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Unveiling Supreme Court Regulation No. 3 of 2023: Does It Really Bring Indonesia Closer to Becoming an Arbitration-Friendly Jurisdiction?

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On 17 October 2023, the Supreme Court of the Republic of Indonesia (the "**Supreme Court**") enacted the Supreme Court Regulation No. 3 of 2023 on the Appointment of Arbitrator by Court, Repudiation Rights, Examination on the Enforcement and Annulment Petition of Arbitral Awards ("**Perma 3/2023**"). Many argue that this regulation represents one of the most progressive attempts by the Supreme Court in years to address the notable absence of comprehensive arbitration regulations.

While Perma 3/2023 clarifies the procedure for, among others, the court-ordered appointment of arbitrators, repudiation rights and the enforcement as well as the annulment of arbitral awards, this publication aims to dissect the salient features of Perma 3/2023, with a particular focus on its impact on the recognition and enforcement of international arbitral awards in Indonesia and queries whether Perma 3/2023 actually brings Indonesia one step closer to becoming an arbitration-friendly jurisdiction.

Redefining the abstract – public order or public policy (*ketertiban umum*)

One of the notable features of Perma 3/2023 is the re-introduction of the definition of "public order" or "public policy" (*ketertiban umum*). The definition of "public policy" has been one of the long-standing obstacles for international arbitral award creditors seeking enforcement in Indonesia. The Arbitration Law prescribes that international arbitral awards may not be enforced if the judges found that the award is contrary to "public policy". However, like the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("**NYC**"), the Arbitration Law is silent on the definition of "public policy".

This has caused confusion in practice as, for example, illustrated by the Central Jakarta District Court in *Astro Nusantara BV et al v. PT Ayunda Prima Mitra et al*, where the Central Jakarta District Court determined that the anti-suit injunction ordered by the SIAC tribunal against PT Ayunda Prima Mitra was against "public policy". The Central Jakarta District Court reasoned that the anti-suit injunction violated citizen fundamental right to defend his interest in his national court. The decision from the Central Jakarta District Court was later on upheld by the Supreme Court who reasoned that the SIAC award violated the principle of sovereignty of the Republic of Indonesia and noted that no sovereign power could dictate Indonesian legal proceedings. Unfortunately, both the Central Jakarta District Court and the Supreme Court did not specify the parameters they used to determine the breach of "public policy" or the nexus between the agreement to arbitrate and the anti-suit injunction in that case. Without clear guidelines or established standards, it has historically been difficult for legal practitioners to analyse how the concept of "public policy" must be assessed and whether an award is in violation of "public policy".[1]

1 See also *Bankers Trust International v. PT Mayora Indah* (Supreme Court Decision No. 01/K/Ex'r/Arb.Int/Pdt/2000) and E.*D & F. Man (Sugar) Ltd v. Yani Haryanto* (Supreme Court Decision No. 1205 K/Pdt/1990)

It is worth noting that "public policy" was previously defined by the Supreme Court Regulation No. 1 of 1990 on the Procedures on the Enforcement of Foreign Arbitral Award ("**Perma 1/1990**"), which, despite predating the Arbitration Law, still holds weight in areas where it does not contradict the law. Perma 1/1990 defines "public policy" broadly as the foundations of the entire legal system and society in Indonesia (*sendi-sendi asasi dari seluruh sistem hukum dan masyarakat di Indonesia*). It is also unclear whether the Central Jakarta District Court and the Supreme Court considered the language of Perma 1/1990 when coming to the conclusion that the anti-suit injunction from the SIAC tribunal in the *Astro Nusantara BV et al v. PT Ayunda Prima Mitra et al* above contravened "public policy".

It is against the above backdrop that we now turn our attention to the potential impact of the definition of "public policy" provided by Perma 3/2023. We query whether this regulation brings about substantive changes concerning the use of "public policy" as a ground for the refusal of the enforcement of foreign arbitral awards.

Perma 3/2023 re-introduces the definition of public policy as follows:

> "anything which constitutes the foundations required for the implementation of the legal, economic and socio-cultural system of the Indonesian society and nation (*segala sesuatu yang merupakan sendi-sendi asasi yang diperlukan demi berjalannya sistem hukum, sistem ekonomi dan sistem sosial budaya masyarakat dan bangsa Indonesia*)."

Interestingly, the above definition of "public policy" under Perma 3/2023 does not fundamentally depart from the definition provided under Perma 1/1990. It merely expands the scope of definition given by Perma 1/1990 so as to encompass economic and socio-cultural systems. In the absence of any measurable and tangible thresholds, it would not surprise us if the practical application of "public policy" will continue to dominate the reason to resist enforcement of foreign arbitral awards.

In a notable dispute between PT Pertamina (Persero) and PT PLN (Persero) and Karaha Bodas Company LLC, the Central Jakarta District Court indeed stated that "public policy" also encompasses the protection of the "national economic interests" and therefore, this interpretation by the Central Jakarta District Court aligns closely with the definition provided by Perma 3/2023. This alignment is indicative of the fact that there is nothing new with the definition provided by Perma 3/2023, which will underscore the ongoing uncertainty regarding the application of "public policy" as a ground to refuse enforcement of foreign arbitral awards in Indonesia.

Despite the above, Indonesia's stance on "public policy" is not an isolated case. The Chinese Supreme People's Court, for example, once refused to enforce a CIETAC award for monies owed to a heavy metal band after the Chinese Ministry of Culture had failed to pay for its performance[2]. The court found that the performance of heavy metal music was "against national sentiments", and accordingly, contrary to the social and public interests.

More broadly speaking, however, courts in many countries typically interpret public policy narrowly, in keeping with the NYC's pro-enforcement bias. One of the most-cited explanations of the concept comes from the case of *Parsons & Whittemore Overseas Co. Inc v. Société Générale de l'Industrie du Papier*, in which the US Second Circuit Court of appeals, in affirming the enforcement of an arbitral award against an American company, stated that "*the NYC's public policy defence should be construed* ***narrowly****. Enforcement of foreign arbitral awards may be denied on this basis only where the enforcement would violate the forum state's most basic notions of morality and justice*".[3] However, despite this sound and narrow interpretation, it is viewed that the notions of morality and justice are equally prone to be interpreted inconsistently and may therefore, require further clarification.

2 Reply of the Supreme People's Court in the matter regarding the request by Beijing First Intermediary People's Court to Refuse Enforcement of Arbitral Award [1997] Jing Ta 35 ('**Heavy Metal**').
3 See Margaret L Moses, The Principles and Practice of International Commercial Arbitration, Third Edition, p. 243.

Registration of international arbitral award – an eventual clarity

The Arbitration Law has outlined the steps for the enforcement of an international arbitral award in Indonesia which involves registering and obtaining exequatur from the Central Jakarta District Court. Previously, the Arbitration Law did not set out a specific timeline for the court to complete these processes, leading to the practical reality where the registration and recognition of international arbitral awards can take months (or even years) to complete.

Registration

Perma 3/2023 now sets a 14-day deadline for the Central Jakarta District Court to complete the registration process, following the submission of a complete registration documents, and allows the registration to be made electronically.

Perma 3/2023 also clarifies that the registration of an international arbitral award shall not be subject to deadline which the Arbitration Law imposes on domestic arbitral award for registration, that is within 30 days upon the issuance of the award. This is in line with the consensus in practice which acknowledges that the Arbitration Law's silence on the deadline for registration would mean that the registration of international arbitral award is not subject to the deadline which is applicable to domestic arbitral awards. This understanding is also due to the fact that international arbitral awards can be set aside in the court of the *seat,* a process that can last longer than the 30-day registration deadline for the domestic arbitral award.[4]

Exequatur

Similar to the registration process, Perma 3/2023 now sets a 14-day deadline for the Chairman of the Central Jakarta District Court to determine as to whether the petition can be approved or rejected. It also allows the submission for exequatur to be made electronically.

While the implementation of this new procedure remains to be seen, it is expected that the procedure and timeline introduced by Perma 3/2023 would help increase efficiency and certainty.

Enforcement

Perma 3/2023 now mandates that the decision on the recognition and enforcement of an international arbitral award shall be concluded within 30 calendar days since the enforcement petition is filed. This provision signifies the Supreme Court's attempt to expedite and further streamline the enforcement process in Indonesia. In the event that the court finds that the international arbitral award is outside the scope of "commerce" and/or contravenes public policy (see "R*edefining the abstract – public order or public policy (ketertiban umum)*" section above), the court will issue a decision to reject the petition for exequatur.

Any court decision granting the enforcement of the award shall be final and binding, and therefore cannot be appealed. Conversely, any court decision rejecting the enforcement of the award can be appealed to the Supreme Court.

Partial enforcement of international arbitral awards is now allowed under Perma 3/2023. The way that the provision was drafted implies that it is the responsibility of the award creditor to proactively seek such partial enforcement. That said, award creditors can now strategically hand-pick certain parts of the award that are less prone to rejection to be enforced. Perma 3/2023, however, is silent on whether the court may, in absence of any express request from the award creditor, reject the enforcement of certain parts of the award while granting the remaining parts of the award.

4 We note that the General Director of the General Judicial Body of the Supreme Court's Enforcement Guideline (Decree No. 40/DJU/SK/JM02.3/1/2019) considers that the 30-day deadline to register an award shall also be applicable to international arbitral award. However, there are no court precedents which suggest that an enforcement application of an international award must be rejected when the application is not submitted within the prescribed deadline.

Conclusion

In conclusion, we circle back to the pivotal question set forth at the outset of this publication: Does Perma 3/2023 propel Indonesia towards the horizon of a more arbitration-friendly jurisdiction? Even though we had hoped that Perma 3/2023 would better clarify and elucidate the concept of "public policy", Perma 3/2023 nevertheless emerges as a positive development in the Indonesian arbitration landscape as it offers improvements to the procedural clarity on many fronts, including the enforcement of international arbitral award.

However, given the abstract nature of "public policy", its application under Perma 3/2023 would still need to be closely monitored and we remain cautious to raise our optimism that Indonesian courts would adopt a pro-enforcement approach to interpreting "public policy" as a ground to resist enforcement of international arbitral awards.

Ultimately, Perma 3/2023 represents a commendable step by the Supreme Court, which would hopefully bring the Indonesia's arbitration ecosystem forward and make it friendlier.

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