

# INDONESIA

by Timur Sukirno<sup>1</sup> and Reno Hirdarisvita,<sup>2</sup>  
Baker & McKenzie, Jakarta

## A. LEGISLATION, TRENDS AND TENDENCIES

### A.1 Legislative Background

Arbitration in Indonesia is promoted by the Indonesian Chamber of Commerce and Industry (Kamar Dagang Industri Indonesia – “KADIN”), which established the Indonesian National Board of Arbitration (Badan Arbitrase Nasional Indonesia – “BANI”) on 3 December 1977. On 12 August 1999, the Government of the Republic of Indonesia promulgated Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (the “Arbitration Law”), which replaces those provisions enacted during the Dutch colonization, *i.e.*, Articles 615 to 651 of the Reglement op de Burgerlijke Rechtsvordering (Stb-1847), Article 377 of the Het Herziene Indonesisch Reglement (Stb-1941) and Article 705 of the Rechtsreglement Buitengewesten (Stb-1927).

The Arbitration Law regulates, *inter alia*, the following matters:

- parties to an arbitration and the arbitration agreement;
- disputes which can be settled by arbitration;
- appointment of arbitrators;
- proceedings before an arbitral tribunal;
- arbitration expenses; and
- actions against arbitral award.

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<sup>1</sup> Timur Sukirno is a partner in Baker & McKenzie’s Jakarta office. He focuses on the areas of debt restructuring, bankruptcy and finance, as well as commercial disputes and arbitration.

<sup>2</sup> Reno Hirdarisvita is an associate in Baker & McKenzie’s Jakarta office and is a member of the Firm’s Global Dispute Resolution Practice Group.

A prominent feature in the Arbitration Law, as compared to the old law, are the provisions on international and domestic arbitration as well as the recognition and enforcement of these awards in Indonesia. Note that the Arbitration Law did not take the UNCITRAL Model Law into account, and therefore Indonesia cannot be qualified as a Model Law country.

## **A.2 Trends and Tendencies**

Under the Arbitration Law, the existence of a valid arbitration agreement precludes the parties from submitting the dispute to the district court. Furthermore, except for certain matters as stipulated in the Arbitration Law (*e.g.*, the appointment of an arbitrator in the event the parties fail to reach an agreement on the appointment or where there is no agreement concerning the appointment of the arbitrator), the district court is obliged to reject a dispute that is the subject of an arbitration agreement. This national policy concerning the validity of arbitration agreements is in line with the New York Convention, to which Indonesia is a signatory.<sup>3</sup>

Prior to the enactment of the Arbitration Law, and in spite of Indonesia's ratification of the New York Convention, there were numerous instances in which disputes validly governed by arbitration provisions were in fact heard by the district courts.

The enactment of the Arbitration Law has not, however, put a definitive end to the courts' resistance to arbitration in Indonesia, particularly in cases relating to the annulment of agreements. The reason for this stems from Article 1266 of the Indonesian Civil Code ("Civil Code") which provides:

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<sup>3</sup> Indonesia ratified the New York Convention through Presidential Decree No. 34 of 1981. Pursuant to this Presidential Decree, and with reference to Article I (3) of the New York Convention, Indonesia will only apply the New York Convention on the basis of reciprocity. Based on the "reciprocity principle," which is commonly called the "reciprocity reservation," foreign arbitral awards can only be enforced if the country granting the award is also a Contracting State to the New York Convention. Additionally, Indonesia will apply the New York Convention only to differences arising out of legal relationships, either contractual or otherwise, which are considered as commercial under Indonesian law (commonly called as "commercial reservation").

Requirements for an annulment shall always be deemed to have been incorporated in mutual agreements, whenever one of the parties does not fulfill its obligations.

In such event the agreement is not null and void by law, but the annulment shall be requested to the Judge.

The common interpretation of this article is that the annulment of agreements upon default by one of the parties is within the purview of the district court, which is why most agreements provide for a waiver of this statute in order to enable the parties to terminate the agreement among themselves, without having to go to court. However, where the parties did not waive this article in their agreement and arbitration is agreed upon as the dispute resolution mechanism, there remains doubt about whether an arbitrator can be interpreted as falling within the scope of the term “Judge” referred to in Article 1266 of the Civil Code.

A recent example of this would be the case between Sabre Inc. (“Sabre”) and PT Metro Batavia (“Batavia”) registered on 28 November 2008. The parties executed an information technology service agreement on 15 March 2002, pursuant to which Sabre agreed to provide IT services for Batavia’s ticketing operation. Claiming that Sabre had provided poor service rising to the level of default of its obligations, Batavia filed an action in the District Court of Central Jakarta requesting that the court annul the agreement. Batavia also claimed that the draft agreement was made unilaterally by Sabre and that Batavia executed it without reviewing and analyzing the draft. In its response, Sabre argued that the district court had no jurisdiction to examine the case since the agreement between the parties is governed under Texas law and also incorporated an arbitration clause. Further, the dispute was actually resolved by the Judicial Arbitration and Mediation Services in Texas on 8 May 2009. The arbitral tribunal found Batavia guilty for breach of contract and ordered Batavia to pay compensation to Sabre. Nevertheless, in a provisional judgment rendered on 22 October 2009, the district court held that it had jurisdiction over the case because the agreement between the parties was made unilaterally, and because the arbitral award originated from a complaint submitted unilaterally by Sabre.

This proceeding is worth noting since the district court appears to view itself as having authority to accept an application for annulment of an agreement despite the fact that there was an arbitration clause, and an arbitral award was in fact rendered in this dispute. The case is currently ongoing, and has not reached a final and binding judgment. The final findings of the district court will be significant to the interpretation of Article 1266 of the Civil Code.

## **B. CASES**

### **B.1 Annulment of Arbitral Award — Government Role in Private Action**

The District Court of Central Jakarta recently issued an interesting decision that is worth noting. In a dispute concerning PT Pertamina EP (“Pertamina”) and PT Lirik Petroleum (“Lirik”), Pertamina submitted an application for the annulment of an arbitral award issued by the ICC. The dispute revolved around a certain Enhanced Oil Recovery Contract (“EOR Contract”) executed by Pertamina and Lirik. Under the EOR Contract, Lirik was entitled to apply for the commercialization of oil and gas fields in Molek, North Pulaui and South Pulaui. Pertamina refused Lirik’s commercialization application, which in turn prompted Lirik to seek indemnification through arbitration before the ICC, as was agreed to in the EOR Contract.

In its Partial Award dated 22 September 2008, the tribunal held that Pertamina’s refusal was in violation of the EOR Contract and therefore Pertamina was liable for Lirik’s loss of potential profit. In its Final Award dated 27 February 2009, the tribunal ordered Pertamina to indemnify Lirik and pay for the arbitration cost in the amount of US\$34,495,000. Pertamina was also ordered to pay 6% interest annually commencing from the date of the Final Award until its execution.

This award was registered at the District Court of Central Jakarta for the purpose of enforcement on 21 April 2009, and Pertamina applied for annulment of the award on 11 May 2009. Pertamina argued that the award was flawed as it violated legal enforcement and certainty.

Pertamina argued that by issuing the award, the ICC tribunal undermined Pertamina's authority as the government's only representative in the oil and gas mining sector. As such, the award violated public policy as stated in Articles 33 (2) and (3) of the 1945 Constitution.<sup>4</sup> Pertamina also argued that the tribunal was not impartial because it awarded Lirik a greater amount in loss of profit damages than Lirik claimed. Specifically, Lirik claimed loss of profit as of 1997, but the tribunal decided that loss of profit damages should be calculated from 12 September 1995 to 27 March 2006.

The district court dismissed Pertamina's application, stating that the application did not satisfy the requirements for annulment as provided in Article 70 of the Arbitration Law.<sup>5</sup> Furthermore, the district court also found that Articles 33(2) and (3) of the 1945 Constitution, regulated the government's authority on policies that are public in nature. When the government executes a contract with a private party, then the government is conducting an action that is private. Thus, the government is required to abide by private law.

Pertamina recently appealed the decision to the Supreme Court.

## **B.2 Annulment of Arbitral Award — Fraud**

In the case concerning PT Jambi Resources ("Jambi") and PT Bungo Raya Nusantara ("Bungo"), the dispute originated from a mining subcontract executed by the parties on 28 July 2006. Bungo was a

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<sup>4</sup> Article 33 (2) of the 1945 Constitution: "Branches of production that are important for the state and control the livelihood of many people shall be controlled by the state."

Article 33 (3) of the 1945 Constitution: "Earth and water and natural resources contained therein shall be controlled by the state and used maximally for the prosperity of the people."

<sup>5</sup> Article 70 of the Arbitration Law provides as follows: An application to nullify an arbitration award may be made if the award is alleged to contain the following elements:

- letters or documents submitted in the hearings which are admitted to be forged or are declared to be forgeries after the award has been rendered;
- documents are found after the award has been rendered which are decisive in nature and were deliberately concealed by the opposing party; or
- an award is made based on fraud committed by one of the parties to the dispute.

*C. Parallel Proceedings before State Courts and Arbitral Tribunals*

coal mining subcontractor engaged by PT Nusantara Termal Coal (“Nusantara”), a holder of Coal Contract of Work (*Perjanjian Karya Pengusahaan Pertambangan Batubara/”PKP2B”*) at the District of Bungo, Jambi, Indonesia since 19 February 1998. Bungo then subcontracted this contract to Jambi.

In the course of the subcontract, Jambi failed to pay royalties to Bungo in the amount of US\$375,486,000, which in turn prompted Bungo to terminate the contract in September 2007. Jambi then brought the dispute before SIAC. The final award, dated 6 August 2009, held that Bungo’s termination of contract was invalid.

In late September 2009, Bungo filed an action with the District Court of Central Jakarta to annul the award. Bungo claimed that the award was issued based on fraud committed by Jambi because Jambi did not inform the tribunal that the subcontract between Bungo and Nusantara was in violation of the PKP2B. According to Bungo, the PKP2B limits the scope of activities capable of being subcontracted to only mining activities, whereas the scope of work covered in the subcontract between Nusantara and Bungo (and subsequently between Bungo and Jambi) includes mining, reclamation, transportation, marketing and sale of coal. Accordingly, the subcontract between Bungo and Jambi should be null and void. For its part, Jambi submitted an exception to the annulment application, arguing that the District Court of Central Jakarta had no jurisdiction to examine the case, and that annulment of the award should be applied for in Singapore, where SIAC is based.

The next proceeding at the District Court of Central Jakarta is scheduled to be held on 3 November 2009, where the agenda will be Bungo’s rebuttal to the exception submitted by Jambi.

## **C. PARALLEL PROCEEDINGS BEFORE STATE COURTS AND ARBITRAL TRIBUNALS**

In Indonesia, certain issues in arbitration are court-dependent. The supportive role of the courts under the Arbitration Law can be found, *inter alia*, in such provision as those relating to the appointing arbi-

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trators in the event the parties fail to reach an agreement on the appointment or where there is no agreement concerning the appointment of the arbitrator, and in the enforcement of arbitral awards.

Enforcement of arbitral awards is conducted through the judiciary system, *i.e.*, the awards must first be registered at the district court. As for international arbitral awards, the Arbitration Law vests jurisdiction to issue *exequatur* to enforce international arbitral awards in the District Court of Central Jakarta, unless the Republic of Indonesia itself is a party to the dispute.<sup>6</sup> The Indonesian courts would not take the initiative to enforce the arbitral award, unless an application for *exequatur* is applied for.

As can be seen in the case concerning Pertamina and Lirik (see section B.1 above), in issuing *exequatur* of enforcement, an Indonesian court is likely to examine the merits of the award. This is a particularity of the Indonesian enforcement procedure relative to the procedures of other contracting states to the New York Convention.

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<sup>6</sup> The main purpose of the *exequatur* is to give the award the standing of *res judicata*. Under the Arbitration Law, an international arbitral award which has received an *exequatur* is comparable to a court judgment that has *res judicata* effect; the award has the same effect as if it were a final and binding judgment in a civil case, and therefore becomes enforceable.