Widyawan & Partners
in association with Linklaters

Kokos Jiang and Prestige Capital Holdings Ltd v. Reliance Power Netherland BV: has it really turned negative perceptions into positive?

February 2023

On 15 May 2020, the Central Jakarta District Court ("**CJDC**"), has refused a claim from Kokos Jiang and Prestige Capital Holdings Ltd who demanded the annulment of a SIAC arbitral award that was issued in 2015. A very pro-arbitration decision from a court in a jurisdiction that is traditionally perceived as being anti-arbitration. Is it really the case and what does it mean for award creditors?

Brief overview

The case was registered under case registry number 328/PDT.G/2019/PN.JKT.PST ("**Case 328**" or "**Decision 328**") and centred around a dispute over an agreement for advance payments ("**Advances Agreement**") between Kokos Jiang (aka Kokos Leo Lim or for the purpose of this publication, "**KJ**"), Prestige Capital Holdings Ltd ("**Prestige**") and Reliance Power Netherland BV ("**Reliance**"). The key arguments[1] from KJ, an Indonesian national and Prestige, a company based out of the Seychelles were threefold.

First, they argued that they were "*tricked*" by Reliance to enter into the Advances Agreement, which was a mere "*pro-forma*" agreement that required KJ and Prestige to return the money that Reliance has paid to them for purchasing shares in PT Sriwijaya Bintang Tiga Energy ("**PT SBTE**") and PT Brayan Bintang Tiga Energy ("**PT BBTE**"). KJ and Prestige were not aware until later that they were required to return the payment that they have received from Reliance.

Second, KJ and Prestige argued that Reliance was also being tricky or dishonest for concealing the requirement to provide the Indonesian language version of the Advances Agreement from the Tribunal, in violation of Article 31 of Law No 24 of 2009 on National Flag, Language, Symbol, and Anthem (the "**Indonesian Language Act**").

Third, KJ and Prestige also argued that the Advances Agreement constitutes a breach of public policy, because the agreement was not for a permissible cause.

Dishonest intention

When raising the argument that Reliance was deceiving KJ and Prestige to sign the Advances Agreement, they also claimed that Reliance had exploited the arbitration agreement under the Advances Agreement to influence the SIAC tribunal to issue an award in favour of Reliance. The fact that the SIAC tribunal has issued an award based on a dishonest intent from Reliance warranted KJ and Prestige's attempt to annul the arbitral award based on Article 70 (c) of the Indonesian Law No 30 of 1999 on Arbitration and Alternative Dispute Settlement (the "**Indonesian Arbitration Act**"). Article 70 (c) states that a party to the arbitration may request for an annulment of the arbitral award if the award was made pursuant to "deceit" or "lies" from one of the parties in dispute. KJ and Prestige further argued that the Reliance's dishonest intent can also be inferred from the fact that it has failed to disclose to KJ and Prestige as well as the SIAC tribunal on the requirement to have an Indonesian language version of the Advances Agreement pursuant to the Indonesian Language Act.

Breach of public policy

In addition to the dishonest intent, KJ and Prestige asserted that the Advances Agreement constitutes a breach of public policy because the agreement was not for a permissible cause, being one of the requirements of a valid agreement under the Indonesian Civil Code. The agreement, according to KJ and Prestige, was simply an instrument to allow Reliance to purchase shares in PT SBTE and PT BBTE from KJ without paying for the price of the shares. Supplementing this argument, KJ and Prestige also asserted that the failure to comply with Indonesian Language Act also constitutes a breach of public policy, which renders the Advances Agreement null and void. To address the issue of invalidity of the agreement, KJ and Prestige indicated that they had made a separate application before the CJDC to invalidate the Advances Agreement under case registry number 590/PDT.G/2018/PN.JKT.PST ("**Case 590**" or "**Decision 590**"). The outcome of the invalidation proceedings is discussed in the final section of this publication.

1 This publication is only a guide and discusses the key arguments from the parties in Case 328. It does not discuss Case 328 in detail but if you need to discuss this further, please do not hesitate to contact us.

Reliance's response

In response to the arguments from KJ and Prestige, Reliance argued, that the Advances Agreement was a separate and stand-alone advance payment agreement, pursuant to which Reliance will lend KJ and Prestige money if certain conditions under the Advances Agreement are met. The loan was supposed to be given in several tranches, but it had to be stopped because KJ and Prestige were unable to fulfil the conditions set out in the Advances Agreement. This has led to a favourable award from the SIAC tribunal and Reliance, therefore, rejected the allegation from KJ and Prestige that it "tricked" them to enter into the Advances Agreement. In addition, Reliance argued that Article 70 of the Indonesian Arbitration Act is only relevant for annulling domestic arbitral awards and not foreign arbitral awards.

To support its argument that KJ and Prestige were aware of their obligations under the Advances Agreement from the outset and to rebut the Indonesian Language Act argument, Reliance highlighted that both KJ and Prestige were represented by a reputable legal counsel and had received extensive advice from their legal counsel throughout the negotiation phase of the Advances Agreement. It was also strange to Reliance that KJ and Prestige only raised concerns regarding Indonesian Language Act during the annulment process and never did so throughout the arbitral proceedings. It is therefore unreasonable for KJ and Prestige to claim that they felt that they had been tricked by Reliance to enter into the Advances Agreement.

Reasoning and verdict from the CJDC

The judges in Case 328 ruled in favour of Reliance. With respect to the requirement to use Indonesian language, the judges at the CJDC reasoned that the fact that the parties decided to sign only the English version of the Advances Agreement despite their knowledge of the provisions of the Indonesian Language Act, (ie the Indonesian Language Act was already available to the public at the time when the agreement was prepared), simply reflects the parties' intention to exercise the freedom of contract principle and is not a reflection of bad faith. As such, the judges noted that there was no indication of deceit in the present case.

On the question of a breach of public policy, the judges at the CJDC reasoned that *first*, because KJ and Prestige have filed a separate application to invalidate the Advances Agreement, the CJDC considered that the CJDC did not have the competence to assess whether the Advances Agreement was valid. *Second*, KJ and Prestige appeared to have been relying on Article 70 of the Indonesian Arbitration Act in raising their claims, but Article 70 of the Indonesian Arbitration Act does not discuss public policy. As such, the judges at the CJDC refused the public policy argument from KJ and Prestige. The judges at the CJDC did not discuss if or not Article 70 of the Indonesian Arbitration Act is only relevant for annulling domestic arbitral awards.

Finally, on the fact that KJ and Prestige had filed a separate application to invalidate the Advances Agreement and the risk that such proceedings would have an impact on the enforcement of the SIAC award, the judges at the CJDC noted that this argument does not constitute a basis for annulling an arbitral award and they therefore dismissed this argument from KJ and Prestige.

Key takeaways

- On its face, Decision 328 appears to be a pro-arbitration decision as it demonstrates a huge shift from the previous approach taken by the courts who were often persuaded to accept satellite proceedings, either meritorious or otherwise. A notable example showcasing an anti-arbitration attitude can be found from *Karaha Bodas LLC v PT Pertamina ("Persero")* where Indonesian courts were persuaded to hear satellite proceedings, including based on a breach of public policy.
- However, it remains to be seen if Indonesian courts will consistently apply the same analysis on similar cases going forward. The underlying Indonesian legal systems, unfortunately, remain unchanged, in that court decisions are not binding, and judges have a broad discretion to determine what they consider to be appropriate and just in any given matter which makes Indonesian proceedings difficult to predict.
- Decision 328 alone does not say much on what Reliance has experienced to secure the decision. The Indonesian Arbitration Act imposes unusual administrative requirements, such as legalisation and consularisation of documents, to enforce a foreign arbitral award which often causes delay in practice.
- Furthermore, although Decision 328 ruled in favour of enforcement of the SIAC award and hence, one may perceive it as being pro-arbitration, the CJDC in Case 590 has, unfortunately, done quite the opposite. The CJDC in Case 590 declared that the underlying agreements that the parties had entered into, including the Advances Agreement were invalid.
- Fortunately, however, Decision 590 was appealed, and the Supreme Court overturned Decision 590 in 2021. The Supreme Court reasoned and decided that the CJDC did not have the authority to hear the matter because the parties have agreed to resolve their dispute in arbitration and an *exequatur* has been granted by the CJDC to recognise and enforce the SIAC award. This, of course, is an encouraging position taken by the Supreme Court.
- Finally, coming back to the heading of this publication, which, to repeat, is whether Case 328 has turned negative perceptions into positive, our assessment is that it remains premature to make that conclusion. The outcome of Decision 590 justifies this doubt, and it remains to be seen whether Indonesian courts will take a consistent approach going forward. It is also worth highlighting, however, that it took nearly seven years, from the date on which the SIAC award was issued in 2015, for Reliance to reach the position that it is today. We currently have no information if the award creditor has now been able to monetise the SIAC award in Indonesia.
- In the meantime, multinational companies engaging into agreements with Indonesian entities are recommended to continue ensuring that their arbitration agreements are overarching and watertight, to minimise the risk of satellite proceedings being successfully brought against them.

Key contacts

Jelita Pandjaitan
Partner, Singapore
Tel: +65 6692 5881
jelita.pandjaitan@linklaters.com

Narendra Adiyasa
Partner, Jakarta
Tel: +62 21 2995 1583
narendra.adiyasa@linklaters.com

Camellia Simbolon
Managing Associate, Singapore
Tel: +65 6692 5874
camelia.simbolon@linklaters.com

David Siagian
Managing Associate, Jakarta
Tel: +62 21 2995 1586
david.siagian@linklaters.com

For general enquiries please contact:

Widyawan & Partners
Sequis Tower, 15th Floor
Jalan Jenderal Sudirman Kav. 71
Jakarta 12190, Indonesia
Tel: +62 21 2995 1500
Fax: +62 21 2995 1501

Abu Dhabi | Amsterdam | Antwerp | Bangkok | Beijing | Berlin | Brisbane* | Brussels | Cape Town*** | Dubai | Dublin
Düsseldorf | Frankfurt | Hamburg | Hanoi* | Ho Chi Minh City* | Hong Kong SAR | Jakarta** | Jeddah$^{\Delta}$ | Johannesburg***
Lisbon | London | Luxembourg | Madrid | Melbourne* | Milan | Munich | New York | Paris | Perth* | Port Moresby*
Riyadh$^{\Delta}$ | Rome | São Paulo | Seoul | Shanghai$^{\Delta\Delta}$ | Singapore | Stockholm | Sydney* | Tokyo | Warsaw | Washington, D.C.

** Office of integrated alliance partner Allens*
*** Office of formally associated firm Widyawan & Partners*
**** Office of collaborative alliance partner Webber Wentzel*

$^{\Delta}$ Office of Zamakhchary & Co. Linklaters in agreement with Zamakhchary & Co.
$^{\Delta\Delta}$ Linklaters Shanghai and Linklaters Zhao Sheng (joint operation office with Zhao Sheng Law Firm)

linklaters.com widyawanpartners.com