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INTERVIEW WITH DR FRANS H. WINARTA, MANAGING PARTNER, FRANS WINARTA & PARTNERS

by Rudy Andreas Sitorus of Makarim & Taira

1. What made you decide to enter the world of lawyering as well as arbitration?

I was interested in being a lawyer since junior high, after watching the film *To Kill a Mockingbird* starring Gregory Peck in the '60s. My struggle to become a lawyer was tough with many obstacles until finally in 1981, I was able to set up my own law office.

As for arbitration, my senior, Harjono Tjitrosoebono, invited me to become an arbitrator like him. He introduced me to Priyatna Abdurrasjid. Then in 1998 I became an arbitrator at BANI up to now.

On the other hand, I have also become an arbitrator in arbitration institutions such as International Chamber of Commerce (ICC), Singapore International Arbitration Centre (SIAC), Arbitrators of the Asian International Arbitration Centre (AIAC, formerly Kuala Lumpur Regional Centre, Pacific International Arbitration Centre (PIAC), Centre for Arbitration & Consultancy Development (CACD), Korean Commercial Arbitration Board (KCAB), Beihai Asia International Arbitration Centre (BAIAC), London Court of International Arbitration (LCIA), under various arbitration rules.

2. What is the most memorable experience as an arbitrator in either domestic or international arbitration or the most interesting arbitration case?

There is one story from my various experiences as an arbitrator. Several years ago I handled a business dispute as an arbitrator. While having lunch with my colleague, an arbitrator from the UK, my colleague told me that he was approached by one of the disputing parties who happened to be the disputing party from Indonesia. I immediately suggested that he not talk to the party and stay away from them. Then I explained to my fellow arbitrator that ironically such things were commonplace in Indonesia. The important thing was that I recommended that he not talk to the party who was currently resolving their dispute in the arbitration proceedings. My colleague shared his experience of being approached by the disputing party in quite a surprised tone because he had never faced anything like this before.

Dr Frans H. Winarta

3. What do you think about the development of arbitration?

In my opinion, in this modern era, the best settlement of business disputes is by amicable settlement. This means that deliberation is the most economical and efficient. Therefore, commercial arbitration is still one of the most effective, accurate and practical methods of settlement for both parties to a dispute.

In my view, arbitration in Indonesia is less effective than arbitration in neighboring countries, such as Singapore, Malaysia, Hong Kong, Korea and other countries. This is because not all international arbitration principles are adopted by the Arbitration Law in Indonesia. This is often discussed in meetings and workshops on arbitration which are often held by various arbitration institutions, and in the end legal experts and legal practitioners in this country agree that it is necessary to amend the Arbitration Law in Indonesia.

4. What is your suggestion for how the arbitration practice in Indonesia can develop and grow?

I always invite young colleagues to learn and work in this field of arbitration which has a bright future. In essence, it requires good integrity from arbitrators to be able to practice arbitration in this country. The arbitrator must be independent and must prioritize settlement between the parties. He must also uphold the code of ethics, respect the rights of the

parties to be heard, be fair, independent, free from influence and pressure from any party, free from conflicts of interest and affiliation, either with one of the disputing parties or with the dispute in question, and be impartial. Thus, a good future for arbitration in Indonesia can be achieved.

5. What do you think are the difficulties that young lawyers (with a civil law background) may face if they want to practice international arbitration outside Indonesia given that lawyers with a Common Law background may be more familiar with oral advocacy and pleadings?

To my knowledge, many Indonesian lawyers do not fully understand the dispute resolution mechanism through arbitration. Many lawyers are still comfortable with the protracted litigation in court. Therefore, young lawyers who are new to arbitration may face difficulties at the beginning of arbitration practice, especially in the arbitration proceedings. There are still many lawyers who need to improve their mastery of foreign languages such as English and Dutch, including practicing argumentation, as well as improving their mastery of civil law and international arbitration law. In particular, many international arbitration principles have not been adopted by the domestic arbitration institution and the customs in international arbitration practice have not been adopted.

6. What are the 3 (three) things that young lawyers (especially Indonesian lawyers) must have so that they can compete in international arbitration in South East Asia?

Honesty, courage, and strong determination.

7. As one of the most respected lawyers and litigators in Indonesia, what is your advice for young legal practitioners (especially Indonesian lawyers) seeking experience in international arbitration?

Along with the current development, business people want a more effective and efficient business dispute resolution. So as a legal practitioner, whether as an arbitrator or as a lawyer who represents a client in a case, they must position themselves accordingly to be able to resolve complex legal cases. Young lawyers must continue to improve their skills by attending seminars and courses/training related to international arbitration. Being a legal practitioner is not just a matter of winning or losing, but practising law ethically and in compliance with applicable laws and the lawyers' and/or arbitrators' code of ethics.

IMPLICATIONS OF INDONESIAN-LANGUAGE REQUIREMENT IN ARBITRATION IN INDONESIA

By Turangga Harlin of MacalloHarlin Mendrofa Advocates (MHM)

For the last several years there has been a growing concern about enforcement of English-language agreements in Indonesia following the Supreme Court's judgment in *PT Bangun Karya Pratama Lestari (Bangun Karya) v. Nine AM Ltd (Nine AM)* [2015]. In *Bangun Karya v. Nine AM*, the Supreme Court decided to affirm the ruling of lower courts which set aside a loan agreement as the agreement was executed only in English. This was considered to have violated Law No. 24 of 2009 on National Flag, Language, Coat of Arms and National Anthem ("**Language Law**").

Although lower courts are not formally bound by the Supreme Court judgments, in practice they can be persuasive authorities. This is demonstrated by the Jakarta High Court's judgments in *Blutether v. PT Global Mediacom Tbk et al. (Global et al.)* [2017] and *Kokos Jiang et al. v. Reliance Coal Resources Private Limited et al.* [2020], where the appellate judges decided to set aside agreements not made in Indonesian language because they violated Article 31 para (1) of the Language Law (which stipulates that Bahasa Indonesia must be used in memoranda of understanding or agreements involving state institutions, government agencies of the Republic of Indonesia, Indonesian private entities, or Indonesian nationals).

Implications of court cases regarding the Indonesian-language requirement in arbitration practice

The Supreme Court's judgment in *Bangun Karya v. Nine AM* has significant implications for arbitration practice in Indonesia. Some litigants have sought to set aside arbitral awards on the basis that the underlying arbitration clauses or agreements were not made in the Indonesian language, and that the failure to comply with the Indonesian-language requirement rendered the arbitration clauses or agreements invalid. Questions arise as to whether an English-language arbitration clause is enforceable before Indonesian courts, or whether violation of the Indonesian-language requirement as stipulated in the Language Law can really be used as a ground to set aside an arbitral award rendered based on an arbitration clause or an agreement made only in English.

Are English-language arbitration clauses enforceable?

In *Bangun Karya Pratama (Bangun Karya) Lestari v. Sumatra Partners LLC [2016]*, Bangun Karya tried to set aside a loan agreement that was executed solely in English for violating the Language Law. Given the violation of the Language Law, Bangun Karya further argued that the loan agreement did not satisfy the element of "permitted clause" as stipulated in Article 1320 of the Civil Code, hence the agreement, including a BANI arbitration clause therein, was null and void as per Article 1335 and 1337 of the Civil Code. In its judgment, the Supreme Court found that because the disputing parties had agreed to choose BANI as the choice of forum to settle any dispute in relation to the loan agreement, including its validity, the question whether the agreement was or was not valid for violating the Language Law and not satisfying Article 1320 of the Civil Code must be brought before an arbitral tribunal.

Another precedent on this subject is *PT Buana Elok Semesta Tentram (Buana) v. PT ISS Facility Services (ISS)* [2019], where the Supreme Court affirmed the Tangerang District Court's judgment which confirmed the enforceability of an English-language BANIarbitration clause by dismissing the Plaintiff's claim that the disputed sale and purchase agreement was invalid for not being made in the Indonesian language. According to the Tangerang District Court, where parties enter into an English language-agreement, so long as they agree to do so without objection, they are deemed to have consented to the agreement; and if any of the parties disagrees with the use of English language for their agreement, then that party should have raised its objection before the execution of the agreement.

What about the enforceability of an English-language SIAC arbitration clause? In the cassation judgment of B*lutether v. Global et al* [2018], the Supreme Court ruled that the district court has no jurisdiction to negate the applicability of the SIAC arbitration clause contained in a sale and purchase agreement that was executed only in English. Moreover, in *PT Catur Jaya v. Carlson Hotels Asia Pacific Pty Limited* [2020], the

Supreme Court decided to uphold the Central Jakarta District Court's judgment which dismissed the Plaintiff's claim on violation of Article 31 of the Language Law as the disputing parties were bound to an SIAC arbitration clause in the disputed agreements.

While the above cases suggest a pro-arbitration approach, Indonesia does not follow the rule of binding precedent. A contrary example is the recent Jakarta High Court's Judgment in *Kokos Jiang et al. v. Reliance Coal Resources Private Limited et al.* [2020], where the appellate judges decided to set aside an investment agreement and the arbitration clause contained therein because they were not made in the Indonesian language and hence violated the Language Law. It remains to be seen how the Supreme Court will decide on this case at the cassation level.

Can violation of the Language Law be used as a ground to set aside or refuse enforcement of an arbitral award?

Article 70 of the Arbitration Law provides three alternative scenarios where an award can be set aside by the court, i.e.: (1) after the award has been rendered, letters or documents submitted in the arbitration proceedings are admitted or declared to be forged, (2) after the award has been rendered, decisive documents are found to have been concealed by the opposing party, or (3) the award is made based on fraud committed by one of the parties in the examination of the dispute. In various judgments, the Supreme Court has repeatedly ruled that Article 70 of the Arbitration Law is a restricted provision, meaning that an application to set aside an award can only be made based on one of the three limited grounds stipulated in that provision. Thus, one may validly argue that violation of the Language Law should not be a trigger to setting aside of an award.

Having said the above, in *PT Grage Trimita Usaha (GTU) v. Shimizu Corporation and PT Hutama Karya (Persero) Joint Operation (Shimizu-Hutama)* [2018], the South Jakarta District Court invoked violation of the Language Law in setting aside a BANI award in addition to the main consideration that Shimizu-Hutama had committed fraudulent actions during the arbitration proceedings at BANI. According to the court, the agreement between GTU and Shimizu-Hutama was in violation of public order because it did not comply with the Indonesian-language requirement set out in the Language Law. Consequently, the agreement was null and void, including the BANI award rendered based on the arbitration clause contained in the agreement.

The South Jakarta District Court's judgment was subsequently affirmed by the Supreme Court. Though the Supreme Court did not specifically refer to the violation of the Language Law as the basis to set aside the BANI award, it declared that the lower court's judgment was correct and there was no misapplication of the law therein.

Another possible implication of violation of the Language Law in the arbitration context is the issue of enforceability. No arbitral awards (either local or foreign awards) can be enforced in Indonesia if they are in contravention of Indonesian public order. There is no precise or clear definition of public order or matters which are deemed to be contrary to public order. The Arbitration Law is silent on the meaning of public order, but Article 4 para (2) of Regulation of the Supreme Court No. 1 of 1990 on Procedures for Enforcing Foreign Arbitral Awards broadly describes public order as "*the fundamental principles of the Indonesian legal system and social system in Indonesia*". In other words, public order is an open-ended concept. It is fair to say that "*fundamental principles of the Indonesian legal system*" can be found in various pieces of Indonesian legislation, including the Language Law. Therefore, the risk that violation of the Language Law could be deemed as violation of the public order is present and it could affect the enforceability of an award rendered based on an arbitration clause or an agreement made only in English. This is particularly true in *GTU v. Shimizu-Hutama* – while it was not a case on enforcement, the court ruled that the non-compliance of the Indonesian-language requirement set out in the Language Law amounted to violation of public order.

Conclusion

Recent cases show a pro-arbitration approach by the Indonesian Supreme Court, which has decided to recognize the enforceability of English-language arbitration clauses (and agreements). Yet, given the rule of non-binding precedent in Indonesia, one should be cautious when dealing with this controversial issue. In order to minimize the risk that an arbitral award may be set aside, or enforcement refused, the preferred approach is still to have a bilingual agreement and arbitration clause where Indonesian entities are involved.

Disclaimer – The views and opinions expressed in this article are solely those of the author(s)/interviewee and do not reflect the views of SIAC or YSIAC.

COMMENTARY ON INDONESIA-SINGAPORE BIT

By Justin Chow of Freshfields Bruckhaus Deringer

Trade and foreign investment between Indonesia and Singapore have always been important to these neighbouring nations. Despite the pandemic, Singapore's foreign investment in Indonesia increased by 50% from US$6.5 billion in 2019 to almost US$10 billion in 2020, as the top source of foreign investments in Indonesia.

Following the expiration of the old Indonesia-Singapore BIT in 2016, Indonesia and Singapore signed the "Agreement between the Republic of Singapore and the Government of the Republic of Indonesia on the Promotion and Protection of Investments" (***New Indonesia-Singapore BIT***) on 11 October 2018. The New Indonesia-Singapore BIT has since come into force on 9 March 2021, representing the first new BIT to come into force after years of investment treaty review by Indonesia.

Highlights – Investor protection

1. Multi-tiered dispute resolution mechanism

The New Indonesia-Singapore BIT provides for a multi-tiered dispute resolution mechanism involving "consultations and negotiations" at the outset of a dispute.

In the event of a dispute, parties are required to first seek to resolve the matter by way of a consultation process. The disputing investor shall initiate the consultation by way of a written request containing the legal and factual basis of the investment dispute, and the consultation process itself shall commence within 30 days thereafter, in either Jakarta or Singapore.

Recourse to mediation is also expressly catered for under Article 16 of the New Indonesia-Singapore BIT. Whilst mediation itself is voluntary, it is a recognised means of satisfying the requisite "consultation" process between the parties.

Interestingly, the parties may request for the mediator to issue a written factual report – however, that report "*shall not include any interpretation of this Agreement.*" In this context, the mediator may therefore need to navigate the challenge of assisting the parties in narrowing down their disputes on a factual level, whilst steering clear of disputed legal issues.

If the disputing parties fail to resolve the dispute within 1 year from the written request for consultation, they may submit the dispute to the courts or arbitration – arbitration under the ICSID Convention and UNCITRAL Arbitration Rules are expressly recognised under the new Indonesia-Singapore BIT.

In essence, investors will have to wait for a one year cooling-off period before they can bring a claim. This cooling-off period is longer than those typically seen in BITs, which are usually between three to six months.

2. Right to comment on arbitration award

Another important highlight is the new right for investors to comment on the arbitral tribunal's award.

Under Article 24(4), the investor can now request to review the tribunal's draft award and submit comments within 60 days after the tribunal transmits its proposed award, and the tribunal will thereafter be required to consider those comments and issue its decision within 45 days after the expiration of the 60-day comment period.

3. Most favoured-nation (MFN) treatment

Under Article 5, treatment of investors under the new Indonesia-Singapore BIT shall be no less favourable than treatment of other non-party investors in the host country with respect to the management, conduct, operation, and sale or other disposition of investments.

However, there are important limitations to the MFN treatment to be provided by the host country – the host country is not obliged to extend to investors the benefit resulting from (a) other BITs which the host country is a party to that were signed or entered into before the New Indonesia-Singapore BIT, or (b) any regional co-operation arrangement with parties in the same geographical region designed to promote economic, social, labour, industrial or monetary fields within the framework of specific projects.

4. Fair and equitable treatment (FET)

The FET provision in the New Indonesia-Singapore BIT requires parties to take measures as "*reasonably necessary to ensure the protection and security of the investment*". The provision seeks to protect investors from the denial of justice in any legal or administrative proceedings in accordance with the principles of due process of law.

This FET clause contains two express caveats. First, the standard of FET is confined to "*customary international law*" requirements. Therefore, it shall not require treatment beyond what is required in customary international law nor create additional substantive rights. Secondly, the mere fact that the host country's act/omission is inconsistent with an investor's expectation does not constitute a breach. This is so even if the act/omission results in loss or damage to the investment.

5. Protection against expropriation

Similar to other BITs among other countries, the New Indonesia-Singapore BIT protects against expropriation – both direct and indirect (i.e. expropriation through regulatory or other measures that deprive the investor of the economic benefits of its investment). Consistent with the standards of other BITs, it provides that a state may only expropriate an investment if the expropriation is done (a) for a public purpose, (b) in a non-discriminatory manner, (c) with adequate and effective compensation and (d) in accordance with due process of law.

However, investors should beware of the potentially broad interpretation of "public purpose", which refers to a concept in customary international law and carries the meaning of "public necessity", "public interest" or "public use".

In terms of compensation, payment shall be made without undue delay and be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place/ became public knowledge (whichever is earlier).

The New Indonesia-Singapore BIT, however, does make clear that the mere failure to pay compensation when the dispute remains unresolved does not render the conduct inherently unlawful, and that there may be legal and administrative processes to be observed before the host country can pay compensation. Also, the valuation of fair market value shall exclude any speculative or windfall profits claimed by the investor.

6. Existing investments covered

It is also worth noting that whilst the New Indonesia-Singapore BIT does not apply to "*claims arising out of events which occurred, or claims which had been raised*" prior to 9 March 2021, it applies to investments "*in existence*" as of 9 March 2021 or "*made, established, acquired or expanded thereafter*". As such, existing foreign investments and investors can also enjoy the benefits under the New Indonesia-Singapore BIT.

Conditions and carve-outs

1. Conditions on "investor" and "investment"

(a) Investors must carry out business activities in the host country

The New Indonesia-Singapore BIT applies to "*an enterprise of a Party*", i.e. an entity (a) constituted or organised under the laws of the host country and (b) carries out business activities there. Furthermore, article 36(1)(b) of the New Indonesia-Singapore BIT specifically entitles a party to deny benefits to an enterprise with no substantive business operations in either Singapore or Indonesia.

This may therefore have the effect of excluding protection for investments in Indonesia held via a Singapore-incorporated holding company with no substantive business operations in Singapore, and vice versa.

(b) Investors shall have diplomatic ties with the host country

The host country may deny the benefits of the new Indonesia-Singapore BIT to an investor from another state, who owns or controls the investing enterprise, if that particular state does not maintain diplomatic ties with the host country in which the investment was made.

In other words, for example, if the investor is from a state which does not maintain diplomatic relations with Indonesia, their investment in Indonesia via a Singapore-incorporated enterprise may well not qualify for protection.

(c) The investment must be admitted under the laws of the host country

The investment shall be admitted according to the host country's laws, regulations and national policies and, if applicable, specifically approved in writing by the host country.

In the event of investor-state disputes, it is therefore possible that the host country may seek to rely on this provision to allege illegality of an investment so as to exclude the application of the New Indonesia-Singapore BIT.

(d) The dominant and effective nationality of the investor with dual nationality must be Singaporean/ Indonesian

Apart from covering enterprises, the definition of "*investor*" in the New Indonesia-Singapore BIT also applies to "*a natural person who, under the law of a Party, is a national of that Party*". It is also clarified that "*if a natural person possesses dual nationality, she or he shall be deemed to possess exclusively the nationality of the Party of her or his dominant and effective nationality*".

In effect, investors with dual nationality can only rely on the New Indonesia-Singapore BIT if their dominant and effective nationality is Singaporean or Indonesian. Investors with dual nationality will not be able to rely on secondary citizenship per se to bring a claim against the host country.

2. Matters of taxation are excluded

The New Indonesia-Singapore BIT explicitly excludes the application on matters of taxation in the territory of a party, except taxation measures that may constitute expropriation. In general, taxation matters shall be governed by the domestic laws of the party and by any tax treaty between the parties. The tax treaty between the parties shall prevail in case of inconsistency with the New Indonesia-Singapore BIT.

Conclusion

Following the Indonesian government's public announcement of the intention to revamp its BITs in 2014 and the subsequent termination of over 20 BITs, the implementation of the new Indonesia-Singapore BIT serves as a helpful indicator as to how Indonesia will approach new BITs that are to follow in times to come.

In the meantime, the new Indonesia-Singapore BIT also provides greater legal certainty to Indonesian and Singaporean investors who wish to invest in either country, as foreign investment between the two countries continue to grow.

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