

Kluwer Arbitration Blog

Can Indonesian Courts Override Arbitration Agreements When Claims Involve Third Parties?

Eddy Leks (Leks&Co) · Friday, January 26th, 2024

An arbitration agreement is an agreement to resolve disputes through arbitration. Its existence precludes disputing parties from bringing their dispute to court: see Article 3 of the [Arbitration and ADR Law](#) of the Republic of Indonesia (“Arbitration Law”), which stipulates that Indonesian courts have no jurisdiction to try disputes between parties bound by an arbitration agreement.

This might be crystal clear when the dispute only involves two disputing parties who have signed an arbitration agreement. But what would happen when a disputing party wishes to claim against non-signatories or where it is otherwise crucial to involve a third party in the arbitration? This blog post will consider how this question is dealt with under Indonesian law.

It is not uncommon for a party bound by an arbitration agreement to seek to be released from that agreement. In Indonesia, the initial approach was to package the claim not as a breach of contract claim but as an unlawful act claim. In contrast to a breach of contract claim, an unlawful act claim is one concerning a breach of the prevailing laws and regulations (rather than the contract’s provisions). Under the Arbitration Law, only disputes of a commercial nature or regarding a right fully controlled by the disputing parties under the laws and regulations can be resolved through arbitration.¹⁾

This approach might have worked at an earlier time, but it has been the position of the Indonesian courts to consider unlawful act claims as part of the dispute to be resolved through arbitration when the claim arises in relation to a contract containing an arbitration agreement.

Arbitrability of an Unlawful Act Claim: Early Jurisprudence

Early Indonesian jurisprudence, namely Decision No. 497/PDT/G/1995/PN.JKT.PST from the District Court of Jakarta Pusat (which referred to the earlier Decision No. 3179 K/Pdt/1984 from the Supreme Court), considered that despite the claimant’s labeling of its claim as an unlawful act claim, the claim should be seen as a breach of contract claim within the arbitration agreement since the parties had entered into a time charter contract from which their dispute originated. Accordingly, the Court decided that it had no jurisdiction to determine the dispute. The Indonesian Supreme Court has reached similar conclusions in subsequent cases, as discussed in a [previous blog post](#).

However, when the claimant adds non-parties to the arbitration agreement as respondents to the dispute, would the Indonesian courts take the same view?

Arbitrability of an Unlawful Act Claim Involving Third Parties

Thus, consideration now turns to claims that are not only lodged as an unlawful act, but also involve third parties that are not signatories to an arbitration agreement. For example, a claimant files an unlawful act claim against three different parties in court but has an arbitration agreement with one of the respondents. Would the court be authorized to try the dispute?

As stated above, Article 3 of the Arbitration Law waives the Indonesian courts' jurisdiction to try a dispute between parties bound by an arbitration agreement. Therefore, on a plain reading, even when the dispute involves many parties, of which only some parties are bound to an arbitration agreement, the court should generally declare itself as without jurisdiction to try the dispute.

However, the above analysis should be accompanied by an analysis of the subject matter of the claim, including whether it derived from, because of, or in relation to the contract containing the arbitration agreement. The importance of the subject matter of the claim has been confirmed by several court decisions (e.g., most recently, Decision No. 368/Pdt.G/2023/PN.Jkt.Sel and Decision No. 214/Pdt.G/2023/PN.Jkt.Sel, both from the District Court of Jakarta Selatan).²⁾ In both cases, which are presently being appealed, the claimant had filed unlawful act claims in court which involved two non-signatories to the arbitration agreement, in addition to a signatory. The Court granted applications challenging its jurisdiction after referring to the Arbitration Law and the subject matter of the claim. These cases show that to the extent that the claim's subject matter originates from the contract containing the arbitration agreement, the court will decline jurisdiction despite the third parties' involvement.

In contrast, when the claim does not originate from the contract containing the arbitration agreement, and especially if the claimant seeks relief not only against the party bound by the arbitration agreement, but also against third parties, the court may consider itself authorized to try the dispute.

For example, in another case, the claim originated from an extraordinary general meeting of shareholders that was alleged to be unlawful. This dispute involved several parties including a governmental institution. Two of the disputing private parties had signed an investment agreement containing an arbitration agreement. The rest had not. At the intermediate appellate stage, the Court declared that the arbitration agreement was valid, and that the Court was not authorized to try the dispute. However, at both the cassation and judicial review stages, the Supreme Court, through its [Decision No. 862 K/Pdt/2013](#), considered that it was authorized to try it. The Supreme Court considered that the subject matter of the dispute concerned an extraordinary general meeting of shareholders which was categorized as an unlawful act that fell outside the investment agreement, and the rest of the parties against which claims were brought were not signatories to the agreement. Therefore, the Court had authority to try the dispute.

This author notes that despite the Court's consideration of whether the parties which the claim was brought against were signatories to the agreement, the emphasis was on whether the dispute fell within or outside the subject matter of the agreement. The key words of the Supreme Court's

consideration were that the dispute fell *outside* the obligations stipulated in the agreement. As such, in the final analysis, the subject matter of the claim is likely a more important factor than the parties against which the claim is brought.

In conclusion, Indonesian courts will generally decline to try an unlawful act claim which includes third parties not bound by an arbitration agreement provided that the subject matter of dispute derives from, because of, or in relation to the underlying contract between the signatories of the arbitration agreement. In contrast, when the claim is entirely not derived from, because of, or in relation to the contract containing the arbitration agreement, the court will have the authority to try the dispute even when the claim involves the signatories of the arbitration agreement.

When Third-Party Involvement is Crucial

The next issue is, what can be done when a claim is related to a third party (or a third party's involvement is crucial to enlighten the dispute or evidence), and hence should be included in the legal proceedings, but this third party is not bound by the arbitration agreement? Would that mean that the claimant cannot lodge a claim against the related third party at all?

Article 30 of the Arbitration Law provides that a third party not bound by an arbitration agreement may participate and join in an arbitration if the third party has related interests, subject to approval by the disputing parties and the arbitral tribunal. This is also the position under Article 9, paragraph 2 of the [BANI Arbitration Center Rules 2022](#). However, this means that the claim will still have to be made in arbitration, not in court. The problem is, there is no legal obligation for this third party to participate in the arbitration. Even when it has an interest in the dispute, a third party may not want to join simply because by joining, it must pay the arbitration costs, or at least, risk bearing them.

Another possibility is to first arbitrate the dispute between the parties who are bound by the arbitration agreement. After that arbitration is concluded, the award can be used as evidence for the claimant to claim against related third parties, who have been ordered to undertake certain actions as a result of the arbitral award. That would surely involve more energy, time, and money, which may not be ideal for the claimant. Can this be seen as a downside of an arbitration agreement?

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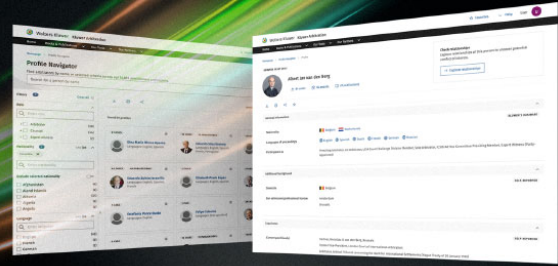
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References

?1 Paragraphs 1 and 2 of Article 5.

?2 The author was involved in both cases as counsel for the successful party.

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