



INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ICCA
PROJECTS

**Does a Right to a
Physical Hearing Exist
in International
Arbitration?**

INDONESIA

Daniel Pakpahan

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a. Parties' Right to a Physical Hearing in the *Lex Arbitri*

1. *Does the lex arbitri of your jurisdiction expressly provide for a right to a physical hearing in arbitration? If so, what are its requirements (e.g., can witness testimony be given remotely, etc.)?*

Short answer: No.

The Indonesian *lex arbitri* – Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (hereinafter, “Law 30/1999”), which governs both domestic and international arbitration seated in Indonesia as well as the enforcement of any international award in Indonesia¹ – does not contain an express provision on the right to a physical hearing. A provision that might be seen as a reference to physical hearings is Article 40, paragraph 2, which provides that the sole arbitrator or chair of the tribunal shall order the parties to “appear at an arbitral hearing” upon receipt of the respondent’s response to the notice of arbitration.² However, the provisions and the Explanatory Note to Law 30/1999 do not define what constitutes an appearance at an arbitral hearing and what form it shall take. An appearance at a hearing is comprised of an oral and simultaneous exchange of opinions which are not exclusive attributes of physical hearings.³ Thus, it is doubtful that Article 40, paragraph 2 of Law 30/1999 creates the right to a physical hearing in arbitration. This conclusion is reinforced by many provisions of Law 30/1999 contradicting the existence of such right.⁴

Prior to the enactment of Law 30/1999, the provisions on arbitration were borrowed from Dutch law as the colonial *lex arbitri*. These were found in Sections 615-651 of the

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¹ Karen MILLS, Iswahjudi KARIM and Margaret ROSE, “Indonesia” in *DELOS Guide to Arbitration Places (GAP)* (15 March 2019) at <<https://delosdr.org/wp-content/uploads/2018/06/Delos-GAP-1st-edn-Indonesia.pdf?pdf=GAP1-Indonesia>> (last accessed 27 November 2020) p. 5.

² Art. 40, paragraph 2, Law 30/1999 provides that: “At the same time [upon receipt of the response from the Respondent], the arbitrator or chair of the arbitral tribunal shall order the parties or their representatives to appear at an arbitral hearing fixed for no more than fourteen (14) days from the issuance of the order” (free translation by the Author).

³ Maxi SCHERER, “Remote Hearings in International Arbitration: An Analytical Framework”, 37 J. Int’l. Arb. (2020) p. 407 at p. 417.

⁴ See sub-paragraph a.2 below.

Code of Civil Procedure (*Reglement op de Burgerlijke Rechtsvordering* or hereinafter, “Rv”)⁵ applicable to the European population group in Indonesia at the time.⁶ Different sets of rules applied to different population groups during the colonial period. For the native Indonesians, the *Herziene Indonesisch Reglement* (hereinafter, “HIR”) and the *Rechtsreglement Buitengewesten* (hereinafter, “RBg”) were applicable, but Article 377 HIR and Article 705 RBg refer back to the *lex arbitri* as contained in Rv for arbitration between native Indonesians.⁷ Considering that Rv was enacted in 1847, it certainly does not contemplate the possibility of holding hearings other than in person, but there is no express provision which treats a physical hearing as a right of the parties.

After the declaration of independence in 1945, the distinction between population groups and the separate applicability of the colonial laws in Indonesia were suspended.⁸ Yet, even after 1945, those provisions of the Rv remained in force until 1999 simply because they had not been replaced by any national law⁹ until the introduction of Law 30/1999.¹⁰ Nevertheless, Article 37, paragraph 3 of Law 30/1999 provides that “examination of witnesses and expert witnesses before the arbitrator or arbitral tribunal shall be carried out in accordance with the provisions of the code of civil procedure”, which is understood as a reference to the provisions of the Rv, HIR and RBg.¹¹ Thus, although no longer part of the *lex arbitri*, these colonial laws remain relevant in arbitral practice. In conclusion, neither the applicable Law 30/1999 nor the old Rv expressly provide for the right to a physical hearing in international arbitration.

2. *If not, can a right to a physical hearing in arbitration be inferred or excluded by way of interpretation of other procedural rules of your jurisdiction's lex arbitri (e.g., a rule providing for the arbitration hearings to be “oral”; a rule allowing the tribunal to decide the case solely on the documents submitted by the parties)?*

⁵ Art. 615 of the Rv reads: “Any person may submit to arbitration disputes regarding rights the disposition of which are within such person’s control” (free translation by the Author).

⁶ Sam R. LUTTRELL, “Lex Arbitri Indonesia: The Law, Practice and Place of Commercial Arbitration in Indonesia Today”, 10 Int. A.L.R. (2007) p. 190 at p. 194.

⁷ Jan K. SCHAEFER, “Leaving the Colonial Arbitration Laws Behind: South East Asia’s Move into the International Arbitration Arena”, 16 Arb. Int’l. (2000) p. 297 at p. 302.

⁸ *Ibid.*

⁹ FIRMANSYAH, Karen MILLS and Margaret ROSE, “Indonesia” in Andrew HORROCKS and Maurice PHELAN, eds., *Commercial Litigation: International Series*, 2nd edn. (Sweet & Maxwell 2015) p. 219 at p. 220.

¹⁰ J.K. SCHAEFER, “Leaving the Colonial Arbitration Laws Behind”, fn. 7 above, p. 317; Art. 81 Law 30/1999 expressly states that Arts. 615–651 of the Rv no longer have force.

¹¹ See MILLS, “National Report Indonesia (2018 through 2020)” in ICCA *International Handbook on Commercial Arbitration* (henceforth *Handbook*) p. 26.

Short answer: It can be excluded.

As there is no express provision on the right to a physical hearing in Law 30/1999, the analysis must now turn to whether such right can be inferred or excluded by interpreting the existing provisions. Several provisions of Law 30/1999 indicate that the *lex arbitri* does not recognize physical hearings as a right.

First, Article 36 of Law 30/1999 stipulates that, by default, arbitrations under Indonesian law are to be documents-only proceedings, and an oral hearing may be held only with the approval of the parties or if the tribunal deems it necessary.¹² This priority placed on written proceedings is also emphasized in Article 46, paragraph 2, regarding the opportunity of each party to present its case, providing that “the parties are afforded an opportunity to explain their respective positions in writing and to submit evidence deemed necessary to support such positions”.¹³ In other words, Law 30/1999 does not expressly adopt the fundamental right of a party to an oral hearing,¹⁴ *a fortiori*, nor a right to a physical hearing.

Second, pursuant to Article 37, paragraph 2, of Law 30/1999, the arbitrators have discretion to hear witness testimony or hold meetings as they deem necessary at a different place from the seat of arbitration.¹⁵ This vests in the arbitrators a broad degree of discretion, i.e., to hear witness testimony and hold other meetings outside the designated seat of arbitration. The most notable exercise of such discretion – an infamous one – is found in the *Himpurna* case,¹⁶ an UNCITRAL arbitration where the tribunal relocated the hearings from Jakarta as the seat of arbitration to The Hague in

¹² Art. 36, paragraphs 1 and 2, Law 30/1999 provides that: “(1) The arbitral proceedings shall be done by written documents. (2) Oral hearings may be conducted with the approval of the parties concerned or if deemed necessary by the arbitrator or arbitral tribunal” (free translation by the Author).

¹³ J.K. SCHAEFER, “Leaving the Colonial Arbitration Laws Behind”, fn. 7 above, p. 197.

¹⁴ Gatot SOEMARTONO and John LUMBANTOBING, “Indonesia” in Gary F. BELL, ed., *The UNCITRAL Model Law and Asian Arbitration Laws. Implementation and Comparisons* (Cambridge University Press 2018) p. 300 at p. 323. See UNCITRAL, Model Law on International Commercial Arbitration, Art. 24, paragraph 1, available at <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> (last accessed 27 November 2020) (hereinafter, “UNCITRAL Model Law”).

¹⁵ Art. 37, paragraph 2, Law 30/1999 provides that: “The arbitrator or arbitral tribunal may hear witness testimony or hold meetings, if deemed necessary, at a place or places outside the place where the arbitration is being held” (free translation by the Author).

¹⁶ *Himpurna California Energy Ltd v. PT Perusahaan Listrik Negara (Persero)*, Final Award (4 May 1999) in ICCA *Yearbook Commercial Arbitration* XXV (2000) (henceforth *Yearbook*) p. 13; *Perusahaan Pertambangan Minyak dan Gas Bumi Negara v. Himpurna California Energy Ltd, PT Perusahaan Listrik Negara dan Menteri Keuangan Republik Indonesia*, Central Jakarta District Court, Judgment No. 272/Pdt.G/1999/ PN.Jkt.Pst. See also *Perusahaan Pertambangan Minyak dan Gas Bumi Negara v. Patuha Power Ltd, PT Perusahaan Listrik Negara dan Menteri Keuangan Republik Indonesia*, Central Jakarta District Court, Judgment No. 271/Pdt.G/1999/PN.Jkt.Pst.

light of an anti-arbitration injunction issued by the Central Jakarta District Court.¹⁷ The injunction was issued not because the hearings were moved to The Hague, but due to protests by another party to the relevant agreement who was not allowed to join the arbitration proceedings and thus requested the suspension of the *Himpurna* arbitration.¹⁸ Since the relocation was not at issue, no legal question arose from the tribunal's decision to hold hearings outside Indonesia, and such decision was justified by the wording of Article 37, paragraph 2, of Law 30/1999.¹⁹ More generally, since this provision does not specify whether hearings and meetings must be held *physically* at a certain "place", the arbitrators' broad discretion suggests that they are free to rule on the need for physical hearings and meetings, including the possibility of conducting them remotely.

Third, Article 31 of Law 30/1999 provides that the parties are free to determine in their arbitration agreement the procedure that the arbitral tribunal shall observe in the course of the proceedings, as long as the procedure does not conflict with Law 30/1999. In the event that parties do not specify the procedural rules applicable to the proceedings, the arbitrators shall conduct the proceeding in accordance with and within the limits of Law 30/1999.²⁰ As noted previously, the *lex arbitri* does not provide for any specific regulation on the conduct of oral hearings. Thus, the parties are free to agree on a procedure, including through the adoption of institutional rules, that allows for remote hearings,²¹ such as the recently published rules of the Indonesian National Board of Arbitration (hereinafter, "BANI"), the main Indonesian arbitration institution, which allow for upcoming and ongoing arbitration proceedings to be conducted remotely under

¹⁷ Komar MULYANA and Jan K. SCHAEFER, "Indonesia's New Framework for International Arbitration: A Critical Assessment of the Law and Its Application by the Courts", 17 *Mealey's Int'l. Arb. Rep.* (2002) p. 39 at p. 71.

¹⁸ See Stephen SCHWEBEL, *Justice in International Law: Further Selected Writings* (Cambridge 2011) pp. 212–219.

¹⁹ G. SOEMARTONO and J. LUMBANTOBING, "Indonesia", fn. 14 above, pp. 320–321.

²⁰ Art. 31, paragraphs 1 and 2, Law 30/1999 provides that: "(1) The parties are free to determine, in an explicit written agreement, the arbitration procedures to be applied in hearing the dispute, provided this does not conflict with the provisions of [Law 30/1999]. (2) In the event that the parties do not themselves determine the procedures to be applied, and the arbitrator or arbitral tribunal has been constituted [...], all disputes which have been so referred to the arbitrator or arbitral tribunal shall be heard and decided upon in accordance with the provisions in [Law 30/1999]" (free translation by the Author).

²¹ Art. 34, paragraphs 1 and 2, Law 30/1999 provides that: "(1) Resolution of a dispute through arbitration may be referred to a national or international arbitration institution if so agreed upon by the parties. (2) Resolution of a dispute through institutional arbitration [...] shall be done according to the rules and procedures of such designated institution, except to the extent otherwise agreed upon by the parties" (free translation by the Author).

certain conditions.²² In absence of the parties' agreement on procedure, Law 30/1999 grants arbitrators great discretion to choose the form of hearings, including whether they are to be held in-person or remotely.

Fourth and lastly, as regards the examination of witnesses, the *lex arbitri* does not provide the arbitrators the power to request a State court to subpoena the witness or to examine the witness itself.²³ Previously, under Article 630 of the Rv as the colonial *lex arbitri*, an arbitrator could appoint an examining magistrate who had the power to compel attendance, but this provision of the Rv has been repealed.²⁴ Currently, Law 30/1999 only provides the possibility for witnesses to be summoned to appear physically upon order of the arbitrators or at the request of the parties under Article 49(1), without providing any mechanism to compel such order or request.²⁵ This arguably precludes the right to hear witnesses physically in arbitration under Law 30/1999, as any conclusion to the contrary would lead to an absurd result where a party holds an inherently unenforceable right under the Indonesian *lex arbitri*.

In conclusion, these four factors are inconsistent with any inference that a right to a physical hearing exists under Law 30/1999. Conversely, it stands to reason that Law 30/1999 excludes such right based on the various provisions conferring upon arbitrators broad discretion to decide how and where hearings should be held.

b. Parties' Right to a Physical Hearing in Litigation and its Potential Application to Arbitration

3. *In case the lex arbitri does not offer a conclusive answer to the question whether a right to a physical hearing in arbitration exists or can be excluded, does your jurisdiction, either expressly or by inference, provide for a right to a physical hearing in the general rules of civil procedure?*

Short answer: Yes, by inference.

²² BANI, Decree No. 20.015/V/SK-BANI/HU on the Rules and Procedures for Electronic Arbitration (28 May 2020), overview available in English at <<https://www.mondaq.com/arbitration-dispute-resolution/948320/bani-moves-arbitration-online>> (last accessed 27 November 2020).

²³ Karen MILLS, "Indonesia" in *IBA Arbitration Guide* (updated January 2018) at <<https://www.ibanet.org/Document/Default.aspx?DocumentUid=06406456-22F4-4035-BF04-75B85A5E903F>> (last accessed 27 November 2020) section IX(iii). See UNCITRAL Model Law, Art. 27.

²⁴ See sub-paragraph a.1 above; MILLS, "National Report Indonesia (2018 through 2020)" in *Handbook*, p. 27.

²⁵ Art. 49, paragraph 1, Law 30/1999 provides that: "Upon the order of the arbitrator or arbitral tribunal, or at the request of the parties, one or more witnesses or expert witnesses may be summoned to give testimony" (free translation by the Author); MILLS, "National Report Indonesia (2018 through 2020)" in *Handbook*, p. 27.

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The Indonesian general rules of civil procedure, i.e., HIR, RBg, and Rv, do not expressly provide for a right to a physical hearing. Since they are the original Dutch laws from the 19th century, other modes of hearing besides physical hearings certainly could not have been envisaged.²⁶ Even after Indonesia's independence, there has been no clarification regarding the extent to which physical appearance is required in litigation, but it could be inferred from the following rules that court hearings need to be physical.

First, the litigating parties are required to appear before the court, at least on the first day of hearing where the judge will then ask the parties to attempt an amicable settlement of the dispute.²⁷ The need for physical appearance is also underscored by the requirement for hearings to be conducted in an open court,²⁸ so that the proceedings are subject to public scrutiny to ensure fairness and impartiality.²⁹

Second, witnesses have a legal obligation to appear in court proceedings; this can be inferred from Articles 140 and 141 of HIR as well as Articles 166 and 167 of RBg, which impose sanctions for witnesses who fail to appear after being properly summoned. The judges will postpone the hearing or set another hearing date for the examination of witnesses who fail to attend the initial hearing.³⁰ Moreover, witness testimony must be given orally³¹ and personally³² at the hearing, so it must be presented by the witness without any representation and cannot be made in writing.³³ These requirements are

²⁶ See sub-paragraph a.1 above.

²⁷ Art. 130, paragraph 1, HIR provides that: "If both parties appear on the designated day, then the district court with the help of the chairman will facilitate an amicable settlement" (free translation by the Author); Art. 7, paragraph 1, Supreme Court Regulations No. 1 of 2008 on Court-annexed Mediation Procedure provides that: "On the designated day of hearing which is attended by both parties, the judge will oblige the parties to mediate" (free translation by the Author).

²⁸ Art. 13, paragraphs 1 and 2, Law No. 48 of 2009 on Judicial Authority (hereinafter, "Law 48/2009") provides that: "(1) All court hearings are open for public, unless the laws determine otherwise. (2) Court decision is only valid and has the force of law if it is pronounced in a hearing which is open for public" (free translation by the Author).

²⁹ FIRMANSYAH, K. MILLS and M. ROSE, "Indonesia", fn. 9 above, p. 226.

³⁰ Art. 139, paragraph 1, HIR provides that: "If the plaintiff or defendant seeks to confirm the truth of his claim with a witness, but because the witness does not want to appear or for other reasons cannot be presented [...], then the district court will determine the day of the next hearing for the examination to be held and order the witness [...] to appear at the hearing that day" (free translation by the Author).

³¹ Art. 150, paragraph 1, HIR provides that: "Both parties will put forward questions that will be asked to the witness through the chairman" (free translation by the Author).

³² Art. 144, paragraph 1, HIR provides that: "The witnesses that appear on the hearing day will be presented one by one" (free translation by the Author).

³³ Sudikno MERTOKUSUMO, *Hukum acara perdata Indonesia* (Universitas Atma Jaya Yogyakarta 2010) p. 229.

commonly understood in practice as not allowing witness testimony to be presented remotely.³⁴

Notwithstanding the aforementioned rules, recent developments in dispute resolution practice indicate a gradual departure from the requirement of physical appearances. The Supreme Court has issued regulations that open up the possibility to conduct court proceedings remotely. Supreme Court Regulations No. 1 of 2016 on Court-annexed Mediation Procedure (hereinafter, “SC Regulations 1/2016”) expressly provide, in Article 5, paragraph 3, that the mandatory mediation proceedings may be conducted remotely,³⁵ which will have the same effect as those conducted physically.³⁶ Furthermore, the Supreme Court Regulations No. 1 of 2019 on Electronic Administration of Disputes and Court Hearings (hereinafter, “SC Regulations 1/2019”) has provided the legal framework for court proceedings to be conducted remotely,³⁷ in line with the fundamental principle that court proceedings must be carried out in a manner as straightforward, expedient, and cost-efficient as possible.³⁸ This option also extends to the examination of witnesses.³⁹ The proceedings which are conducted through an open-access network will fulfil the requirement that hearings must be open to the public.⁴⁰ Likewise, a judgment rendered through this process will be deemed a judgment read in an open court with the appearance of the parties.⁴¹

However, remote hearings in litigation under SC Regulations 1/2019 still require the parties’ agreement, and the regulations do not appear to permit judges to order remote

³⁴ FIRMANSYAH, K. MILLS and M. ROSE, “Indonesia”, fn. 9 above, p. 223.

³⁵ Art. 5, paragraph 3, SC Regulations 1/2016 provides that: “Mediation proceedings may be conducted through remote audio-visual communication which allows all parties to see and hear each other directly and participate in the proceedings” (free translation by the Author).

³⁶ Art. 6, paragraph 2, SC Regulations 1/2016 provides that: “The presence of the Parties through remote audio-visual communication [...] shall be considered as in-person appearance” (free translation by the Author).

³⁷ Arts. 19-28 SC Regulations 1/2019.

³⁸ Art. 2, paragraph 4, Law 48/2009 provides that: “Judiciary must be conducted in a straightforward, expedient, and inexpensive manner” (free translation by the Author).

³⁹ Art. 24, paragraph 1, SC Regulations 1/2019 provides that: “Upon an agreement by the parties, the evidentiary hearing on the examination of witnesses and/or expert witnesses can be carried out remotely through audio-visual communication media which allows all parties to participate in the hearing” (free translation by the Author).

⁴⁰ Art. 26, paragraph 3, SC Regulations 1/2019 provides that: “The pronouncement of the judgment [...] is deemed by law to have been attended by the parties and carried out in a hearing open to the public” (free translation by the Author).

⁴¹ Art. 27 SC Regulations 1/2019 provides that: “Electronic hearing conducted [...] on public internet networks by law have fulfilled the principle and requirement that hearings must be open to the public in accordance with the statutory provisions” (free translation by the Author).

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hearings *sua sponte*.⁴² Similarly, as regards the possibility for remote mediation under SC Regulations 1/2016, it remains unclear whether the judge may impose on the parties the duty to carry out mediation remotely or if it shall remain subject to the parties' agreement. The section governing the option for remote mediation is titled "Nature of the Mediation Proceedings"; another provision within that section, Article 5, paragraph 1, of SC Regulations 1/2016, stipulates that "the mediation process is private in nature unless the parties intended otherwise". It is reasonable to assume that the transition from physical to remote hearings shall also be subject to the parties' agreement as it concerns the nature of the mediation proceedings.

In conclusion, the law as it stands supports the existence of a right to a physical hearing in litigation; the Indonesian rules of procedure still operate on the presumption that hearings will be conducted physically. Nevertheless, the advent of new regulations on remote hearings has established a framework for the parties to depart from the traditional court practice, in the event that they agree to waive their right to a physical hearing.

4. *If yes, does such right extend to arbitration? To what extent (e.g., does it also bar witness testimony from being given remotely)?*

Short answer: No.

It is clear from its provisions that Law 30/1999 is diametrically opposed to the Indonesian rules of civil procedure on the existence of a right to a physical hearing. Although the traditional court system coupled with SC Regulations 1/2019 strongly suggest that a physical hearing is a litigating party's right,⁴³ Law 30/1999 instead lays great emphasis on written procedures.⁴⁴ Furthermore, Law 30/1999 does not appear to allow judicial rules of procedure to fill any gap in the *lex arbitri*,⁴⁵ except for the procedure on the examination of witnesses and expert witnesses which refers to HIR.⁴⁶

⁴² Art. 20, paragraph 1, SC Regulations 1/2019 provides that: "Electronic hearing may be conducted with the consent of the plaintiff and the defendant after the mediation process has been declared unsuccessful" (free translation by the Author).

⁴³ See sub-paragraph b.3 above.

⁴⁴ See sub-paragraph a.2 above.

⁴⁵ Art. 31, paragraph 2, Law 30/1999 provides that: "In the event that the parties do not themselves determine the procedures to be applied, and the arbitrator or arbitral tribunal has been constituted [...], all disputes which have been so referred to the arbitrator or arbitral tribunal shall be heard and decided upon in accordance with the provisions in [Law 30/1999]" (free translation by the Author).

⁴⁶ Art. 37, paragraph 3, Law 30/1999 provides that: "Examination of witnesses and expert witnesses before the arbitrator or arbitral tribunal shall be carried out on accordance with the provisions of the Code of Civil Procedure" (free translation by the Author). See K.

This represents a clear departure from the state of law prior to Law 30/1999, where historically the entire rules of evidence in Rv, HIR, and RBg were intended to apply to both court hearings and arbitral proceedings alike.⁴⁷

Notwithstanding the applicability of HIR based on Article 37, paragraph 2, of Law 30/1999, this cannot be seen as requiring witnesses to be present for in-person examination. The relevant provisions in HIR only require witnesses to provide their testimony personally and orally without any representation,⁴⁸ which is not a requirement for physical testimony, especially since arbitrators cannot impose sanctions on recalcitrant witnesses and compel them to appear physically,⁴⁹ unlike in litigation.⁵⁰ Thus, the *lex arbitri* clearly does not intend to import any requirement for physical hearings in general, or physical examination of witnesses in particular.

c. Mandatory v. Default Rule and Inherent Powers of the Arbitral Tribunal

5. *To the extent that a right to a physical hearing in arbitration does exist in your jurisdiction, could the parties waive such right (including by adopting institutional rules that allow remote hearings) and can they do so in advance of the dispute?*

Short answer: N/A

This question is not applicable, since a right to a physical hearing in arbitration does not exist in Indonesia, as analyzed above under paragraphs a and b.

6. *To the extent that a right to a physical hearing in arbitration is not mandatory or does not exist in your jurisdiction, could the arbitral tribunal decide to hold a remote hearing even if the parties had agreed to a physical hearing? What would be the legal consequences of such an order?*

Short answer: It depends.

As described above, Indonesian law does not require an arbitration hearing to be physical.⁵¹ Nonetheless, the parties' general freedom of contract certainly allows them to agree that hearings shall be physical.⁵² Whether a tribunal may order a remote hearing

MULYANA and J.K. SCHAEFER, "Indonesia's New Framework for International Arbitration", fn. 17 above, pp. 74–75.

⁴⁷ MILLS, "National Report Indonesia (2018 through 2020)" in *Handbook*, p. 27.

⁴⁸ *Ibid.* See sub-paragraph b.3 above.

⁴⁹ See sub-paragraph a.2 above.

⁵⁰ See sub-paragraph b.3 above.

⁵¹ See paragraphs a and b above.

⁵² Art. 1338 Indonesian Civil Code provides that: "All legally executed agreements shall bind the individuals who have concluded them by law. They cannot be revoked otherwise than by

over the parties' agreement to a physical hearing generally depends on the nature of the agreement and at what point in time it was reached by the parties. Law 30/1999 recognizes the parties' freedom to agree on procedure, subject to any mandatory provisions, but this freedom is confined to (i) an express and written agreement entered into (ii) prior to the constitution of the tribunal.⁵³ Thus, the legal consequences of the tribunal's order will vary depending on whether a physical hearing is agreed by the parties in advance of the arbitration within their written arbitration agreement or only after proceedings have commenced. Two scenarios can be identified.

The first scenario is where the parties explicitly agree to have hearings conducted physically in their arbitration agreement, in which case the arbitrators must comply with such determination and cannot order a remote hearing.⁵⁴ Curiously, Law 30/1999 does not expressly delineate the consequences of an arbitrator's order that contradicts the arbitration agreement.⁵⁵ The provision concerning the setting aside of awards is silent on issues such as due process violations, excess of jurisdiction, irregularity of arbitral tribunal composition and similar violations.⁵⁶ However, in the *Karaha Bodas* case,⁵⁷ the Central Jakarta District Court decided to set aside an award based on procedural irregularity in the composition of the tribunal and the tribunal's excess of authority.⁵⁸ In light of this, Indonesian courts might be willing to set aside awards where the arbitration procedure does not conform to the parties' arbitration agreement, although the unusual circumstances surrounding the *Karaha Bodas* case render the treatment of the issues of

mutual agreement, or pursuant to reasons which are legally declared to be sufficient. They shall be executed in good faith" (free translation by the Author).

⁵³ Art. 31, paragraphs 1 and 2, Law 30/1999 provides that: "(1) The parties are free to determine, in an explicit written agreement, the arbitration procedures to be applied in hearing the dispute, provided this does not conflict with the provisions of [Law 30/1999]. (2) In the event that the parties do not themselves determine the procedures to be applied, and the arbitrator or arbitral tribunal has been constituted [...], all disputes which have been so referred to the arbitrator or arbitral tribunal shall be heard and decided upon in accordance with the provisions in [Law 30/1999]" (free translation by the Author).

⁵⁴ See MILLS, "National Report Indonesia (2018 through 2020)" in *Handbook*, p. 24.

⁵⁵ See UNCITRAL Model Law, Art. 34(2)(a)(iv).

⁵⁶ See sub-paragraph d.9 below; G. SOEMARTONO and J. LUMBANTOBING, "Indonesia", fn. 14 above, p. 333.

⁵⁷ *Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina) v. Karaha Bodas Company LLC and PT PLN (Persero)*, Central Jakarta District Court, Judgment No. 86/Pdt.G/2002/PN.Jkt.Pst.

⁵⁸ This decision was later overturned by the Supreme Court who held that the Central Jakarta District Court improperly assumed jurisdiction to set aside a Swiss UNCITRAL award using Indonesian *lex arbitri*. See *Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina) v. Karaha Bodas Company LLC and PT PLN (Persero)*, Supreme Court, Judgment No. 444 PK/Pdt/2007.

limited value as a precedent. It is worth noting that the case was fraught with strong political undertones, which led one commentator to argue that the judges in that case were “[taking] the law into their own hands”.⁵⁹ Hence, there is no clear-cut answer as to the consequences of an arbitrator’s breach of the parties’ agreed procedure because Law 30/1999 lacks precisely-tailored grounds for setting aside.⁶⁰

In the second scenario, the parties did not express their intention to have a physical hearing within their arbitration agreement, e.g., simply agreeing to arbitrate in Indonesia without designating either an administering institution or rules to govern the procedure.⁶¹ In such case, Article 31(2) of Law 30/1999 becomes relevant, and the arbitral tribunal is bound to apply the provisions of Law 30/1999.⁶² This Article is imprecise as to the effect of subsequent procedural determinations of the parties and whether they could bind the tribunal, especially when many provisions of Law 30/1999 do not leave the parties room to determine the procedure or otherwise require the arbitrators’ consent.⁶³ With the numerous provisions in Law 30/1999 having mandatory character, the scope of party autonomy appears to be rather limited.⁶⁴ As an illustration, Article 28 of Law 30/1999 mandates the use of Bahasa Indonesia as the default language of the arbitration, and the parties may only agree to another language with the approval of the arbitrators.⁶⁵ Another example is Article 37 of Law 30/1999, which grants arbitrators freedom to select any place to hear witness testimony or hold meetings as they deem necessary, a decision that would be unaffected by the parties’ determination to the contrary.⁶⁶ With respect to physical hearings, since Law 30/1999 does not contain any default rule pertaining to the form of hearing required, it is reasonable to conclude that the arbitrators may tailor the form of hearings as they see fit, if the parties have not expressly agreed to physical

⁵⁹ Noah RUBINS, “The Enforcement and Annulment of International Arbitration Awards in Indonesia”, 20 Am. U. Int’l. L. Rev. (2005) p. 359 at p. 398.

⁶⁰ See sub-paragraph d.9 below.

⁶¹ See MILLS, “National Report Indonesia (2018 through 2020)” in *Handbook*, p. 24.

⁶² *Ibid.*; Art. 31, paragraph 2, Law 30/1999 provides that: “In the event that the parties do not themselves determine the procedures to be applied, and the arbitrator or arbitral tribunal has been constituted [...], all disputes which have been so referred to the arbitrator or arbitral tribunal shall be heard and decided upon in accordance with the provisions in [Law 30/1999]” (free translation by the Author).

⁶³ G. SOEMARTONO and J. LUMBANTOBING, “Indonesia”, fn. 14 above, pp. 319–320, 346.

⁶⁴ *Ibid.*; K. MULYANA and J.K. SCHAEFER, “Indonesia’s New Framework for International Arbitration”, fn. 17 above, p. 51.

⁶⁵ Art. 28 Law 30/1999 provides that: “The language to be used in all arbitration proceedings is Bahasa Indonesia, except that the parties may choose another language to be used, subject to consent of the arbitrator or arbitral tribunal” (free translation by the Author).

⁶⁶ Art. 37, paragraph 2, Law 30/1999 provides that: “The arbitrator or arbitral tribunal may hear witness testimony or hold meetings, if deemed necessary, at a place or places outside the place where the arbitration is being held” (free translation by the Author).

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hearing before the arbitration commences, i.e., the date when the tribunal is constituted.⁶⁷ This is supported by a tribunal's broad discretion to choose or subsequently change the venue of arbitration and to determine if oral hearings would even be necessary at all.⁶⁸ Therefore, the parties' subsequent agreement to the contrary will not bind the arbitrators or adversely impact the award in this scenario.

d. Setting Aside Proceedings

7. *If a party fails to raise a breach of the abovementioned right to a physical hearing during the arbitral proceeding, does that failure prevent that party from using it as a ground for challenging the award in your jurisdiction?*

Short answer: Inconclusive, but likely yes.

As mentioned above,⁶⁹ the Indonesian *lex arbitri* does not provide for the right to a physical hearing. Assuming, however, that such a right was recognized in a specific case, it is unclear whether the party wishing to challenge the award based on a violation of such right is required to raise it in the course of the proceedings. Law 30/1999 has no specific provision allowing the parties to waive their right to challenge an award, although it is generally understood that such waiver is not prohibited.⁷⁰ The more pertinent issue of deemed waiver – where a party is barred from challenging an award if it knows of an irregularity in the application of the agreed procedure but fails to raise a timely objection⁷¹ – is also not expressly addressed.⁷²

Despite the silence of Law 30/1999, in *Manunggal Engineering v. BANI*, the Supreme Court upheld a district court judgment that rejected an application to set aside an award issued by BANI on the basis of deemed waiver.⁷³ The case concerns the appointment of one arbitrator by BANI which allegedly had not complied with the terms of the arbitration agreement requiring appointment to be made with prior consultation with the parties. The Court considered that the parties had acquiesced to such alleged non-compliance throughout the proceedings, and therefore rejected the challenge to the

⁶⁷ G. SOEMARTONO and J. LUMBANTOBING, “Indonesia”, fn. 14 above, p. 321.

⁶⁸ See sub-paragraph a.2 above.

⁶⁹ See paragraphs a and b above.

⁷⁰ See MILLS, “National Report Indonesia (2018 through 2020)” in *Handbook*, p. 52.

⁷¹ Simon GREENBERG, Christopher KEE and Romesh WEERAMANTRY, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge 2011) p. 424. See UNCITRAL Model Law, Art. 4.

⁷² G. SOEMARTONO and J. LUMBANTOBING, “Indonesia”, fn. 14 above, p. 303.

⁷³ *PT Manunggal Engineering v. Badan Arbitrase Nasional Indonesia (BANI)*, Supreme Court, Judgment No. 770 K/Pdt.Sus/2011.

award.⁷⁴ This shows that a failure to timely object to a procedural breach, including breach of an agreement to have physical hearings, would likely bar parties from raising it as a ground to challenge an award before the Indonesian courts.

8. *To the extent that your jurisdiction recognizes a right to a physical hearing, does a breach thereof constitute per se a ground for setting aside (e.g., does it constitute per se a violation of public policy or of the due process principle) or must the party prove that such breach has translated into a material violation of the public policy/due process principle, or has otherwise caused actual prejudice?*

Short answer: N/A

This question is not applicable, since Indonesian law does not recognize a right to a physical hearing in arbitration, as analyzed above under paragraphs a and b.

9. *In case a right to a physical hearing in arbitration is not provided for in your jurisdiction, could the failure to conduct a physical hearing by the arbitral tribunal nevertheless constitute a basis for setting aside the award?*

Short answer: Inconclusive, but likely not.

As explained,⁷⁵ the Indonesian *lex arbitri* does not provide for a right to a physical hearing in arbitration. Thus, the question of whether the arbitrators' order to hold a remote hearing may nevertheless constitute a basis for setting aside the award becomes relevant when there is an objection to proceeding with a remote hearing, i.e., an objection raised either individually or jointly by the parties based on the express terms of the arbitration agreement or spontaneously in the middle of proceedings. It has been discussed above that an objection towards remote hearing based on the parties' agreement might not easily lead to the award being set aside, even when the objection is based on an express arbitration agreement providing for a physical hearing.⁷⁶

The main provision on setting aside, i.e., Article 70 of Law 30/1999, provides limited grounds for setting aside an award, which are: false or forged letters or documents submitted in the hearings, discovery of material documents intentionally concealed by a party after the award is rendered, or where an award was rendered as a result of fraud committed by one of the parties to the dispute.⁷⁷ This provision does not include, and

⁷⁴ See G. SOEMARTONO and J. LUMBANTOBING, "Indonesia", fn. 14 above, p. 303.

⁷⁵ See paragraphs a and b above.

⁷⁶ See sub-paragraph c.6 above.

⁷⁷ Art. 70 Law 30/1999 provides that: "The parties may submit an application for nullification of an arbitral award if such award is alleged to contain the following: (a) Letters or documents submitted in the proceedings are, after the award is rendered, acknowledged to be false or declared to be forgeries; (b) After the award has been rendered documents are found which

could be seen as excluding, fundamental grounds such as due process violations, arbitrators' excess of powers, or violation of Indonesian public policy, and others.⁷⁸ The three grounds in Article 70 of Law 30/1999 are quite unorthodox compared to those in other jurisdictions.⁷⁹ They originate from Article 643 of Rv, which provided ten grounds to set aside an award, including the three grounds maintained by Law 30/1999.⁸⁰ The reason to discard the other grounds in the Rv is unclear and particularly surprising as those discarded grounds would normally be acceptable in most jurisdictions.⁸¹ They would also have been relevant in assessing a tribunal's failure to conduct a physical hearing.

The ambiguity surrounding Article 70 of Law 30/1999 – whether the grounds listed are exhaustive or inclusive – constantly led to confusion in practice.⁸² The Explanatory Note to Law 30/1999 falls short of providing a solution to this conundrum; when discussing the part that concerns setting aside, the Explanatory Note simply explains that the grounds to set aside arbitral awards, are “among others”, the three grounds listed in said article.⁸³ As might be expected, this uncertainty has caused inconsistencies in dealing with setting aside applications. Several court decisions interpreted Article 70 of Law 30/1999 as exhaustive,⁸⁴ but some did not hesitate to utilize the phrase “among

are decisive in nature and which were deliberately concealed by the opposing party or (c) The award is rendered as a result of fraud committed by one of the parties in the proceedings” (free translation by the Author).

⁷⁸ N. RUBINS, “Enforcement and Annulment in Indonesia”, fn. 59 above, p. 371.

⁷⁹ See G. SOEMARTONO and J. LUMBANTOBING, “Indonesia”, fn. 14 above, p. 333.

⁸⁰ Art. 643 Rv provides that: “An arbitral award which cannot be appealed, can be set aside in the following situations: (1) the award exceeds the scope of the arbitration agreement, (2) the award is based on an invalid arbitration agreement, (3) the award is rendered by an arbitrator who is not authorized to do so without the presence of the other arbitrators, (4) the award contains an order in its dispositive section which has not been requested or grants more than requested, (5) the award contains contradictory rulings, (6) the arbitrators have been negligent in failing to decide one or more prayers requested by the parties and (7) the arbitrators have violated mandatory procedural law, the violation of which may result in annulment [...]” (free translation by the Author).

⁸¹ G. SOEMARTONO and J. LUMBANTOBING, “Indonesia”, fn. 14 above, p. 333.

⁸² S.R. LUTTRELL, “Lex Arbitri Indonesia”, fn. 6 above, pp. 202–203; N. RUBINS, “Enforcement and Annulment in Indonesia”, fn. 59 above, pp. 372–373.

⁸³ The Explanatory Note to Law 30/1999, General Part, paragraph 18, provides that: “Chapter VII regulates the setting aside of an arbitral award. This is possible for several reasons, among others: [...]” (free translation by the Author).

⁸⁴ See, among others, *Kepala Dinas Pekerjaan Umum Provinsi Riau v. Badan Arbitrase Nasional Indonesia (BANI)*, Supreme Court, Judgment No. 709 K/Pdt.Sus/2011 (refusal to set aside a BANI award as the application failed to prove any ground under Article 70 of Law 30/1999); *PT. Sumi Asih v. Vinmar Overseas Ltd. and The American Arbitration*

others” in the Explanatory Note and opened the floodgates for an array of setting aside grounds beyond the letter of the law, e.g., violation of public order, improper constitution of the tribunal, failure to apply Indonesian law, and others.⁸⁵

Even if one adopts an expansive view of Article 70 and chooses to treat an objection to a remote hearing raised during the proceedings through another lens such as by alleging serious due process violation, there is still a paucity of jurisprudence concerning the interpretation and application of due process in Indonesia’s arbitration framework. Indonesia’s *lex arbitri* does not address the parties’ right to a “full opportunity to present their case”.⁸⁶ Rather, Law 30/1999 provides in Article 29, paragraph 1, that parties have the “same right and opportunity to present their respective opinions”.⁸⁷ By expressly conflating “equal treatment” and the parties’ “opportunity” to present their case⁸⁸ – when there is already significant overlap between the two concepts⁸⁹ – Law 30/1999 watered down the tribunal’s duty to a mere standard of hearing the opinions duly presented by both sides in the same manner,⁹⁰ irrespective of the fact that in some cases, “treating the parties in precisely the same manner may lead to unfair results”.⁹¹ Therefore, it is unlikely that a tribunal’s refusal to hold a physical hearing could violate Article 29, paragraph 1, of Law 30/1999 if both parties are still given the same right and opportunity to present their case, albeit remotely. An argument that remote hearing hinders one party from presenting its case to the fullest extent might be considered irrelevant under this provision when the opposing party also experiences the same circumstances.

In conclusion, due to the vague scope of the provision on setting aside an award and the quite lenient rule regarding the treatment of the parties under Law 30/1999, a

Association (AAA), Supreme Court, Judgment No. 268 K/Pdt.Sus/2012 (refusal to set aside an AAA award by maintaining the limited set of grounds under Article 70 of Law 30/1999, notwithstanding the allegations of public policy violation and other grounds). See also G. SOEMARTONO and J. LUMBANTOBING, “Indonesia”, fn. 14 above, p. 334, fn. 126.

⁸⁵ *E.D. & F. Man (Sugar) v. Yani Haryanto*, Central Jakarta District Court, Judgment No. 736/Pdt/G/VI/1988/PN.Jkt.Pst; *Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina) v. Karaha Bodas Co. LLC.*, Central Jakarta District Court, Judgment No. 86/Pdt.G/2000/PN.Jkt.Pst; *Bankers Trust International v. PT Mayora Indah*, South Jakarta District Court, Judgment No. 454/PDT.G/1999/PN.Jak.Sel. See G. SOEMARTONO and J. LUMBANTOBING, “Indonesia”, fn. 14 above, pp. 334-335.

⁸⁶ G. SOEMARTONO and J. LUMBANTOBING, “Indonesia”, fn. 14 above, p. 318.

⁸⁷ Art. 29, paragraph 1, Law 30/1999 provides that: “The parties in dispute shall have the same right and opportunity to present their respective opinions” (free translation by the Author).

⁸⁸ See UNCITRAL Model Law, Art. 18.

⁸⁹ David D. CARON, Lee M. CAPLAN and Matti PELLONPÄÄ, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford 2006) p. 29.

⁹⁰ See G. SOEMARTONO and J. LUMBANTOBING, “Indonesia”, fn. 14 above, p. 318.

⁹¹ Yves DÉRAINS and Eric A. SCHWARTZ, *A Guide to the ICC Rules of Arbitration*, 2nd edn. (Kluwer Law International 2005) p. 229.

tribunal's refusal to hold physical hearings upon objection by the parties is unlikely to constitute a ground to set aside an award.

e. Recognition/Enforcement

10. *Would a breach of a right to a physical hearing (irrespective of whether the breach is assessed pursuant to the law of your jurisdiction or otherwise) constitute in your jurisdiction a ground for refusing recognition and enforcement of a foreign award under Articles V(1)(b) (right of the party to present its case), V(1)(d) (irregularity in the procedure) and/or V(2)(b) (violation of public policy of the country where enforcement is sought) of the New York Convention?*

Short answer: Inconclusive, but likely not.

In Indonesia, there is not an abundance of case law regarding the grounds to refuse enforcement of foreign awards. The enforcement of foreign awards in Indonesia is regulated by the Supreme Court Regulations No. 1 of 1990 on the Procedure of Enforcement of Foreign Arbitral Awards (hereinafter, "SC Regulations 1/1990") as the implementing legislation for the New York Convention in Indonesia, as well as Articles 65-69 of Law 30/1999. Article 3 of SC Regulations 1/1990 provides several requirements for enforcing foreign awards instead of grounds to refuse enforcement,⁹² which means Indonesia does not transpose the pro-enforcement provisions of the New York Convention – under which all awards are enforceable unless there exists any ground to refuse enforcement – into its legal framework.⁹³ The additional Supreme Court requirements made their way into Article 66 of Law 30/1999, which merely repeats the requirements for enforcement under SC Regulations 1/1990. These requirements for enforcing foreign awards thus serve as a yardstick to refuse enforcement of foreign awards.⁹⁴

It is unclear whether, by introducing such limited requirements for enforcement, Law 30/1999 was intended to derogate from the New York Convention and, if so, whether this is permissible. Nevertheless, Indonesian courts did not adopt this view as seen in

⁹² Article 3 SC Regulations 1/1990 provides that: "International Arbitration Awards will only be recognised and may only be enforced within the jurisdiction of the Republic of Indonesia if they fulfill the following requirements: (1) the award must be rendered in a country bound by a treaty concerning recognition and enforcement of foreign arbitral awards with Indonesia. Enforcement is based on the principle of reciprocity; (2) the award must fall within the scope of commercial law under Indonesian law; and (3) the award must not be contrary to public order [...]" (free translation by the Author).

⁹³ G. SOEMARTONO and J. LUMBANTOBING, "Indonesia", fn. 14 above, p. 342.

⁹⁴ *Ibid.*

subsequent practices. Similar to setting aside cases,⁹⁵ Indonesian courts have not restricted refusal of enforcement to the grounds expressly set out in Law 30/1999. They have directly applied the grounds provided in Article V of New York Convention, but it is not possible to identify a consistent – and well-reasoned – approach taken by Indonesian courts in dealing with the issues enumerated therein.

In one case that referred to Articles V(1)(b) and V(1)(d) of the New York Convention, the South Jakarta District Court refused to enforce an award rendered in London, reasoning that Indonesian laws require both parties to be heard adequately. The court held that one party was not given the opportunity to defend itself since the tribunal refused to consider evidence that party furnished to justify non-performance.⁹⁶ Regardless of the cogency of the court’s decision – the South Jakarta District Court neither assessed the relevance of the evidence nor the tribunal’s consideration for not admitting it – this decision shows the tendency of Indonesian courts to apply Indonesian laws instead of looking at the law of the seat in assessing the right of the party to present its case and whether there is any irregularity in the procedure.

It remains unclear, however, what level of prejudice is needed to refuse enforcement of foreign awards in Indonesia based on the two grounds, as case laws discussing the subject-matter apart from the above are virtually non-existent. Consequently, since under Indonesian law, refusal to hold physical hearings upon objection by the parties is unlikely to breach Law 30/1999’s provision regarding equal treatment of opinions,⁹⁷ it is equally unlikely to cause Indonesian courts to refuse enforcement under Articles V(1)(b) and V(1)(d) of the New York Convention.

Indonesian courts also conduct similar assessments of Indonesian laws when refusing enforcement based on violation of Indonesian public policy under Article V(2)(b) of the New York Convention. The only definition of Indonesian public policy is specified in Article 4, paragraph 2, of SC Regulations 1/1990, which states that: “An *exequatur* shall not be granted if the award violates the fundamental basis of the entire legal system and society in Indonesia (public order)”.⁹⁸ This broad definition of Indonesian public policy renders any incompatibility with mandatory provisions of Indonesian law or Indonesia’s national interests as a ground to refuse enforcement under Article V(2)(b) of New York Convention.⁹⁹ In practice, this definition gives Indonesian courts considerable discretion to take an expansive approach to what constitutes violation of public policy. For example, such instances could include a violation of the prevailing laws and regulations

⁹⁵ See sub-paragraph d.9 above.

⁹⁶ *Trading Corporation of Pakistan Limited v. P.T. Bakrie and Brothers*, South Jakarta District Court, Judgment No. 64/Pdt/G/1984/PN.Jkt.Sel.

⁹⁷ See sub-paragraph d.9 above.

⁹⁸ Free translation by the Author.

⁹⁹ Fifi JUNITA, “Judicial Review of International Arbitral Awards on the Public Policy Exception in Indonesia”, 29 J. Int’l. Arb. (2012) p. 405 at pp. 414–415.

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in Indonesia,¹⁰⁰ harm towards national interests such as the national economy,¹⁰¹ or a violation of Indonesian sovereignty.¹⁰² However, no matter how broadly the public policy exception has been construed, bearing in mind that Indonesian judicial and arbitral institutions have adopted several measures to facilitate remote hearings,¹⁰³ it is implausible to argue that Indonesia has a national policy requiring physical hearings which would justify refusal of enforcement under Article V(2)(b) of the New York Convention.

From these decisions, one trend can be discerned: Indonesian courts rarely look at the tribunal's adherence with the laws of the seat. Rather, the courts would immediately scrutinize the award's incompatibility with Indonesian laws and public policy. Thus, whether the right to a physical hearing existed at the seat would be inconsequential to the decision. In any case, since in Indonesia no right to a physical hearing exists in international arbitration and arbitrators have broad powers to choose the form of hearings,¹⁰⁴ it is unlikely that refusal to hold physical hearings would in itself form a basis to refuse enforcement of foreign awards in Indonesia.

f. COVID-Specific Initiatives

¹⁰⁰ *E.D. & F. Man (Sugar) v. Yani Haryanto*, Central Jakarta District Court, Judgment No. 736/Pdt/G/VI/1988/PN.Jkt.Pst (the Court held that the purchase contract was contrary to public policy in Indonesia since it contravened Indonesian state regulations and any arbitration arising out of a dispute touching on such an illegal contract could not be enforced for being contrary to public policy).

¹⁰¹ *Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina) v. Karaha Bodas Company LLC and PT PLN (Persero)*, Central Jakarta District Court, Judgment No. 86/Pdt.G/2002/PN.Jkt.Pst (after citing Articles V(1)(d) and V(1)(e) as well as Article V(2)(b) of New York Convention, the Court considered that the award prejudiced the economic interest of the Indonesian State, that the arbitral tribunal disregarded Indonesian law, and that the composition of the arbitral tribunal was in violation of the parties' agreement, without specifying which provision of New York Convention served as the basis for each of those considerations).

¹⁰² *Astro Nusantara International BV, et al. v. PT Ayunda Primamitra, et al.*, Central Jakarta District Court, Judgment No. 05/PDT.ARB.INT/2009/PN.Jkt.Pst; *Astro Nusantara International BV, et al. v. PT Ayunda Primamitra, et al.*, Supreme Court, Judgment No. 01 K/Pdt.Sus/2010 (the order in the SIAC award for the respondents to discontinue parallel claims in Indonesian courts was considered a violation of Indonesia's sovereignty and thus contrary to public policy, although the order was directed towards the respondents and not the Indonesian courts).

¹⁰³ See sub-paragraph f.11 below.

¹⁰⁴ See paragraphs a, b and c above.

11. *To the extent not otherwise addressed above, how has your jurisdiction addressed the challenges presented to holding physical hearings during the COVID pandemic? Are there any interesting initiatives or innovations in the legal order that stand out?*

Short answer: N/A

The COVID-19 pandemic has prompted judicial and arbitral institutions in Indonesia to utilize teleconferencing technology to facilitate remote hearings. The Supreme Court issued Supreme Court Circular Letter Number 1 of 2020, which allows judges and judicial officials to carry out their official duties by working from their residences.¹⁰⁵ This further enhances the applicability of SC Regulations 1/2019,¹⁰⁶ which was accompanied by Chairman of Supreme Court Decree No. 129/KMA/SK/VIII/2019 on Technical Guidelines for the Administration of Case and Hearing in the Court through Electronic System, to facilitate remote hearings during the pandemic. Additionally, on 13 April 2020, a Cooperation Agreement on Conducting Hearings Through Teleconferences was signed between the Supreme Court, the Public Attorney, and the Ministry of Law and Human Rights which fully authorizes the use of teleconferences in criminal proceedings during the COVID-19 pandemic.¹⁰⁷

Similarly, BANI confirms through the issuance of Decree No. 20.015/V/SK-BANI/HU that upcoming or ongoing arbitration proceedings under BANI may be conducted remotely, i.e., via audio or video conference, “in the event of emergencies such as occurrence of natural or non-natural disasters, or even special cases which prevent any of the parties or arbitrators from being present at the hearing”, which is meant to apply during the pandemic and beyond.¹⁰⁸

¹⁰⁵ Circular Letter No. 1 of 2020 on Guidelines for Executing Duties During the Prevention Period of Covid-19 Spread in the Supreme Court and Lower Judicial Bodies, paragraph 1, sub-paragraph a, provides that: “Judges and Judicial Apparatus can carry out official duties by working from home” (free translation by the Author).

¹⁰⁶ See sub-paragraph b.3 above.

¹⁰⁷ KarimSyah, “Cooperation Agreement of the Supreme Court, Attorney General, and Ministry of Law and Human Rights on Teleconference Hearings” (4 September 2020) at <<https://www.karimsyah.com/newsletter/teleconference-hearings>> (last accessed 27 November 2020).

¹⁰⁸ Assegaf Hamzah & Partners, “Indonesia: BANI Moves Arbitration Online” (6 June 2020) at <<https://www.mondaq.com/arbitration-dispute-resolution/948320/bani-moves-arbitration-online>> (last accessed 27 November 2020).