THE DILEMMA BETWEEN MONISM AND DUALISM IN LAW: THE EXECUTORIAL POWER OF INTERNATIONAL ARBITRATION AWARDS AND THE SOVEREIGNTY OF LAW IN INDONESIA

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Abstract
Globalization has driven increased economic and legal interactions between nations, including the use of international arbitration as a primary mechanism for resolving disputes in transnational business relations. However, the enforcement of international arbitration awards in Indonesia often faces challenges, particularly when the principle of national legal sovereignty clashes with international legal norms. This dilemma reflects the fundamental differences between the monist and dualist theories in transnational law. The monist theory posits that international law and national law constitute an integrated entity, allowing international arbitration awards to be directly enforceable within national jurisdictions. Conversely, the dualist theory prioritizes the supremacy of national law, asserting that international law cannot be applied without adaptation through domestic legislative processes. These conceptual differences form the foundation for analyzing the complexities of enforcing international arbitration awards in Indonesia. Through the case study of the dispute between PT First Media Tbk (Indonesia) and Astro All Asia Networks (Malaysia), this article explores how the Supreme Court of Indonesia refused to enforce an award issued by the Singapore International Arbitration Centre (SIAC), amounting to USD 303 million, citing public policy and national legal sovereignty. This analysis employs a normative and comparative approach to assess the relevance of monist and dualist theories within the Indonesian legal system. The article aims to identify challenges and opportunities in harmonizing national law and international commitments, as well as the role of national courts in determining the boundaries of enforcing international arbitration awards.
Keywords: International Arbitration, Monism, Dualism, National Legal Sovereignty

INTRODUCTION

The development of globalization, which has resulted in increased economic access and legal governance in recent times, has become an issue of significant concern. This development also demands that Indonesia integrate a legal governance framework capable

of synergizing to attract foreign investors, while at the same time ensuring that national sovereignty remains protected.[1]

In this context, the settlement of disputes through international arbitration bodies has become a standard practice in executing international business agreements, whether such relationships are business-to-business, business-to-person, or business-to-government.[2] One of the prevailing issues today concerns the question of the enforceability or the legitimacy of implementing international arbitral awards in different national jurisdictions.

There are two schools of thought regarding this issue. The monism school,[3] adheres to the principle that international law constitutes a logical ratio which directly derives from the fundamental norms of all legal systems, [4] thereby collectively binding every individual, legal entity, and/or state that has consented to such "law" through treaties or bilateral and multilateral agreements. [5] Thus, under this school of thought, international law and national law are regarded as a unified entity intrinsically linked to one another, legitimizing the direct application of international law within the domestic legal system without requiring modification of the underlying national legal norms. [6]

Conversely, the dualism theory grants supremacy to national law and regards the sovereignty of national law as deriving from state sovereignty. Consequently, international law cannot compel a state to comply and adhere to it.[7] There is a strict separation between the two systems, and the inherent orientation towards the interests of a state or a certain group becomes the geo-juridical and geo-political foundation for such a view.

This dichotomy can be observed in the international arbitration dispute between PT First Media Tbk, an Indonesian company engaged in telecommunications and multimedia, and Astro All Asia Networks, a Malaysian company operating in the media and entertainment industry. The dispute arose from Astro All Asia Networks' claim that PT First Media Tbk failed to fulfill payment obligations as stipulated in their commercial agreement. In that agreement, both parties agreed that any disputes arising from alleged breaches would be resolved through arbitration in Singapore under the rules of the Singapore International Arbitration Centre (SIAC).

Subsequently, in 2008, the Singapore International Arbitration Centre (SIAC) rendered an award requiring PT First Media Tbk to pay compensation to Astro All Asia Networks in the amount of USD 303 million, including interest and arbitration costs. This became a fundamental issue: how can an arbitral award rendered by an international arbitration body

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[1] Argvirta, A.S., &, Agus, A. (2020). *Modul Best Practice Penanganan Gugatan Arbitrase Internasional Terhadap Pemerintah Indonesia. Teknis Substantif Bidang Pelayanan Otoritas Pusat dan Hukum Internasional.* Depok: BPSDM KUMHAM Press, 11

[2] Latief, A. M. I., Sumardi, J., & Sakharina, I. K. (2023). *Kedaulatan Hukum Nasional Dalam Putusan Arbitrase Internasional: Sengketa Negara Versus Pihak Swasta.* Amanna Gappa, 31(1), 58

[3] Cali, B. (2015). *The Authority of International Law: Obdience, Respect, and Rebuttal.* Oxford University Press, 137.

[4] Dixon, M. (1993). *Textbook on International Law.* Blackstone Press Limited, 69

[5] Istanto, S. (2010). *Hukum International.* Universitas Atma Jaya Yogyakarta, 7

[6] Dumoli Agusman, D. (2014). *Treaties Under Indonesian Law: Comparative Study.* Remaja Rosdakarya, 85

[7] D'Amatio, A. (2010). *The Coerciveness of International Law.* Faculty Working Papers: http://scholarycommons.law.northwestern.edu/cgi/viewcontent.cgi?article1090&context=facultyworkingpapers, diakses pada 1 Juli 2024 pukul 10.35 WIB.

obtain executorial justification in Indonesia, given that PT First Media Tbk is a company subject to Indonesian jurisdiction rather than Singaporean jurisdiction?

In this journal, the author will conduct an in-depth comparative analysis regarding the enforcement of arbitral awards issued by international arbitration bodies from the perspective of the monism school of thought and the dualism theory, as well as examine the role of national courts in providing justification for the enforcement of such international arbitral awards within the Indonesian legal system.

METHOD

This research employs a normative juridical method,[8] aiming to analyze statutory regulations, legal doctrines, and legal concepts related to the enforcement of arbitral awards rendered by international arbitration bodies within the jurisdiction of Indonesia. In particular, it utilizes a statute approach as a means to examine and distinguish the legal foundations based on the monism and dualism schools of thought, along with the relevant legal provisions that may justify the execution of arbitral awards issued by international arbitration bodies within the Indonesian legal system.

RESULTS AND DISCUSSIONS

According to Mochtar Kusumaatmadja, an international treaty is defined as an agreement entered into between members of the community of states, which is intended to create specific legal consequences.[9] Accordingly, subjects of international law are those parties qualified to enter into and implement international treaties, including States, International Organizations, the Holy See/Vatican, the International Red Cross, belligerents (rebels), and, in a limited scope, individuals.[10]

Simon Butt indicates that Indonesia is prone to experiencing overlapping legal interpretations.[11] Proponents of monism consider Indonesia a monist state, as evidenced by two factors. First, Law Number 24 of 2000 concerning International Treaties does not provide clarification regarding the status of international treaties ratified by Indonesia; thus, the existence of this Law does not automatically oblige the state to carry out a process of transformation. [12] Second, the Indonesian Supreme Court, in resolving the case involving the Embassy of Saudi Arabia in Indonesia, applied the principle of diplomatic immunity based on Article 31 of the 1961 Vienna Convention on Diplomatic Relations, even though at that time it had not yet been transformed or integrated into national law. [13] These two considerations suggest that Indonesia is a monist state in the perspective of monism-dualism theory.

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[8] Hasna Triadi, N., & Arfa'I, (2022). *Analisis Perpu Sebagai Salah Satu Jenis Peraturan Perundang-Undangan Berdasarkan UU No. 12 Tahun 2022*. Limbago Journal of Constitutional Law, 2(3), 366.
[9] Mahawijaya, I. (2015). *Perjanjian Internasional dan Mahkamah Konstitusi dalam Ruang Perdebatan.* Malang: Media Nusa Creative, 31
[10] Roisah, K. (2015). *Hukum Perjanjian Internasional Teori dan Praktik.* Malang: Setara Press, 5
[11] Melatyugra, N. (2016). *Mendorong Sikap Lebih Bersahabat Terhadap Hukum Internasional: Penerapan Hukum Internasional Oleh Pengadilan Indonesia.* Refleksi Hukum: Jurnal Ilmu Hukum, 1(1), 49
[12] Butt, S. (2014). *The Position of International Law Within The Indonesian Legal System.* Empry International Law Review, 1(1), 79
[13] *Ibid*, 79

Under this principle, international arbitral awards possess direct executorial power and may be implemented without the necessity of transformation or approval from national law. The application of this principle strengthens the position of international law as a fundamental norm in transnational legal relations. In the context of Indonesia, the monist perspective should encourage the direct enforcement of international arbitral awards in accordance with the state's commitments under international agreements, such as the 1958 New York Convention.

Although international law recognizes the sovereignty of each state within the international community, it does not permit the imposition of the legal provisions of one state on the jurisdiction of another, insofar as it would undermine the fundamental norms and values of the respondent state. [14]

Conversely, dualists consider Indonesia to be a dualist state, as indicated by two factors. First, the ratification of the United Nations Convention on the Law of the Sea (UNCLOS) into Law Number 17 of 1985 concerning the Ratification of UNCLOS did not immediately replace Law Number 4 of 1960 concerning Indonesian Waters, until ten years later with the promulgation of Law Number 6 of 1996 concerning Indonesian Territorial Waters, which authorized the applicability of UNCLOS provisions.

Second, in practice, there are often obstacles to enforcing international arbitral awards in Indonesia due to the complex and lengthy execution processes and high costs.[15] The fact that such awards are not self-executing, even though Indonesia ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards through Presidential Decree Number 34 of 1981. Consequently, international arbitral awards may be annulled by Indonesian courts as stipulated in Supreme Court Regulation Number 3 of 2023 concerning Procedures for the Appointment of Arbitrators by the Court, Right to Challenge, Examination of Applications for Enforcement, and Annulment of Arbitral Awards.

Accordingly, from this perspective, international arbitral awards may only be executed after undergoing an adaptation or transformation process into the domestic legal system. National courts serve as the authority that determines the validity and application of international law within their jurisdiction.

The position of international law within the Indonesian legal system is highly inclusive under the 1945 Constitution of the Republic of Indonesia, which does not explicitly regulate the status of international law within its main body, merely granting the authority to conclude international treaties without specifying their status within the national legal system. This stands in contrast to, for example, the Constitution of South Africa, which is considered one of the most progressive constitutions for clearly articulating the status of international law within its national legal system.[16]

[14] Widjaja, G. (2001). *Seri Hukum Bisnis – Alternatif Penyelesaian Sengketa.* Jakarta: PT. Raja Grafindo, 158.
[15] Sakharina, I. K., Patittingi, F., Hidayat, A., Aspan, Z., Halim, H., Hasrul, M., & Yunus, A. (2021). *Taiwan Soverignty And It's Position To The South China Sea Dispute Under Ther International Law.* Jurnal of Legal: Ethical and Regulatory Issues, 24(1), 8
[16] Melber, H. (2013). *Constitution In Democratic South Afrika: Celebrations, Constations, and Challenges.* Strategic Review for Southern Afrika, 36(1), 203

Reflecting on the international dispute that resulted in the SIAC award ordering PT First Media Tbk to pay compensation to Astro All Asia Networks in the amount of USD 303 million, including interest and arbitration costs, it ultimately ended with the arbitral award being non-executable as annulled by the Indonesian Supreme Court Decision Number 1100/Pdt.G-PN.Jkt.Sel, which applied the public order principle (ordre public) to reject the enforcement of the international arbitral award.

This is not solely based on national law; Article V paragraph (2) letter b of the 1958 New York Convention provides:

> "*The recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country*."

Thus, international treaty agreements explicitly stipulate that any decision made by a state other than the state where recognition or enforcement is sought constitutes a foreign arbitral award and prohibits the recognition or enforcement of an award that is contrary to the public policy of that state. This serves as an equilibrium in the utilization of international law, preventing abuse and providing clear guidelines for national courts.[17]

Furthermore, based on the competence, authority, and scope of enforcement of international arbitral awards, Article 62 paragraph (2) of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution stipulates:

> "*The Chairman of the District Court as referred to in paragraph (1) shall, prior to issuing an enforcement order, first examine whether the arbitral award complies with Articles 4 and 5, and is not contrary to morality and public order*."

Additionally, Article 66 letter c provides:

> "*International arbitral awards as referred to in letter a may only be enforced in Indonesia insofar as they do not conflict with public order*."

Accordingly, both national and international legal frameworks provide space for a state to refuse the enforcement of an international arbitral award if it is deemed to conflict with the principle of public order. This underscores the central role of national courts as legitimizing agents in determining the validity and enforceability of international arbitral awards.[18]

CONCLUSION

Based on the analysis of the dilemma between monism and dualism in the enforcement of international arbitral awards in Indonesia, it can be concluded that the implementation of international arbitral awards still faces various challenges, particularly concerning the principle of public order, complex execution procedures, and diverse legal interpretations. The Indonesian legal system, which does not explicitly determine the hierarchy of international law within the national legal framework, further exacerbates this complexity.

[17] Cleveland, S. H. (2006). *Our International Constitution*. The Yale Journal of International Law, 1(1), 107.
[18] Weill, S. (2014). *The Role of National Courts in Applying International Humanitarian Law*. Oxford University Press, 13

The case of PT First Media Tbk vs Astro All Asia Networks illustrates how national courts, through the application of the public order principle, play a central role in determining the validity of enforcing international arbitral awards. Nevertheless, an overly protective attitude toward national law may negatively impact Indonesia's attractiveness as a destination for foreign investment.

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