

Indonesia: Enforceability of Foreign Anti-Suit Injunctions under Indonesian Law

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There have been a number of occasions in Indonesia when domestic court proceedings and foreign arbitration proceedings of the same matter were carried out concurrently. In some of those occasions, the arbitral tribunal, upon the claimant's request, issued an anti-suit injunction in respect of the Indonesian court proceedings brought by the respondent. In *Astro Nusantara International B.V. et al. (Astro) v. PT Ayunda Prima Mitra et al. (Ayunda)* [2010 and 2012], the Indonesian Supreme Court refused to recognize and enforce a foreign anti-suit injunction issued by a tribunal constituted under the Singapore International Arbitration Centre (SIAC) Rules. This post will discuss the Supreme Court's reasoning behind the decision and, at the same time, will attempt to identify whether there are actually bases to recognize and enforce a foreign anti-suit injunction in Indonesia.

Anti-Suit Injunction under Arbitration Law

Indonesia is a member of the New York Convention, which was ratified through Presidential Decree No. 34 of 1981. As a follow-up to the ratification, the Supreme Court issued Regulation No. 1 of 1990 on Enforcement of International Arbitration Awards. In 1999, the Indonesian government enacted the Arbitration Law. The contents of the Supreme Court regulation are more or less similar to the provisions of the Arbitration Law concerning the enforcement of foreign arbitral awards.

While the Arbitration Law is silent on issues related to the issuance of anti-suit injunctions (or foreign anti-suit injunctions) to prevent opposing parties from commencing or continuing court proceedings, the law recognizes certain procedural orders for various purposes. Article 32 of the Arbitration Law provides that, at the request of one of the parties, a tribunal may make a provisional award or other interlocutory decision on how to organize the examination of the dispute, including passing a procedural order for security attachment, deposit of goods to third parties, and sale of perishable goods. It is worth noting, however, that practically speaking, there has been no known cases of the Indonesian National Board of Arbitration (BANI) issuing a security attachment order.

Supreme Court's Position on the Enforceability of Foreign Anti-Suit Injunctions

In *Astro v. Ayunda*, the Indonesian Supreme Court decided to uphold the Chairman of the Central Jakarta District Court's refusal to recognize and enforce an SIAC award on the basis that the award contained an anti-suit injunction. According to the Supreme Court: (1) the anti-suit injunction amounted to interference in an ongoing Indonesian judicial process, and hence it violated the principle of state sovereignty of the Republic of Indonesia; (2) it violated Indonesian public order; and (3) it did not fall within the commercial sector, rather it fell within the field of procedural law.

The dispute between Astro and Ayunda originally concerned a failed joint venture under a Subscription and Shareholders Agreement (SSA). Pursuant to the arbitration clause in the SSA, Astro commenced arbitration against Ayunda under SIAC Rules. However, prior to such event, Ayunda filed a case against Astro at the South Jakarta District Court. During the arbitral proceedings, Ayunda raised a jurisdictional objection contesting the Tribunal's jurisdiction. The Tribunal issued an award dismissing Ayunda's jurisdictional challenge, and granted an anti-suit injunction prohibiting Ayunda from continuing its court proceedings against Astro in Indonesia because the subject matter of the dispute fell within the arbitration clause set out in the SSA.

Interference in an ongoing Indonesian Judicial Process

In arriving at its conclusion on this issue, the Supreme Court appeared to have considered that the anti-suit injunction was addressed to the South Jakarta District Court vis-à-vis the panel of judges who presided over Ayunda's case against Astro. Thus, the Supreme Court was of the view that the anti-suit injunction amounted to interference in an ongoing Indonesian judicial process, and that it violated the principle of state sovereignty of the Republic of Indonesia.

In reality, the anti-suit injunction was issued to order Ayunda (and not the South Jakarta District Court) to discontinue its case before the court because Ayunda was bound by the arbitration clause set out in the SSA. In fact, under the Indonesian Civil Procedural Law, Ayunda as the plaintiff always had the right to discontinue the case by withdrawing its statement of claim and the civil courts were not empowered to preclude a plaintiff from withdrawing its case. If Astro had submitted its statement of defence, Ayunda's withdrawal could only be made with Astro's consent. Given that Astro had commenced the arbitral proceedings against Ayunda at SIAC, it is likely Astro would have consented to Ayunda's withdrawal.

The Supreme Court's treatment of the anti-suit injunction as an order against the Indonesian court also appears to be questionable since it is commonly accepted that, in the arbitration context, a tribunal only has jurisdiction over the disputing parties bound by the arbitration agreement based on which the tribunal is constituted. Arbitration is a creature of contract, and hence there is generally no way for a tribunal to issue an order against a third party, let alone against a foreign court. Indonesian Arbitration Law has a similar concept whereby the authority of a tribunal to render an award or order lies in the parties' arbitration agreement, meaning that the tribunal can only address its awards or orders to those who are bound by the arbitration agreement. Thus, saying that the anti-suit injunction (actually addressed to Ayunda) amounts to a form of intervention against the Indonesian court or judicial process is debatable.

Violation 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. Article 4 para (2) of Regulation of the Supreme Court No. 1 of 1990 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.

"*Fundamental principles of the Indonesian legal system*" can be found in various pieces of Indonesian legislation. In the arbitration context, one should look at the Arbitration Law to discern the fundamental principles under Indonesian law. One of the most essential articles in the Arbitration Law is Article 11, para (1) in which provides that "*the existence of a written arbitration agreement eliminates the rights of the parties to submit the resolution of their disputes or differences of opinion contained in the contract to the District Court*". Article 11 para (2) goes further by saying that "*the District Court **must reject** and **must not interfere** in any dispute settlement which has been*

agreed to be done through arbitration”.

It is therefore arguable that the anti-suit injunction is in line with Article 11 para (1) of the Arbitration Law based on which Ayunda has no right to submit any dispute under the SSA to the Indonesian courts. The anti-suit injunction is also not in contravention of para (2) of Article 11 because, under this provision, the South Jakarta District Court has no jurisdiction to hear any dispute arising out of the SSA. One may fairly say that the anti-suit injunction essentially supports the enforcement of Article 11 of the Arbitration Law. Some may argue further that the anti-suit injunction was instead meant to maintain public order by preventing the risk of conflicting decisions on the same matter. In this context, leading scholars have opined that the notion of a court’s jurisdiction is a matter of public order. This is the reason why under the Indonesian Civil Procedural Law, civil court judges are, by their office, obliged not to take jurisdiction over a case where the parties are bound by an arbitration agreement. This means that, even if no party raises a jurisdictional objection, the judge must dismiss the case.

“Commerciality” Principle

Despite the fact that the dispute between Astro and Ayunda arose out of a contractual relationship under the SSA, the Indonesian Supreme Court ruled that the content of the SIAC award does not fall within the commercial sector, rather it falls within the field of procedural law since the award contains the anti-suit injunction.

The question that arises is what needs to fall within the commercial sector: the subject matter of dispute, the legal relation between disputing parties, or the orders set out in foreign arbitral awards?

The Arbitration Law specifically refers to the term “disputes” when setting down the rules of arbitrability. Article 5 provides that *“disputes that can be settled by arbitration are those in the commercial sector and the merits of which concern rights that are fully controlled by disputing parties”*. This provision underpins Article 66 letter b of the Arbitration Law stating that Indonesia will only recognize and enforce international arbitration awards which fall within the scope of commercial law. Elucidation of Article 66 letter b elaborates on the meaning of the “the scope of commercial law”, i.e. “activities” in the field of commerce, banking, finance, investment, industry, and intellectual property rights. Further, the Presidential Decree on the ratification of the New York Convention provides that Indonesia will apply the New York Convention only to differences arising out of “legal relationships” which are considered to be commercial under the Indonesian law.

Given those provisions, the “commerciality” principle appears to concern the nature of the dispute or legal relationship between disputing parties, rather than the orders set out in foreign arbitral awards, let alone the procedural orders. Leading scholars have opined that the existence of procedural orders in a foreign arbitral award cannot in any way negate the commercial nature of the award so long as the dispute based on which the award is issued arises from a commercial arrangement. Thus, applying the “commerciality” test to a procedural order such as a foreign anti-suit injunction may sound perplexing.

Conclusion

In view of the foregoing discussion, it appears that the nature of the anti-suit injunction issued in *Astro v. Ayunda* is consistent with Article 11 and 32 of the Arbitration Law.

The real issue here is perhaps the “actual” enforcement of the anti-suit injunction, i.e. how to procure Ayunda to withdraw its case before the Indonesian court. The same problem in fact arises in an Indonesian court case where the court passes an order for specific performance (say to perform the

agreed service) as opposed to an order for monetary damages. It is generally difficult to execute the former if the losing party refuses to voluntarily comply with the order, especially because there is no clear sanction for not obeying a civil court order. In contrast, Indonesian courts can execute an order for monetary damages by seizing and auctioning off the losing party's assets before eventually handing over the proceeds to the winning party. It is common for Indonesian litigants who seek a court order for specific performance to also request a "dwangsom" (order for monetary penalty) at the same time. If the request for dwangsom is granted by the court, the losing party will be required to pay a penalty of an amount determined by the court for each day of delay in complying with the order for specific performance. If the losing party continues refusing to perform the required act, the court can execute the dwangsom as any other orders for monetary damages. This will put certain pressure on the losing party to comply with the order for specific performance.

Given the above, it may be worth considering seeking an anti-suit injunction accompanied by a monetary penalty that is payable if the party against which the injunction is issued (such as Ayunda) refuses or fails to comply with the injunction. Having said that, one needs to be very cautious about asking for an anti-suit injunction if it intends to enforce its case in Indonesia as Indonesian courts may not only refuse to recognize the anti-suit injunction, but also the entire award as in *Astro v. Ayunda* (although like other civil law countries, Indonesia does not follow the rule of binding precedent).