjian Internasional," Pub. L. No. UU No. 4 Tahun 2000 (2000), Arts. 1(2) and 14.
[37] Adolf, "The Urgency to Form Law on International Commercial Arbitration,": 317.

However, Law No. 10 of 2004 took effect five years after the enactment of Law No. 30 of 1999. The question then arises: within this five-year period, did the repeal of previous law require explicit mention? When the principle of *lex posteriori derogat lex priori* is applied, it does not require explicit revocation. As long as there are two conflicting provisions within two different regulations on the same issue, the later rule takes precedence.

Within this chronological framework, provisions not regulated in Part Two on International Arbitration in Chapter VI on the Enforcement of Arbitral Awards in Law No. 30 of 1999 are supplemented by provisions in the NYC 1958. The most notable example of this is the spirit reflected in the "Introduction" of the NYC 1958, where the principle underlying the enforcement of foreign arbitral awards is to respect such awards, and not to create barriers to their enforcement, even if the parties involved include the Indonesian government. This principle is explicitly stated in Article 3 of the NYC 1958. Thus, the perspective that is not explicitly illustrated in Law No. 30 of 1999 is explicitly embodied in the NYC 1958, which then applies automatically in the context of recognizing and enforcing foreign arbitral awards in Indonesia.

Conversely, for provisions that are unaddressed in, or that overlap with, those in the NYC 1958, the substance refers to the regulations set forth in Law No. 30 of 1999. An initial example is the requirement of four cumulative and one conditional criterion to

recognize and enforce foreign arbitral awards. Article 68 also provides a systematic framework in the recognition and enforcement of foreign arbitral awards concerning legal remedies for decisions related to their recognition and enforcement.[38]

Thus, when the NYC 1958 and Law No. 30 of 1999 are systematically incorporated in a way that each fills in for the other's gaps, the essential provisions systematically align in a cohesive approach to the recognition and enforcement of arbitral awards.

Regarding the Recognition and Enforcement of Foreign/International Arbitral Awards in Indonesia

1. Explicit Notion in the Introduction of the NYC 1958: High Regard for the Recognition and Enforcement of Foreign Arbitral Awards. The introductory section of the New York Convention 1958 (NYC 1958) explicitly emphasizes a high level of respect for the recognition and enforcement of foreign arbitral awards.
2. Indonesia's Obligations as a Ratifying State of the NYC 1958. As a signatory of the NYC 1958, Indonesia is required to recognize foreign arbitral awards as binding decisions and to enforce them in accordance with the procedural regulations in force in

[38] As stated in Article 67 of Law No. 30 of 1999: (1) No appeal or cassation may be filed against the decision of the Chief Judge of the Central Jakarta District Court, as referred to in Article 66(d), which recognizes and enforces an International Arbitration Award; (2) An appeal may be filed in cassation against the decision of the Chief Judge of the Central Jakarta District Court, as referred to in Article 66(d), which rejects the recognition and enforcement of an International Arbitration Award; (3) The Supreme Court shall consider and decide on each cassation submission, as referred to in paragraph (2), within no later than 90 (ninety) days from the receipt of the cassation application by the Supreme Court; (4) No opposition may be filed against the Supreme Court's decision as referred to in Article 66(e).

Indonesia. Conditions for recognition and enforcement should not be more burdensome, nor should additional fees be imposed, in comparison to the recognition and enforcement of domestic arbitral awards as mandated by the Convention (vide Article 3 of NYC 1958).

3. Requirements for the Recognition and Enforcement of Foreign/International Arbitral Awards in the Republic of Indonesia (vide Article 66 of Law No. 30/1999). International arbitral awards are recognized and may be enforced within the jurisdiction of Indonesia only if the following conditions are met:
    a. The award is rendered by an arbitrator or an arbitral tribunal in a country with which Indonesia has a bilateral or multilateral agreement concerning the recognition and enforcement of international arbitral awards.
    b. The award is limited to matters considered by Indonesian law to fall within the scope of commercial law.
    c. The award does not contravene public order.
    d. The award has been granted exequatur by the Chief Justice of the Central Jakarta District Court, or, in cases involving the Republic of Indonesia as a party, it may only be enforced after exequatur is issued by the Supreme Court of the Republic of Indonesia, which then delegates authority to the Central Jakarta District Court.

4. Grounds for Refusal of Recognition and Enforcement of Foreign Arbitral Awards (vide Article 5 of NYC 1958). The court with jurisdiction may refuse to recognize and enforce a foreign arbitral award only if evidence exists that:
    a. The parties involved in the dispute resolution through arbitration are, under applicable law, incompetent, or the arbitration agreement made by them is invalid according to the law to which the parties have subjected themselves.
    b. One of the parties opposing recognition and enforcement was not duly notified of the appointment of the arbitrator or the arbitration process itself, thereby hindering its ability to present arguments adequately.
    c. The award pertains to matters outside the absolute jurisdiction of arbitration.
    d. The composition of the arbitral authority or the arbitral procedure was not in accordance with the parties' arbitration agreement or, in the absence of such an agreement, did not comply with the law of the country where the arbitration took place.
    e. The award has not become binding upon the parties or has been annulled or suspended by the competent authority in the country where the award was made or under the law of that country.

5. Required Documents for Recognition and Enforcement Applications (vide Article 67 of Law No. 30/1999, consistent with Article 4 of NYC 1958). Article 67 of Law No. 30/1999 does not differ significantly from Article 4 of NYC 1958. Hence, parties filing for recognition and enforcement must provide the following documents:
    a. The original or authenticated copy of the international arbitral award, compliant with authentication requirements for foreign documents, and its official translation into Indonesian.
    b. The original or authenticated copy of the arbitration agreement underlying the international arbitral award, compliant with authentication requirements for foreign documents, and its official translation into Indonesian.
    c. A statement from the diplomatic representative of the Republic of Indonesia in the country where the international arbitral award was rendered, affirming that the applicant country is bound by a bilateral or multilateral agreement with the Republic of Indonesia concerning the recognition and enforcement of international arbitral awards.
6. Legal Remedies. While NYC 1958 does not detail legal remedies, Article 68 of Law No. 30/1999 provides for them. Appeals or cassation cannot be filed against decisions by the Chief Justice of

the Central Jakarta District Court to recognize and enforce a foreign arbitral award. However, if the decision is to deny recognition and enforcement of a foreign arbitral award, cassation may be pursued.

Thus, the legal framework for recognizing and enforcing international arbitral awards in Indonesia involves a complementary interaction between NYC 1958 and Law No. 30/1999, where each fills in the provisions of the other, aligning the Convention's international framework with the national legal requirements.

2) Implications

If a central finding is drawn from the analysis above, the NYC 1958, ratified by Presidential Decree No. 34 of 1981, is clearly still in effect, particularly in relation to provisions not regulated in Law No. 30 of 1999. Law No. 30 of 1999 does not negate the existence of the NYC 1958 as positive law but instead complements it, forming a systematic relationship between the two regulations. With this understanding, both business actors resolving disputes through foreign arbitration forums and the Central Jakarta District Court (PN Jakarta Pusat) and Supreme Court (MA) handling recognition and enforcement requests for foreign arbitration awards are obligated to adhere to both provisions as a unified framework.

From a paradigmatic implication perspective, as outlined in Article 3 of the NYC 1958, foreign arbitration awards are final, binding, and must be recognized and enforced. In the arbitration

context, "final and binding" implies that the decision is the first and last, or is immediately enforceable and legally binding for the disputing parties. Based on Law No. 30 of 1999, arbitration awards are fundamentally final and binding; however, this is stipulated in Article 60 within the National Arbitration section of Chapter VI on Enforcement of Arbitration Awards, not within the International Arbitration section. Thus, Article 3 of the NYC 1958 fills this gap for international arbitration awards.

This paradigm also brings practical implications. The phrase "must be recognized and enforced" in the NYC 1958 creates an impression that foreign arbitration awards carry an intrinsic executorial effect. Principally, under the paradigm that foreign arbitration awards are final and binding, business actors who have resolved disputes through arbitration should implement foreign arbitration awards in Indonesia voluntarily and in good faith, without the need for third-party intervention.[39] Voluntary compliance by the losing party is a fundamental consequence of the parties' agreement in arbitration, which includes an arbitration clause within their contract. When arbitration is chosen, both parties are expected to abandon the mindset of traditional court proceedings, where parties often attempt to avoid accountability

[39] Panusunan Harahap, "Eksekutabilitas Putusan Arbitrase Oleh Lembaga Peradilan [The Executability of Arbitration Award by Judicial Institutions]," Jurnal Hukum Dan Peradilan 7, no. 1 (March 21, 2018): 131, https://doi.org/10.25216/jhp.7.1.2018.127-150.

and delay enforcement. In contrast, arbitration aims to achieve efficiency, professionalism, and trust.[40]

However, procedurally under Article 66 of Law No. 30 of 1999, obtaining executorial status still requires an application through the Central Jakarta District Court, meaning it is not automatically enforceable. Foreign arbitration awards can only be executed once the Central Jakarta District Court issues an order for enforcement, as the court bailiff must receive authorization from the court. This requirement exists to ensure comprehensive enforcement when a party lacks good faith in voluntary compliance.

For the competent court, this paradigm concerning the characteristics of arbitration awards as final, binding, and enforceable also has practical implications. Judges should, in fact, impose greater constraints on parties attempting to resist foreign arbitration awards. While Article 5 of the NYC 1958 and Article 66 of Law No. 30 of 1999 do permit the possibility of refusing recognition and enforcement of foreign arbitration awards, both provisions should be interpreted in a systematic context.

One of the most problematic conditions is the phrase "public order." There have been several foreign arbitration awards denied recognition and enforcement in Indonesia, one example being the KBC vs. PT P and PL case. This discussion will not delve into the

[40] Anangga W. Roosdiono and Muhamad Dzadit Taqwa, "Paradigma Dalam Arbitrase Di Indonesia: Win-Lose Atau Win-Win/Lose-Lose?," Hukumonline.com, March 3, 2023.

complex debate over the ambiguity of "public order." Instead, it highlights that, under the systematic context between the NYC 1958 and Law No. 30 of 1999, when a foreign arbitration forum rules that one party must pay a claim and that party is proven to be at fault, the court should respect the foreign arbitration award. Similarly, the procedure for recognizing and enforcing foreign arbitration awards should not be used by the responsible party as a means to evade accountability.

If there is a misalignment between the normative approach that should govern the recognition and enforcement of foreign arbitration awards in Indonesia and the practices of disputing parties and the courts, this could impact foreign investors' willingness to engage with Indonesian parties. In this regard, the principles embodied in the NYC 1958 provide assurance of protection for foreign arbitration awards in Indonesia. Business actors involved in international arbitration disputes can receive assurance of protection for the recognition, validation, or enforcement of foreign awards, provided certain conditions are met according to Indonesian law. This is beneficial for business actors, as it avoids the risk of merely a "paper victory." Escalating these issues could diminish interest in international business transactions and investment, potentially hindering business activities and reducing profitability for business actors involved.

III. Conclusion

Rather than nullifying the legal effect of the NYC 1958 through Law No. 30 of 1999, these two regulations complement each other in the context of the recognition and enforcement of foreign arbitration awards in Indonesia. An examination of the articles within NYC 1958 reveals no provisions that significantly diverge from or conflict with Part Two on International Arbitration in Chapter VI on Enforcement of Arbitration Awards of Law No. 30 of 1999. Instead, various provisions in the NYC 1958 address issues not covered in Law No. 30 of 1999, with one of the most significant aspects being the respect for foreign arbitration awards. Conversely, matters not addressed in NYC 1958 but regulated by Law No. 30 of 1999 refer back to Law No. 30 of 1999. These include the requirements for recognition and enforcement of foreign arbitration awards in Indonesia and legal recourse against rulings of the Central Jakarta District Court's Chief Judge.

This understanding carries both paradigmatic and practical implications. In principle, business actors and the relevant courts should recognize that foreign arbitration awards are binding and enforceable based on Article 3 of the NYC 1958. The underlying tone is that Indonesia values and grants high respect to foreign arbitration awards, in contrast to the emphasis in the GC 1927 on respect for national sovereignty. This paradigmatic implication naturally leads to practical implications as well.

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