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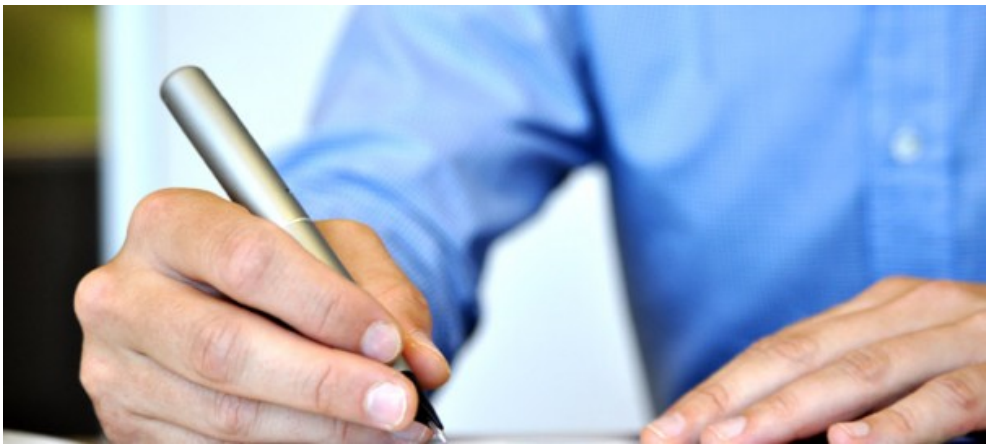

DEBUNKING THE MYTH: ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN INDONESIA

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I. The Myth

More than likely many readers have attended conferences where self-styled experts on Southeast Asia, including Indonesia, (few of whom have any experience in the region at all) have blithely insisted that foreign awards cannot be enforced in Indonesia. That, dear readers, is a Myth. True, it was not a myth until 25 years ago, but one does not go to conferences, nor read professional notes, to be regaled with 25-year-old "news".

II. The History

Indonesia ratified the New York Convention (1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards) in 1981. Until that time, enforcement of arbitral awards was handled in the

same manner as enforcement of final and binding court judgments. Arbitration, as well as civil litigation, were at that time regulated under the mid-19th Century Dutch Code of Civil Procedure, Reglement op de Rechtsvordering (generally known as the "RV") , which, together with other Dutch procedural laws, had been adopted by Indonesia upon her independence in 1945. The RV still governs litigation but since 1999 arbitration is governed by its own Arbitration Law, Law No. 30 of 1999.

Article 463 of the RV provides that, with virtually no exception, judgments of foreign courts cannot be enforced in Indonesia. Thus it was always assumed that the same applied to foreign-rendered arbitration awards and thus these could not be enforced in Indonesia. Although the ratification of the New York Convention clearly changed this, it was not until 1990 that the implementing regulation for New York Convention enforcement, Supreme Court Regulation No. 1 of 1990, was promulgated. And thus for the nine years following ratification, the courts had no mechanism to enforce foreign-rendered awards, even though they were aware that Article III of the New York Convention so required.[3]

Article 634 of the RV provided that registration and application for enforcement of arbitration awards was to be made in the District Court (*Pengadilan Negeri*) in the district in which the award is rendered, thus the Supreme Court members could not agree as to which court one would apply for enforcement of a foreign-rendered award, there being no District Court in which to register, nor which would have had jurisdiction to grant enforcement of, an award rendered outside of the jurisdiction of any District Court. Some judges therefore believed that application should be made directly to the Supreme Court; others that the awards should be "self-executing"; and still others that a single District Court should be designated to take jurisdiction over New York Convention enforcement applications. But, as there was as yet no guidance from the legislature, those few awards that may have been rendered elsewhere had to lay dormant.

Finally, Supreme Court Regulation No. 1 of 1990 set out the necessary implementing regulations for enforcement of arbitral awards rendered in a country which, together with Indonesia, is party to an international convention regarding implementation of foreign arbitral awards. The District Court of Central Jakarta (*Pengadilan Negeri Jakarta Pusat*) was designated as the venue to which application for enforcement thereof was to be made. The Chairman of that court was then allotted 14 days in which to transmit the request file to the Supreme Court, which was then the only court invested with jurisdiction to issue *exequatur,* the enforcement order, in cases of foreign-rendered awards.

Once the order of *exequatur* was granted, the same was to be sent back down to the Chairman of the District Court of Central Jakarta for implementation. If execution was to be effected in a different district (i.e. that of the domicile of

the losing party, or the location of its assets), the order was to be delegated to the appropriate District Court for implementation. Execution was effected on property and possessions of the losing party in accordance with the normal provisions of the RV relating to execution of court judgments.

Regulation 1 of 1990, however, did not set any time limit within which the Supreme Court was required to rule on these applications and, for the most part, they were simply docketed into the Supreme Court's normal case-load. Nonetheless, the initial nine applications, those filed between 1991 and mid-1993, were acted upon with reasonable promptness – some in less than six months. However, no such orders were issued after mid-1994, either of *exequatur* or rejection thereof, and thus the remaining seven applications filed prior to August, 1999 remained pending at the time of promulgation of Law No. 30 of 1999, the current Arbitration Law.

To make matters worse, although the very first application for enforcement filed after 1990 was granted *exequatur* without difficulty, actual execution was sabotaged by the respondent through other legal action, a story which was widely published and complained about internationally, undoubtedly being the instrument of the spread of the Myth, which is still believed today.

The case of E.D. & F. Man (Sugar) Ltd. vs. Yani Haryanto involved a long series of arbitral references and court applications. The subject matter of the dispute was a contract for provision of sugar by claimant Seller to respondent Buyer, FOB a port in Indonesia. As it happened, at the time certain staples, including sugar, could only be imported when authorized by only the Government Logistics Bureau ("*BULOG")*, but Buyer had not obtained such authorisation. Between contracting and intended delivery date, the market price of sugar declined substantially. The Buyer did not provide the necessary Letters of Credit, and subsequently cancelled the contract. As the initial purchase contract called for arbitration in London, the Seller commenced arbitration, obtaining an award against the Buyer for breach of contract. The Buyer then filed a suit in the High Court of London seeking a declaration that the contract was null and void as being contrary to law and public policy, since no permit had been issued by *BULOG* to import the sugar. The parties subsequently reached a settlement agreement whereby the Buyer was to pay to the Seller a reduced compensation in installments, also calling for arbitration in London in case of any disputes. After meeting its obligation with regard to the first installment, the Buyer defaulted on subsequent installments and the Seller again brought arbitration in London, once again prevailing and obtaining an award against the Buyer. The Buyer did not satisfy the award but instead brought an action in the District Court of Central Jakarta seeking annulment of the original contract on the basis that it was invalid *ab initio,* being in violation of the law and public policy, and that therefore the arbitration clause was also invalid.

The court apparently followed this logic, despite the fact that it was the Buyer

that violated the provisions of law and also that at this stage the parties were in dispute not over the original sale contract but under the subsequent settlement agreement. The settlement agreement was declared null and void by the District Court, and its decision was confirmed at the high court level. The Seller further appealed to the Supreme Court, and also brought action against the Buyer in the District Court for breach of its obligation to make payments under the settlement agreement.

Although the Supreme Court had issued the order of *exequatur* to enforce the London arbitral award against the Buyer before hearing the Seller's appeal to the court verdict, the Seller was nonetheless unable to execute the award because of the appeals still pending. Finally the Supreme Court found for the Buyer in both applications and therefore nullified its *exequatur* order on the basis that it had now found that the original contract was null and void *ab initio* and therefore so was the arbitration clause (severability not applicable where a contract is void *ab initio* as being contrary to law).

Whether this notorious decision was a product of undue influence, or only lack of understanding of the arbitral concept on the part of the court, has never been determined, nor its reasoning followed in any subsequent case. Nonetheless the stigma of this 1991 case, the bad news of which was spread throughout the world, has undoubtedly etched the Myth in the minds of much of the international legal profession. Today, 25 years later, it is time to forget the past and recognize the current state of play.

Between 1991 and the enactment of the new Arbitration Law in 1999 only one application for enforcement of a foreign-rendered award was rejected by the Supreme Court, and that was on the ground that the parties had not executed an agreement to arbitrate.

III. The Current Situation

On 12 August, 1999, Indonesia promulgated its new, and in fact its first comprehensive, Arbitration Law, Law No. 30 of 1999, which went into effect immediately upon promulgation and rescinded and superseded Articles 615 – 651 of the RV, those previously covering arbitration. Although Law No. 30/99 does not also specifically rescind the provisions of Supreme Court Regulation 1 of 1990, a law is superior to a regulation in the legal hierarchy and thus to the extent that the two are inconsistent the provisions of Law No. 30/99 will prevail. The primary difference between Law No. 30/99 and Supreme Court Regulation No. 1 of 1990 is the designation of the courts which have jurisdiction to issue *exequatur,* being the court with which the award must first be registered. Domestic awards, being awards rendered in an arbitration held within the bounds of the nation's archipelagic jurisdiction, must be registered with the clerk of the District Court "*having jurisdiction over the respondent*",[4] which would be that court sitting in the district in which the respondent is domiciled. Such registration must be effected within 30 days of

rendering in order for the award to be enforceable. [5]

International awards are defined as "*. . . awards handed down by an arbitration institution or individual arbitrator(s) outside the jurisdiction of the Republic of Indonesia, or an award by an arbitration institution or individual arbitrators(s) which under the provisions of Indonesian law are deemed to be International arbitration awards*". As there has been no legislation to the contrary, an award rendered in an arbitration with venue within Indonesia will be domestic, regardless of the nationality of the parties or other factors. Unless the Republic of Indonesia itself is a party to the arbitrated dispute, applications for enforcement of international awards are no longer required to be submitted to the Supreme Court at all. Law No. 30/99 vests in the District Court of Central Jakarta (*Pengadilan Negeri Jakarta Pusat)* the jurisdiction to issue orders of *exequatur* to enforce international arbitral awards, as well as to execute such domestic awards as are rendered within its normal jurisdiction – central Jakarta. This shift of jurisdiction has expedited the process significantly. Except for a short hiatus during 2010 – 2011, the District Court of Central Jakarta has acted upon applications for enforcement of foreign awards quite promptly.

IV Enforcement Procedure

But enforcement of foreign awards is not entirely without some difficulties, although these are primarily administrative and relate to registration, which is required for the award to be enforceable. Although for an international award there is no time limit for registration, as there is for domestic awards, the registration is required to be effected by the arbitrators or their duly authorised representatives.[6] While this rarely causes a problem for domestic awards, as the arbitrators, or at least local counsel, are aware that a power of attorney for registration from the Tribunal is required, it has caused some delay in registration of international awards where neither the arbitrators nor the parties' counsel have familiarized themselves with the requirements of Indonesia's law.

Often more troublesome is the requirement, for registration of international awards only, that the award be accompanied by a "*certification from the diplomatic representative of the Republic of Indonesia in the country in which the International Arbitration Award was rendered stating that such country and the Republic of Indonesia are bound by a bilateral or multilateral treaty on the recognition and implementation of International Arbitration Awards*." [7] (This means New York Convention as Indonesia is not party to any other such treaty.) While this requirement seems quite straightforward, it has not been effectively communicated by the Foreign Ministry to its consulates, and thus often requires some administrative burden and attendant delay.

Once the award has been registered, the applicant (invariably the claimant) may apply for the order of *exequatur*. Having issued the exequatur, the court

may apply for the order of *exequatur*. Having issued the *exequatur*, the court (District Court of Central Jakarta for international awards) will summon the respondent (losing party) and give it the opportunity to comply with the award, usually within 8 days. If this order is not complied with, the court will issue the attachment order, which will then be sent to the court having jurisdiction over the respondent, which court will attend to execution against the identifiable assets of such party. Such execution may take some time, as each subject asset must be attached by a bailiff and sold through the state auction house, unless a private sale has been approved, and all of these steps will need to be closely supervised by counsel if it is to be accomplished in a timely manner.

Rejection of *exequatur* for a foreign award can be appealed to the Supreme Court[8], which must decide upon the appeal within 90 days.[9] Issuance of *exequatur*, however, is not subject to appeal.[10] Nor may a decision of the Supreme Court either issuing or rejecting *exequatur* or execution, where the Government of Indonesia is a party, be appealed.[11]

The District Court of Central Jakarta keeps a record not only of those awards registered, but also those for which *exequatur* has been requested, and issued. However, as most awards are complied with voluntarily and, where not, execution is carried out, for the most part, by one of the almost 300 other District Courts in the archipelago, there is no complete data. However, to the knowledge of this firm, no application for *exequatur* of a registered foreign award has been rejected since promulgation of the 1999 Arbitration Law.

So much for the Myth!

In fact, Indonesia is a very arbitration-friendly jurisdiction and, as clearly dictated by Law No. 30 of 1999, the courts may not interfere,[12] except where they are required to assist in the enforcement (as long as the parties did agree to arbitrate and the dispute is of a commercial nature).[13] Even an interim award on jurisdiction cannot be appealed to the courts, as so often happens in common law jurisdictions thereby greatly delaying the process, almost always unnecessarily. The process may take a bit longer than it does in some jurisdictions, but it is much quicker and successful than in many others.

Let us hope this note will serve to debunk the Myth, whose misinformation has been spread too widely and for too long.

[1] By Presidential Decree No 34 of 1981, published in the State Gazette (*Berita Negara*) of 1981, as No. 40, of 5 August, 1981. Indonesia made both the commerciality and the reciprocity reservations in its accession.

[2] State Gazette No. 52 of 1847, juncto No. 63 of 1849 (Arbitration was

covered in Articles 615 through 651 of Title I).

[3] Article III of the New York Convention provides that every contracting state must recognise and enforce awards rendered in other contracting states without imposing substantially more onerous conditions than are imposed upon recognition or enforcement of domestic awards.

[4] Article 1 (4), Law No. 30/99

[5] Article 59 (1), Law No. 30/99.

[6] Article 67 (1), Law No. 30 of 1999.

[7] Article 76 (2), Law No. 30/1999.

[8] Article 68(1), Law No. 30/99.

[9] Article 68 (3), Law No. 30/99.

[10] Article 68 (1) & (2), Law No. 30/99.

[11] Article 68 (4), Law No. 30/99.

[12] Articles 3 and 11, Law No. 30/99.

[13] Article 62 (2), Law No. 30/99

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Karen Mills has practiced in Indonesia for over 30 years. A Chartered Arbitrator, Fellow of the Chartered Institute of Arbitrators ("CIArb") and of the Singapore and Hong Kong Institutes, Ms. Mills founded and co-chairs the Indonesian Chapter of CIArb, is on the panel of arbitrators of most arbitral institutions in the region, including those in Indonesia, China, Malaysia, New Zealand, Singapore, Hong Kong, Korea, and the Philippines, as well as the AAA/ICDR

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