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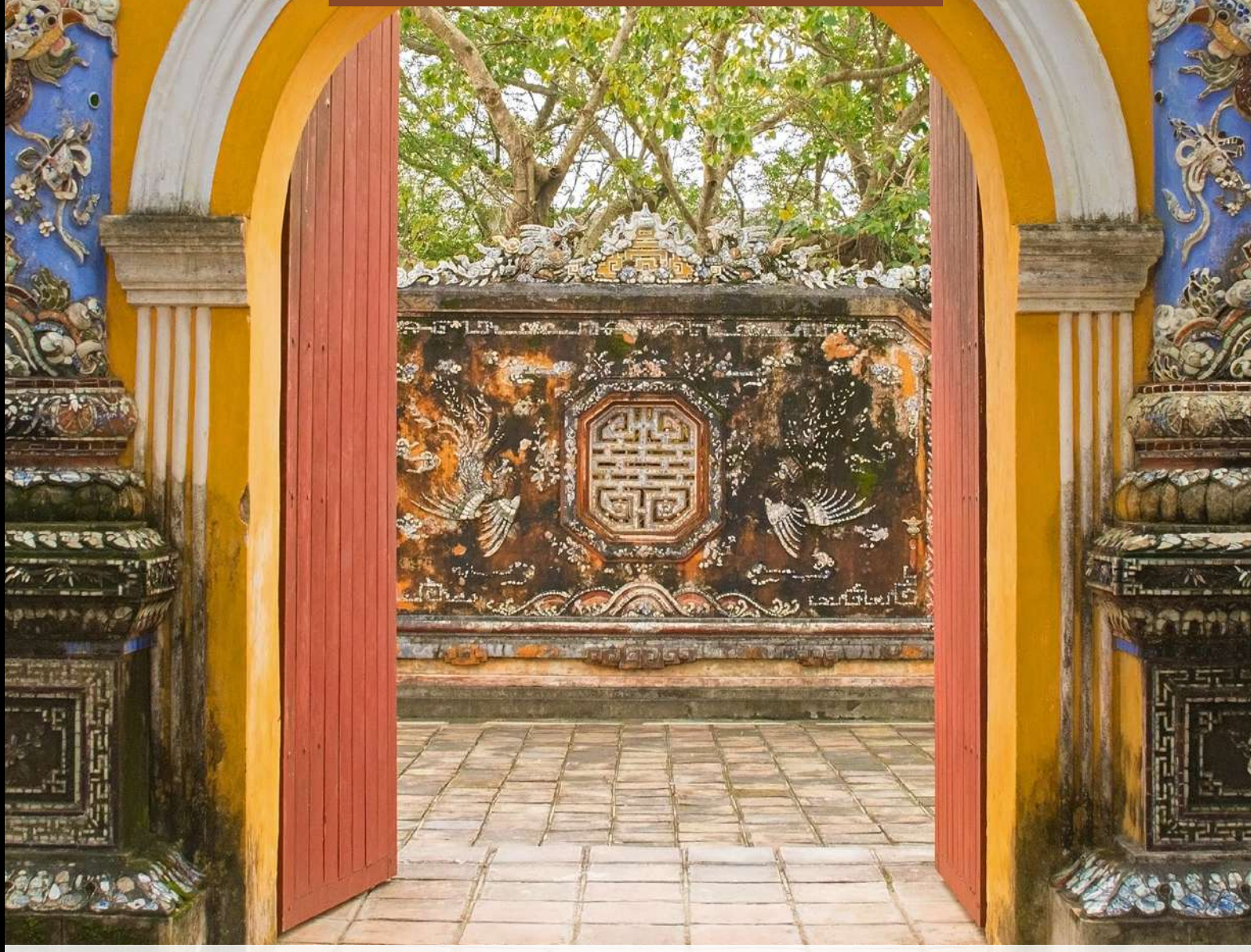

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Country Update: Commercial Arbitration in Indonesia

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This article provides a commentary on arbitration law and practice under Indonesia's first national dispute resolution legislation, Law No 30 of 1999 on Arbitration and Alternative Dispute Resolution, in light of decisions of the Supreme Court and the Constitutional Court. It also focuses on difficulties arising from the registration, enforcement and annulment of awards, the role of arbitral and ADR institutions in the dispute resolution landscape and challenges to the acceptance of institutional arbitration.

Background

The practice of arbitration has existed in Indonesia since the mid-19th century. Prior to the country's independence, it was governed by arts 615-651 of the former Dutch Code of Civil Procedure for Europeans (*Reglement op 'de Rechtsvordering* or colonial *RV*). The national legal system continued to recognise arbitration following independence. Under the Indonesian Constitution of 1945, former Dutch laws not conflicting with it would remain valid, if not fully binding and at least as guidelines, unless and until superseded by laws of the Republic of Indonesia.

Prior to 1999, however, arbitration was usually considered a pre-litigation dispute resolution process. Article 15 of Law No 1 of 1950 on the Structure, Power and Judicial Process of the Supreme Court empowered Indonesia's Supreme Court (the Supreme Court) to adjudicate appeals against arbitral awards. Thus, until the enactment of Indonesia's first

national law on arbitration in 1999, State courts continued to dominate the dispute resolution landscape.

Current arbitration legislation

The key Indonesian legislation on arbitration today is Law No 30 of 1999 on Arbitration and Alternative Dispute Resolution (the 1999 Law or the Law).[1] Enacted and promulgated on 12 August 1999, it replaced arts 615-651 of the colonial *RV*.

It is important to note that the 1999 Law did not adopt the UNCITRAL Model Law on International Commercial Arbitration. Further, apart from provisions governing the enforcement of awards, it applies only to 'domestic' and not 'international' arbitration. It therefore does not deal with many important current issues in international arbitration, such as multi-party arbitration, expedited procedures, emergency arbitration and the enforcement of emergency awards, and third-party funding.

> "… [T]he 1999 Law did not adopt the UNCITRAL Model Law on International Commercial Arbitration. Further, apart from provisions governing the enforcement of awards, it applies only to 'domestic' and not 'international' arbitration."

Nevertheless, the Arbitration Law recognises some of the most fundamental principles of arbitration, such as party autonomy, the limited role of the State courts, the arbitrability of disputes, separability of the arbitration agreement, powers of arbitrators, confidentiality of arbitral proceedings, finality of awards and court assistance in the enforcement of awards. These are discussed below.

Party autonomy

Under art 31 of the 1999 Law, the parties are free to choose the procedural law applicable to their arbitration, provided that it does not conflict with the provisions of the Law. If no arbitration rules are designated, the Law shall apply. As such, parties are entitled to conduct *ad hoc* arbitration without the involvement of any arbitral institution to administer the proceedings under its rules.

Despite the foregoing, the common method for conducting arbitration in Indonesia is by way of institutional arbitration. Due to lack of public awareness and education about *ad hoc* arbitration, there has been a common misapprehension that arbitration must be conducted by an arbitral institution. In this connection, the Indonesian National Arbitration Board/*Badan Arbitrase Nasional Indonesia* (BANI), which was established in 1977, has long been mistakenly perceived as a government-initiated arbitral institution, particularly because its name contains the word 'National'.

More pertinently, many complaints have been made that BANI's arbitration procedure is both too costly and time-consuming. It is also a common complaint that BANI-appointed arbitrators may not demonstrate the level of expertise and integrity that should be expected when performing their duties. Owing to a lack of information on the professional qualifications of arbitrators, it is usually difficult for parties to select competent arbitrators who can demonstrate a required level of experience and understanding of arbitration procedure. Moreover, under the current BANI Arbitration Rules 2021, parties may only challenge the appointment of an arbitrator by the chairman of BANI if they have reason to doubt his or her competence or that he or she has a conflict of interest.

Because of parties' dissatisfaction with the quality of BANI awards, many such awards are, in practice, brought to the courts for scrutiny on the grounds that an arbitrator may have misapplied the law or misunderstood the facts in reaching an erroneous decision. A number of BANI awards, such as that

in *v PT Pura Barutama Perum Percetakan Uang RI* (*PERURI*),[2] have been annulled by the Indonesian courts on the grounds that decisive documents were deliberately concealed by the claimant during the arbitration proceedings and that the chair of the arbitral tribunal (who was also the chairman of BANI), had a relationship with the claimant and so had not been independent.

> "… [T]he Arbitration Law recognises some of the most fundamental principles of arbitration, such as party autonomy, the limited role of the State courts, the arbitrability of a dispute, separability of the arbitration agreement, powers of arbitrators, confidentiality of arbitral proceedings, finality of awards and court assistance in the enforcement of awards."

Pursuant to art 22 of the 1999 Law, any party may challenge the appointment of an arbitrator if there are sufficient reasons and authentic evidence for doubting whether he or she will perform his or her tasks honestly and make impartial decisions. An appointment may also be challenged if a party can prove that the arbitrator has a family, financial or work relationship with one of the parties or their attorneys.

With the aim of enabling parties in dispute to have easier access to justice and developing Indonesian arbitration, several concerned authorities and business associations have taken the initiative in establishing new and more specialised arbitral bodies, such as BASYARNAS (*Badan Arbitrase Syariah Nasional*) to settle disputes in accordance with *Shari'ah* principles, BAPMI (*Badan Arbitrase Pasar Modal Indonesia*) to settle disputes in capital markets, and BAKTI (*Badan Arbitrase Perdagangan Berjangka Komoditi*) to settle disputes in commodities and futures exchanges. In the past two decades, more than 10 new arbitral bodies have been established in Indonesia and the numbers continue to grow. It may be said that their establishment was mainly motivated by the desire of local communities to have their own people, with experience and specialisation in specific sectors, sit as arbitrators.

In view of the co-existence of so many arbitral bodies in the financial sector, on 22 September 2020 the Indonesian Financial Services Authority/*Otoritas Jasa Keuangan* (OJK) decided to establish a single *Lembaga Alternatif Penyelesaian Sengketa - OJK* (LAPS-OJK) to assist the public in settling all kinds of dispute in the financial sector through arbitration and ADR. This initiative combined all of the pre-existing arbitration and ADR bodies in the financial sector[3] into one body.

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In light of the proliferation of arbitral bodies, Indonesian disputants are now more sceptical about institutional arbitration and tend to gravitate towards *ad hoc* arbitration. Many of them have become concerned about rigid institutional procedures and policies as well as (given the arbitration costs payable by parties) the quality of support facilities and staff provided by institutions.

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To promote and facilitate both *ad hoc* arbitration and mediation practice in Indonesia, the Indonesian Academy of Independent Mediators and Arbitrators/*Akademi Mediator dan Arbiter Independen Indonesia* (MedArbId) was established by a group of Indonesian independent mediators and arbitrators on 17 August 2015. MedArbId offers support to the public in conducting arbitration and mediation under either institutional or 'self-administered' (*ad hoc*) procedures and rules. To carry out its mission, MedArbId has established two affordable, accessible and convenient facilities in Jakarta and Denpasar (Bali) through which to provide venues and accommodation for arbitration and mediation participants.

Limited role of the State courts

The power of Indonesian courts to intervene in arbitral proceedings under the 1999 Law is expressly limited to specific circumstances.[4] These relate to the annulment and enforcement of awards and the appointment of arbitrators in cases where no other appointing authority has been designated by the parties or in the rules chosen by them.

Although the 1999 Law does not expressly recognise the *Kompetenz-Kompetenz* principle, it deems parties to have

waived their right to resolve disputes through litigation in a national court where they have agreed to arbitrate.[5] The Law also expressly provides that the courts have no jurisdiction over a dispute that is subject to an arbitration agreement.[6]

Arbitrability of disputes

Article 5 of the 1999 Law provides that all disputes that are commercial in nature (whether contractual or not) and concern rights which, under prevailing laws and regulations, fall within the full legal authority of and can be disposed of by way of an amicable settlement by the disputing parties, may be settled through arbitration. While the Law provides clear rules as to whether a particular type of a dispute can or cannot be settled by arbitration, much is open to interpretation.

> Many [disputants] … have become concerned about rigid institutional procedures and policies as well as (given the arbitration costs payable by parties) the quality of support facilities and staff provided by institutions.

In practice, certain disputes may involve such sensitive public policy issues that they are left exclusively to the jurisdiction of domestic courts applying domestic law. For example, in *ED & F Man (Sugar) Ltd v Yani Haryanto*,[7] the Supreme Court considered that the dispute determined by an LCIA award was not arbitrable under Indonesian law. This was because the subject-matter of the dispute was an agreement for provision of sugar that was subject to the approval of a local authority, the Indonesia Logistics Bureau/*Badan Urusan Logistik* (BULOG).

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Separability of the arbitration agreement

The 1999 Law defines an 'arbitration agreement' as a written agreement in the form of an arbitration clause entered into before a dispute arises, or a separate written agreement (a submission agreement) made after a dispute has arisen.[8] For a submission agreement to be recognised and enforced in Indonesia, it must be signed by all parties to the dispute and contain certain information (including the full names of the arbitrators and their secretary, as well as the period in which the dispute shall be resolved through the arbitration).

The 1999 Law recognises the principle of separability or autonomy of the arbitration clause. Under the Law, an arbitration clause which forms part of a contract will be treated as an agreement independent of the other terms of the contract. Article 10 of the Law expressly states that an arbitration agreement will not become void because of the occurrence of circumstances pertaining to the underlying agreement or the contracting parties, including termination of the underlying agreement.

Powers of arbitrators

Pursuant to art 31 of the 1999 Law, the parties are free to choose either institutional or *ad hoc* arbitration or to vary chosen rules, provided that this does not conflict with the provisions of the Law. Furthermore, the appointed arbitral tribunal may decide the timeframe and place of the arbitration where these issues have not been determined by the parties.

Under the 1999 Law, and at the request of one of the parties, the tribunal may issue a provisional, interim or other interlocutory award or decision to regulate how the dispute will be considered, including ordering a security attachment, deposit of goods with third parties or the sale of perishable goods. While in practice the court's assistance may be requested if the tribunal grants a provisional award or interim relief in the arbitration, the 1999 Law, unfortunately, makes no express provision allowing court intervention specifically in relation to interim measures. It only permits parties to seek judicial assistance for the appointment of arbitrators, determination of challenges to arbitrators and the enforcement of awards.

> "… [T]he 1999 Law … makes no express provision allowing court intervention specifically in relation to interim measures. It only permits parties to seek judicial assistance for the appointment of arbitrators, determination of challenges to arbitrators and the enforcement of awards."

The 1999 Law is also silent on whether a tribunal or a party to an arbitration agreement can compel a third party to join an arbitration. However, art 30 of the Law stipulates that a third party may voluntarily intervene and join the arbitration if:

(1) it has an interest in the dispute referred to arbitration;
(2) the parties agree that it may join the arbitration; and
(3) the tribunal agrees that it may join the arbitration.

Confidentiality of arbitral proceedings

Article 27 of the 1999 Law stipulates that all proceedings are closed to the public, a statutory elucidation explaining that this is to ensure the confidentiality of the arbitration process. It should be noted, however, that the Law makes no provision as to the confidentiality of arbitral awards.

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Finality of awards

Pursuant to art 60 of the 1999 Law, an award shall be final and binding upon both parties in the same way as a final and binding court judgment. These provisions attempt to address the main concerns of the general public in Indonesia about the effectiveness of awards.

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Registration of awards

The 1999 Law requires an arbitral award to be registered in a competent court if it is to be recognised and enforced in Indonesia. This applies whether the award is domestic or international and responsibility for registration with the court rests with the tribunal or their duly authorised representatives. Pursuant to art 59(4) of the Law, failure to register a "national" (ie, domestic) award within 30 days from the date it was rendered will render it unenforceable. There is no express provision in the Law regarding a time limit for registering international awards.

Thus far, Indonesian courts have not strictly applied the 30-day limit to registration of international awards, but have granted *exequatur* in cases where applications have been made outside of this timeframe. That said, a judicial review petition was submitted to the Constitutional Court by an Indonesian company, PT Indiratex Spindo, challenging such differential treatment under the 1999 Law, including the lack of a time limit for filing an application with the relevant District Court for annulment of an international award. The Constitutional Court rejected the petitioner's application on the ground that no breach of constitutional rights arose from the petitioner's complaint.[9]

Court assistance in the enforcement of awards

As previously explained, registration of both domestic and international arbitral awards in Indonesia is a necessary step for the purpose of enforcement of awards. The registration process is not, however, straightforward as it is subject to certain administrative procedures.

A party seeking registration must first determine whether an award is domestic/national or foreign/international. The 1999 Law does not define 'domestic/national award'. Article 1(9) does, however, define 'International Arbitration Awards' as "awards handed down by an arbitration institution or individual arbitrator(s) outside the jurisdiction of the Republic of Indonesia, or an award [*sic*] by an arbitration institution or individual arbitrators which under the provisions of Indonesian law are deemed to be international arbitration awards."

The lack of a provision expanding the definition of 'international arbitration award' entails that only an award rendered outside of the jurisdiction of Indonesia may be considered such an award. Conversely, therefore, if an award is rendered in Indonesia, then it may be considered as a national or domestic award.

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It is important to note, however, that such a distinction between 'national' and 'international' awards based on the venue or seat of the arbitration may not apply across the board. In *PT Lirik Petroleum v PT Pertamina*,[10] the Supreme Court held that an ICC award rendered in Jakarta was not a 'domestic arbitration award' because of the ICC's involvement as administrator of the arbitration. It considered that the ICC (with its headquarters in Paris) was an international arbitral institution, so that the ICC award concerned was an 'international arbitration award'. Furthermore, the court held that, as an 'international arbitration award' under the 1999 Law, its registration was not subject to the 30-day time limit pursuant to art 59(1) of the Law.

Under the 1999 Law, international awards may be registered at the District Court of Central Jakarta (DCCJ) only if they are supported by the following documents:

(1) a duly executed power of attorney from the arbitrator (where the award is registered by the arbitrator's proxy) and its official translation into *Bahasa Indonesia* (Indonesian);
(2) an original or an authenticated copy of the award and its official translation into Indonesian;
(3) an original or an authenticated copy of the agreement that is the basis of the foreign arbitral award and its official translation into Indonesian; and
(4) a statement by the Indonesian Embassy in the country where the arbitral award was rendered stating that

the country has a bilateral or multilateral treaty with Indonesia on the recognition and enforcement of foreign arbitral awards (eg, the New York Convention 1958).

After registration of the award has been completed, leave for enforcement (*exequatur*) may be sought from the competent court. Unless the government of the Republic of Indonesia is a party to the arbitrated dispute, art 66(d) of the 1999 Law vests jurisdiction in the Chief Judge of the DCCJ to issue an *exequatur* (where the government was a party, art 66(e) stipulates the Supreme Court). The Chief Judge shall issue an *exequatur* if the award:

(1) has been rendered by an arbitral tribunal in a country that is a contracting party under a bilateral or multilateral treaty on the recognition and enforcement of foreign arbitral awards (art 66(a));
(2) falls within the scope of commercial law under Indonesian law (art 66(b)); and
(3) does not violate public policy (art 66(c)).

Legally, the *exequatur* issued by the Chief Judge of the DCCJ is final and binding. Article 68 of the 1999 Law provides that it is not reviewable, whether through appeal or cassation. An arbitral award that has received an *exequatur* is equivalent to a court judgment having a *res judicata* effect. It is the *exequatur* that makes an arbitral award enforceable. Once it has been issued, the award creditor must file an application with the Chief Judge of the DCCJ to obtain a writ of execution if it wishes the court to enforce the award judicially.

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Once the application has been granted, the DCCJ will summon and reprimand (*aanmaning*) the award debtor to comply with the award. If the debtor still fails to comply with it, judicial enforcement (by attachment and sale of the debtor's identified assets through public auction or private sale) will commence, with the assistance of relevant district courts based on the location(s) of specific assets.

Annulment of awards

Article 70 of the 1999 Law provides limited grounds for annulling awards. These are:

(1) that letters or documents submitted in the arbitration proceedings were discovered or deemed to have been false after the award was rendered;
(2) that a document that was material to the outcome of the case or decisive in nature was deliberately concealed by the opposing party and was found after the award was rendered; and
(3) that the award was rendered as a result of fraud committed by one of the parties.

In this connection, Constitutional Court decision No 15/PUU/XII/2014 is of particular significance. In this case, the Court set aside the elucidations to art 70 of the 1999 Law. It considered that the text of art 70 itself was already sufficiently clear regarding the requirements for fulfilling the three grounds set out therein. The elucidations led to confusion and uncertainty as to whether prior examination of the subject award by a court was a prerequisite to submission of an application to annul it. The Court made clear that valid

applications for annulment of awards in Indonesia did not require a prior court decision confirming the existence of the three circumstances set out in art 70.

Pursuant to art 71 of the Law, no annulment application can be made after 30 days from the date the award is registered at the competent court.

Pursuant to art 72(4) of the Law, no appeal is permissible against a court decision rejecting an annulment application.[111] In practice, however, this provision has often been ignored, not only by parties but also by district court clerk offices on the basis that the latter are in no position to reject appeal submissions. To address the growing concerns about the abuse of the judicial system by parties acting in bad faith, the Supreme Court issued *Circular Letter No 4 of 2016*, which provides an interpretation of art 72(4). In it, the Supreme Court reaffirms its position that there is no available legal avenue (by appeal or judicial review) for challenging a District Court decision rejecting an annulment application. It appears that the number of appeals filed against District Court rejections of annulment applications since 2016 have declined.

> "… [T]here is no available legal avenue (by appeal or judicial review) for challenging a District Court decision rejecting an annulment application."

Application of public policy

In *Pertamina v Karaha Bodas,*[12] the DCCJ controversially granted an application to annul an UNCITRAL award rendered in Geneva on public policy grounds. The DCCJ found (*inter alia*) that the Indonesian parties had no opportunity to participate in the appointment of the tribunal and that it may have misapplied a number of Indonesian mandatory laws that were the governing law of the parties' contract. Following much criticism, the Supreme Court later overturned the DCCJ's decision and so remedied the problem.

Since its decision in *Pertamina v Karaha Bodas*, the Supreme Court has steadily developed a fluent body of jurisprudence in this regard. It is therefore well settled and understood by Indonesian courts today that the competent court for the annulment of an international arbitral award is that of the seat of arbitration.

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That said, special caution needs to be applied by parties who arbitrate under applicable Indonesian substantive or procedural law. To date, Indonesia has had an inadequate law on 'public order' (to employ the term used in the 1999 Law). Award debtors have often taken advantage of the lack of a statutory definition of or guidelines on the interpretation of 'public policy' or 'public order' to challenge or avoid the enforcement of awards on public policy grounds.

There are a number of cases in which enforcement of an award has been refused on grounds of violation of public policy. A notable recent Indonesian court decision on the application of public policy is *Astro Nusantara International BV & Ors v PT Ayunda Prima Mitra & Ors.*[13] Astro's application for recognition and enforcement in Indonesia of an SIAC award in its favour was rejected by the DCCJ in September 2012 on public policy grounds. The DCCJ considered that the arbitral tribunal had unlawfully interfered in the sovereignty of the Indonesian judiciary pursuant to an arbitration clause

that limited the rights of the parties to bring the case to court. The DCCJ found that the parties had made an agreement to refer all disputes to arbitration under the SIAC Rules and not to litigate in any State court, including in Indonesia. The DCCJ also found that the award contained an instruction to Ayunda to cease and withdraw its Indonesian litigation proceedings against Astro and others.

In this case, the DCCJ held that the limitation of the parties' right to go to court as set out in their arbitration agreement breached the legal requirements for a valid agreement under the Indonesian Civil Code, particularly that of "permissible cause". The DCCJ further reasoned that the SIAC award violated the Indonesian court's sovereignty by ordering Ayunda to rescind its ongoing litigation case. On appeal, the Supreme Court upheld the DCCJ's decision.

It appears from this case that there is a risk factor in Indonesian courts refusing enforcement of an award on public policy grounds where they find that there is an ongoing case brought by an Indonesian party in the Indonesian courts on the same subject-matter prior to the application for enforcement of an award against that party. Further, Indonesian courts may be willing to apply the public policy ground if they find that an arbitral tribunal has violated an established Indonesian legal principle.

Other caveats

The process of execution of assets upon issuance of an *exequatur* can take a considerable length of time. This is because it depends heavily on the attitude of court officials in carrying out the relevant procedures, the creditor's ability to locate the debtor's assets to be attached and sold, and the co-operation of the debtor.

Given that challenging the filing of an application to the Indonesian courts for annulment of international awards is no longer effective and that issuance of an *exequatur* is not subject to appeal, award debtors try to find other ways of delaying or frustrating enforcement. One such is to file a formal opposition or challenge to the court as to the legality of the execution against assets. There is no specific provision in the 1999 Law prohibiting of such challenges.

> "The process of execution of assets upon issuance of an *exequatur* can take a considerable length of time."

There is also no provision in the 1999 Law that allows or prohibits the stay of enforcement proceedings by the enforcing court pending the outcome of the challenge proceedings. In practice, however, the court usually and at its discretion stays enforcement proceedings on a request by the party against which enforcement is sought. Although theoretically the filing of such opposition will not block enforcement of an international award that has been granted an *exequatur* by the competent court, in practice every submission opposing enforcement will effectively stay any enforcement process.

1 *Editorial note*: Available in unofficial English translation (but without statutory explanatory notes or 'Elucidations') at http://www.flevin.com/id/lgso/translations/.

2 Decision No 30/Pdt.P/2002/PN.KDS (District Court of Kudus, Central Java, 2 July 2003).

3 *Badan Arbitrase Pasar Modal Indonesia* (*BAPMI*), *Badan Mediasi dan Arbitrase Asuransi Indonesia* (*BMAI*) *Badan Mediasi Dana Pensiun* (*BMDP*), *Lembaga Alternatif Penyelesaian Sengketa Perbankan Indonesia* (*LAPSPI*), *Badan Mediasi Perusahaan Penjaminan Indonesia* (*BAMPPI*) and *Badan Mediasi Pembiayaan, Pegadaian, dan Venture Indonesia* (*BAMPPVI*).

4 Article 11(2) of the 1999 Law.

5 *Ibid*, art 11(1).

6 *Ibid*, art 11(3).

7 Judgment No 1205, K/Pdt/1990 (4 December 1991).

8 Article 1(3) of the 1999 Law.

9 Decision No 19/PUU-XIII/2015.

10 *PT Pertamina EP and PT Pertamina (Persero) v PT Lirik Petroleum*, Judgment No 904 K/Pdt.Sus/2009 (9 June 2010, Supreme Court).

11 Nonetheless, under the 1999 Law, in cases in which a District Court decides to annul an award, the respondent to the petition may appeal to the Supreme Court.

12 *Perusahaan Pertambangan Minyan dan Gas Bumi Negara (Pertamina) v Karaha Bodas Co LLC & Anor*, Extraordinary Appeal No 444/Pk/Pdt/2007 (Supreme Court, 9 September 2008).

13 Judgment No 877 K/Pdt.Sus/2012 (Supreme Court, 26 March 2013). See also Extraordinary Appeal No 26 PK/Pdt.Sus-Arbt/2016 (Supreme Court, 18 May 2016).

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