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INTERACTION BETWEEN THE SETTING ASIDE OF AN AWARD AND LEAVE FOR ENFORCEMENT

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Abstract
Karaha Bodas case is a notorious case which demonstrates how is unpredictable of the Indonesian court's practice when facing cases related to arbitration. This case shows various aberrations of the principles that have been commonly accepted in international commercial arbitration but distorted in practice, especially in Indonesia, therefore many experts in the field of international commercial arbitration always mention this case as a "pathology" in international commercial arbitration.[1] This article will examine the interaction between the attempt to set aside of the award, while on the other hand the successful party requests for enforcement in other jurisdictions. The U.S. courts – like any other jurisdictions – disobeyed the judgement of the annulment which was rendered by Indonesian court, because Indonesian courts were the secondary jurisdiction. In addition, the courts in which the enforcement sought may have discretion whether they will or will not enforce an award which has been vacated in the country of origin. The discretion is guaranteed under the New York Convention 1958.
Keywords: Arbitration; Award; Setting Aside; Enforcement.

Abstrak
Perkara Karaha Bodas adalah salah satu perkara yang menarik perhatian yang menunjukkan bagaimana pengadilan di Indonesia memutus perkara secara mengejutkan yang berkaitan dengan arbitrase. Perkara ini menunjukkan berbagai penyimpangan terhadap prinsip-prinsip arbitrase yang telah diterima secara international dalam arbitrase perdagangan, oleh karena itu beberapa ahli menyebut perkara ini sebagai patologi dalam arbitrase perdagangan. Artikel ini menyoroti interaksi antara upaya untuk membatalkan putusan arbitrase, sementara itu salah satu pihak yang dimenangkan dalam arbitrase mengupayakan untuk mengeksekusi putusan tersebut. Pengadilan Amerika Serikat, sebagaimana pengadilan di yurisdiksi lain, mengabaikan putusan pembatalan putusan arbitrase Swiss yang dijatuhkan oleh pengadilan Indonesia, karena pengadilan Indonesia hanya sebagai secondary jurisdiction. Di samping itu pengadilan di mana putusan arbitrase dimohonkan pelaksanaan memiliki diskresi untuk mengakui dan melaksanakan putusan arbitrase asing, ataupun menolak untuk mengakui dan melaksanakan putusan arbitrase asing. Diskresi tersebut dijamin oleh Konvensi New York 1958.
Kata Kunci: *Arbitrase; Putusan; Pembatalan; Pelaksanaan.*

Introduction

Two features which are offered by arbitration, as an out of court dispute resolution, is the finality of the award and cross border enforceability of the award

by virtue of the New York Convention 1958.1 Even though an arbitral award has its finality once it was issued by the tribunal, however in most jurisdictions the arbitral award is subject to the system of court control.[2] Under the system of court control, one party may institute a setting aside procedure against the arbitral award, while another party requests enforcement. Facing these actions, the enforcement judge may suspend his decision on the request for enforcement until the setting aside judge renders his decision.[3]

The statistic shows that almost defeated parties in arbitration have willingness to comply with the terms of international arbitral awards against them or settle soon after the award is rendered.[4] The successful party expects that the award will be carried out in a reasonable time and voluntarily. However in some cases, it can be found that defeated parties refuse to comply against the arbitral award, instead they seek to set aside the award through court proceeding. In this situation, there are links between two procedures. In an international arbitration, the successful party may request enforcement to the courts where the losing party has assets. The failed party may oppose the enforcement, and if the court is satisfied by opposing grounds which are invoked by the failed party, the court may refuse to enforce the award. The refusal for enforcing the award is not the end of story, the successful party still can request enforcement to the other jurisdictions where the failed party's assets are situated. On the opposite, the failed party may apply a request for setting aside the award before the court in which, or under the law of which, the award has been made. When the award is set aside by the competent court, in principle, the award can no longer be enforced to any other country.[5]

The interaction between the setting aside and the enforcement of an

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[1] I owe this term (pathology in international commercial arbitration) from Vesna Lazic, lecturer and researcher at Mollengraaf Instituut voor Privaatrecht, Universiteit Utrecht, the Netherlands.

[2] Mauro Cappelletti, 'Arbitration' in Pieter Sanders (ed), *International Encyclopaedia of Comparative Law* (Volume XVI, Martinus Nijhoff Publishers 1999).[129].

[3] *ibid*.[157]. See: 'The New York Convention 1958: An Overview' , *Yearbook Commercial Arbitration* (Volume XXV, Kluwer Law 2003).[6].

[4] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (3rd edn, Sweet & Maxwell 1999).[443].

[5] 'The New York Convention 1958: An Overview'.[5]

international arbitral award always involving national courts within cross border jurisdiction. Even though the New York Convention 1958 has laid down provisions which regarding to the enforcement of the arbitral award and also incorporated international arbitration principles within its provisions, however the court practices in some jurisdictions still demonstrate an excessive and unnecessary intervention toward the arbitral award which results improper court's decision and hampering the enforcement of an arbitral award.

Karaha Bodas case, a case between *Karaha Bodas* Company L.L.C., a Cayman Island based company ("KBC"), versus *PT. Pertambangan Minyak dan Gas Bumi Negara* ("Pertamina") and *PT. Perusahaan Listrik Negara* ("PLN"), the two Indonesian state owned companies, is one of the notorious cases which is best to illustrate the interaction between the setting aside and the enforcement of an arbitral award. The dispute arose from contractual relationship between KBC and Pertamina in a joint operation contract ("JOC") which granted KBC geothermal development rights in West Java, Indonesia. Subsequently, KBC and Pertamina also signed an energy sales contract ("ESC") with PLN.[6] However, in September 1997 when Indonesia got financial crisis, through a Presidential decree the Indonesian government suspended the project. The project had been resumed in November 1997, before it was unilaterally terminated by Presidential decree on January 1998.[7] Then KBC initiated a consolidation arbitral proceeding of the JOC and ESC on 30 April 1998 by notifying both Pertamina and PLN. The arbitral proceeding was based on arbitration clauses which are provided in the JOC and ESC. Both arbitration clauses in the contracts provided that the arbitration proceeding would be held in Geneva, Switzerland under the UNCITRAL Arbitration Rules, while the applicable law for the merit is Indonesian law.[8] Briefly on 18 December 2000, the panel which was consisted of three arbitrators, in its final award held that Pertamina and PLN breached their contracts with KBC and awarded about USD 261 million plus 4%

[6] See: Karaha Bodas Company LLC v PT Pertambangan Minyak dan Gas Bumi Negara (Karaha bodas I) (2001) 190 F. Sup.[3].

[7] *ibid*.[5].

[8] See: JOC ex Article 13.2(a) and ESC ex § 8.2(a).

post-judgement interest for KBC.[9]

Pertamina refused to comply toward arbitral award and sought for setting aside the award before the Swiss Supreme Court, pursuant to the law of the seat of arbitration (Switzerland) and the New York Convention 1959. However, the Swiss court declined the Pertamina's application, because Pertamina did not comply with the procedure in paying court fees on time. Then, Pertamina requested a motion for reconsideration which was also denied, and ultimately the Swiss Supreme Court denied the appeal in August 2001.[10] While, in February 2001, KBC initiated legal proceeding to enforce the arbitral award in United States, Hong Kong, Canada, and Singapore under Article V of the New York Convention 1958.[11] In United States, the enforcement was submitted before the United States District Court for the Southern District of Texas. Pertamina opposed the enforcement of the award on the grounds that 1) the arbitral proceedings violated the parties' agreement; 2) the arbitral panel deprived Pertamina of due process in the arbitration; 3) enforcement would constitute a violation of public policy.[12] On its judgment, dated on 4 December 2001, the district court confirmed the award for enforcement under the New York Convention 1958 and held that the agreement is legal, and the composition of the arbitral panel as well as the consolidation of JOC and ESC arbitration proceedings is proper.[13]

Three months after the judgment of the U.S. district court which confirmed the enforcement of the award, Pertamina initiated legal proceeding before the District Court of Central Jakarta. In the legal proceeding, Pertamina sought injunctive relief against KBC enforcement actions and annulment of the arbitral award.[14] Pertamina argued inter alia that the arbitral panel exceeded its authority by failing to apply

[9] *Op.Cit.*[12].

[10] Karaha Bodas Company LLC v PT Pertambangan Minyak dan Gas Bumi Negara (Karaha Bodas II) (2003) 264 F. Sup.[3].

[11] Karaha Bodas Company LLC v PT Pertambangan Minyak dan Gas Bumi Negara (Karaha Bodas III) (2002) 264 F. Sup.[3-4].

[12] Karaha Bodas Company LLC v. PT. Pertambangan Minyak dan Gas Bumi Negara (Karaha bodas I).[24].

[13] *ibid.*[65].

[14] PT Pertambangan Minyak dan Gas Bumi Negara v Karaha Bodas Co, No 86/PdtG/2002/PNJktPst.[5].

Indonesian law, the panel failed to interpret Indonesian law on the issue of force majeur, the arbitral award violated public policy of Indonesia, and KBC failed to give Pertamina proper notice on the appointment of arbitrators.[15] In its reply, the KBC argued inter alia that the annulment request had no legal basis and did not meet the ground for annulment pursuant to Indonesian law, Pertamina claims was obscure and ambiguous because it was unclear whether Pertamina wants to vacate the agreements (JOC and ESC) or the Swiss arbitral awards, moreover KBC also invoked that the annulment request was premature because the award had not been registered as required by Indonesian law.[16]

The District Court of Central Jakarta subsequently on its preliminary measures granted Pertamina's provisional request on injunction against KBC, barring for attempting to enforce the arbitral award and imposing a USD 500.000 per day for any KBC non compliance.[17] On the other hand, the U.S. district court also issued a temporary restraining order requiring Pertamina to withdraw its court petition against KBC on Indonesian district court, then on 2 April 2002 the U.S. District Court found that Pertamina did not comply to the temporary restraining order.[18] Ultimately, on 26 April 2002, the U.S. District Court granted KBC's motion for preliminary injunction and refrain Pertamina to make any further action based on Indonesian injunction.[19]

In August 2002, the District Court of Central Jakarta issued final judgment on Pertamina's petition. The court, in its judgement, set aside the arbitral award, on the grounds that 1) the panel had exceeded its authority in failing to apply Indonesian law; 2) the award violated Indonesian public policy (ordre public); 3) the arbitral tribunal had failed to interpret the issue of force majeur under Indonesian law; 4) the panel should not consolidated the JOC and ESC disputes; and 5) Indonesian law

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[15] *ibid.*

[16] *ibid.*

[17] See: *Indonesian Proceeding*, Provisional Measures, 1 April 2002 [hereinafter *Indonesian Proceeding, Provisional Measures*].

[18] *Karaha Bodas Company LLC v. PT. Pertambangan Minyak dan Gas Bumi Negara (Karaha Bodas III).[7].*

[19] *ibid*.[29].

permits such annulment.[20]

The case became interesting and complicated. After Pertamina got final judgement from the Indonesian district court, Pertamina tried to set aside the enforcement judgment which was issued by the U.S. district court. This paper will discuss two issues regarding the tension between the enforcement and the setting aside of an arbitral award: what kind of jurisdiction is recognized by the New York Convention in terms of post-rendered an arbitral award? and what is the effect of setting aside of an award to the enforcement of the award in any other jurisdictions?.

The Competent Court for Setting Aside and Enforcing an International Arbitral Award

The New York Convention 1958 governs the matter of recognition and enforcement of foreign arbitral awards, the convention does not provide – specifically – the matter of setting aside an international arbitral awards. It seems that the New York Convention 1958 imposing the matter of setting aside of an international arbitral awards to the national law.[21] However, we still can find the provisions which is related to the annulment of arbitral awards as provided in Article V(1)(e) and Article VI of the New York Convention 1958.[22] Article V(1)(e) of the convention states as followed:

> "1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:……(e) The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made".[23]

The article gives effect that the enforcing court may refuse to enforce an arbitral

[20] See: *Indonesian Proceeding*, Final Judgement.

[21] See: Gary B. Born, 2009, *International Commercial Arbitration*, Kluwer Law International, Alphen aan den Rijn, p. 2552 ("…the New York Convention and other leading international arbitration conventions impose no express international limits on the grounds available for annulment; these grounds are almost exclusively matters of local law."); then at p. 2553 ("…, international arbitration conventions have generally not been interpreted as imposing limits on the grounds that may be invoked to annul an arbitral award, thus leaving the subject almost entirely to national law.").

[22] 'The New York Convention 1958: An Overview'.[9]. will be discussed on the issue related to Part III of this paper. See: *Infra*.[9].

[23] *ibid.*

award if the court which has competency to set aside the award has annulled the award. From this article, the New York Convention 1958 recognizes two jurisdictions in post-rendered of an arbitral award to review the award. The first jurisdiction related to set aside an arbitral award; and the second jurisdiction deals with the enforcement of the arbitral award.

The Primary Jurisdiction

The New York Convention 1958 establishes principle that the jurisdiction to set aside an arbitral award, also called "the primary jurisdiction", should belong to the competent authority of the *country in which, or under the law of which, that the arbitral award was made.*[24] Thus, it can be drawn that the jurisdiction to set aside the award may be referred to: the authority in the country where the arbitration has its seat; or the authority in the country where the *lex arbitri* of that country was used to produce the award.

The authority which is laid on the country in which the arbitration has its seat, is derived from the seat theory, the traditional "seat theory" follows that the law of the arbitration is the law of the place of the arbitral proceedings; the *lex arbitri* is the *lex loci arbitri*. Thus an arbitrator must bow to mandatory norms of the country in which he sits.[25] This authority, which is attached to the seat of arbitration, may also be derived from the jurisdictional theory. This theory projects the concept of state sovereignty above the consensual agreement of the parties. It emphasizes the state as the progenitor of the methods and procedures for dispute resolution, implicitly, affirming the *lex loci arbitri* as the law which governs the conduct of the arbitration and the status of arbitral awards.[26] According to these two theories, the authority of the court, in which the arbitration has its seat, expects to retain a level of control to

[24] *ibid.*

[25] William W. Park, 'The Lex Loci Arbitri and the International Commercial Arbitration' (1983) 32 The International and Comparative Law Quarterly.[23].

[26] Aniekan Iboro Ukpe, 'Determining the Lex Loci Arbitri in International Commercial Arbitration for Purposes of the Validity of an Arbitral Award, Chartered Institute of Arbitrators (Nigeria Branch)' (*Oxford University Press*, 1999).[230]. See also: John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (Oxford University Press 1999).[25].

ensure that private system of justice meets at least minimum standards of fairness, so that arbitration is not a system that is fraudulent, corrupt or lacking in essential due process.[27]

The authority to set aside an arbitral award can also be referred to the authority of which the *lex arbitri* of a state is used to render the award. Usually, the parties have agreed, on their arbitration agreement, that a particular *lex arbitri* will govern the arbitration conduct. This authority has its foundation on contractual theory, this theory suggests that the validity of an arbitral process is wholly dependent on the consensual agreement of the parties as to its conduct. However, it is dependent on the assumption that an existing legal system confers such freedom to so agree on the parties.[28] The authority which is sourced from the consensual of the parties, also has its legitimacy according to party autonomy theory. This theory emphasizes the entrenchment of arbitration in different legal system, as a self-standing mechanism of its own that should not be subsumed under an inappropriate legal category. The theory projects the freedom of parties to choose a *lex arbitri*, while not disregarding the state as the precursor of the right.[29]

The problem may arise when the parties have expressly agreed on a particular *lex arbitri* other than the arbitration law in which the arbitration has its seat (*lex loci arbitri*), which also has been expressly chosen. This situation will be depended upon the *lex loci arbitri* itself, if it allows such a choice, then the *lex arbitri* chosen by the parties may apply to the arbitral process. However, if the *lex loci arbitri* does not allow the freedom to choose any other *lex arbitri*, subsequently the *lex loci arbitri* may prevail.[30]

The grounds to set aside an arbitral award are established by the national law, the New York Convention does not have any provision to provide such grounds. Therefore, the primary jurisdiction may evaluate the arbitral award which is sought

[27] Margaret L. Moses, The Principles and Practice of International Commercial Arbitration (Cambridge University Press 2008).[84].

[28] Aniekan Iboro Ukpe.*Loc.Cit.*

[29] John Collier and Vaughan Lowe.[231].

[30] Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of Its Country of Origin' (1981) 1 International and Comparative Law Quarterly.[360].

to be set aside by defeated party according to the grounds that has been provided on the *lex arbitri* of that state. However, the UNCITRAL Model Law adopts the grounds for refusing recognition and enforcement of arbitral awards, as provided in Article V of the New York Convention 1958, as the ground for setting aside the arbitral awards.[31] Because of the New York Convention does not provide the grounds for setting aside the arbitral awards, the contracting states may feel free to provide the grounds for setting aside the arbitral awards, thus it may vary from one jurisdiction to the others.

The Secondary Jurisdiction

Another jurisdiction which is established by, and becomes the main concern of, the New York Convention 1958 is the jurisdiction to enforce the arbitral awards. Article III of the New York Convention 1958 requires Contracting States to recognize arbitral awards as binding, and to enforce them in accordance with national law, consistent with the provisions of the convention.[32] According to the scope of the convention as provided in Article I (1) which states: "The convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought,…".[33]

Thus, the enforcement authorities, according to the convention, are the authorities other than the authority of the country of origin in which the award has been made, the enforcement authorities also called "secondary jurisdiction". Usually, and it is in almost all cases, the secondary jurisdiction are the courts where the assets of defeated party are situated.

Unlike the primary jurisdiction which has more freedom to lay its decision to set aside an arbitral award according to national law, the courts of secondary

[31] United Nations Commission on International Trade Law, 'Model Law on International Commercial Arbitration, United Nations', UNCITRAL (United Nations Commission on International Trade Law 1985).[34] See: *Infra 2.2 The Secondary Jurisdiction*, on the part of the grounds to refuse.

[32] 'The New York Convention 1958: An Overview'.[6]

[33] *ibid.*[1].

jurisdiction decision are bound and limited to the New York Convention 1958. They are only empowered to recognize and enforce the arbitral awards which were made in foreign jurisdiction, they do not have jurisdiction to set aside such awards. The grounds that the enforcement court may or may not grant to enforce an arbitral award are limited only on the requirements as provided in Article IV and Article V of the New York Convention 1958.

According to the convention, the party who seeks enforcement of the award are required to provide the court with the authenticated original award or a certified copy, and the original arbitration agreement or a certified copy.[34] In addition, if the award or the agreement is not in the same language used in the enforcing jurisdiction, the party must provide a certified translation of the documents.[35] In order to support the enforcement of the award, the New York Convention provides only a limited number of defences to enforcement, they are also considered exhaustive, meaning they are the only grounds on which non-enforcement can be raised.[36] The enforcement court may refuse to enforce an arbitral award if the resisting party can proof that the award meets the following condition: 1) the incapacity of the parties or the invalidity of the arbitration agreement; 2) lack of arbitration notice or unfair arbitration proceedings; 3) arbitrator acted in excess of authority; 4) the tribunal or the procedure was contrary to the agreement; and 5) the award is not yet binding or has been set aside by the competent authority.[37] The court may also refuse to enforce an arbitral award on its own motion if the court finds that: 1) the disputes were lack of arbitrability; and 2) the award may violate the public policy.[38]

The Jurisdiction to Set Aside the Award in Karaha Bodas Case

In Karaha Bodas case, Pertamina, as the defeated party, had tried to set aside the award by applying to the Swiss court, as the authority under the *lex loci arbitri*, but the Swiss court refused to set aside the award on procedural grounds because

[34] *ibid*.[5].
[35] *ibid.*
[36] Margaret L. Moses.*Op,Cit*.[208].
[37] 'The New York Convention 1958: An Overview'.[5].
[38] *ibid.*

Pertamina did not comply to pay court fees on time.[39] This fact shows that Pertamina acknowledged the Swiss court as the primary jurisdiction over the arbitral award.

However, Pertamina then denied Swiss court as the primary jurisdiction by applying petition to the District Court of Central Jakarta and acknowledged it as the primary jurisdiction. Pertamina argued that Indonesian procedural law applied to its arbitration with KBC, the Fifth Circuit rejected this position, relying upon the strong presumption that the law applicable to any arbitral procedure is the *lex arbitri* – the law of the arbitral situs, which in the present case was Switzerland.[40] Occasional contractual references to certain Indonesian civil procedure rules were insufficient to rebut this presumption.[41] The appellate court also held that Swiss courts had primary jurisdiction, and the Indonesian courts only secondary jurisdiction over the proceedings.[42]

In this case, regarding the jurisdiction, the District Court of Central Jakarta made two errors. First, while the District Court of Central Jakarta could have applied the New York Convention 1958, however the convention has no place in an action to set aside an award.[43] Second, even assuming the convention governs annulment proceedings, the court erred in concluding that the Indonesian court is a "competent authority" to vacate the Swiss award under the convention.[44] The Indonesian courts are the secondary jurisdiction which only have jurisdiction to enforce or refuse to enforce an arbitral award which is sought its enforcement within Indonesian jurisdiction.

Moreover, regarding the grounds for setting aside, the District Court of Central Jakarta decided the annulment totally departed from the provisions in the Indonesian Arbitration Act (Law No. 30/1999 concerning on Arbitration and Alternative DisputeResolution). The Indonesian Arbitration Act provides only three grounds

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[39] *Karaha Bodas Company LLC v. PT. Pertambangan Minyak dan Gas Bumi Negara (Karaha bodas I).*[12].

[40] *Karaha Bodas Company LLC v PT Pertambangan Minyak dan Gas Bumi Negara et al (Karaha Bodas IV) (2003) 335 F. 3d*.[42].

[41] *ibid.*

[42] Noah Rubins, 'The Enforcement and Annulment of International Arbitration Awards in Indonesia' (2005) 20 American University International Law Review.[385].

[43] *ibid.*

[44] *ibid.*

for setting aside an arbitral award: 1) if there is a proof that a party submitted false documents; or 2) if the court finds that key documents were withheld from the other party to the arbitration; or 3) if one parties committed a fraudulent act during the arbitral proceeding.[45] The District Court of Central Jakarta did not use those grounds, even deciding that the Swiss arbitral award violated Indonesian public policy. The District Court of Central Jakarta based its decision from Article V(2) (b) of the New York Convention and also referred to Indonesian Supreme Court Regulation No. 1 of 1990 concerning The Enforcement of Foreign Arbitral Awards in Indonesia. Thus, the district court used grounds for refusal to annul the arbitral award, which such ground – violating Indonesian public policy – is not provided in Indonesian Arbitration Act as a ground to set aside an arbitral award.[46]

The Implications of The Proceedings In The Country of Origin Toward Enforcement of The Award

The New York Convention 1958 does not provide the matter of setting aside the arbitral awards, however the convention does provide certain consequences in the host country, the country in which the arbitral awards are sought for enforcement, if the arbitral awards have been set aside or the proceedings are pending in the country of origin.

The Effect of Setting Aside of an Arbitral Award against the Enforcement of the Award

Article V(1)(e) of the New York Convention 1958 provides that to be enforceable, the award should not have been previously set aside in the country where rendered, or under the law of which it was subjected.[47] The setting aside authority is the court where the award was rendered. Traditionally, in principle,

[45] Republik Indonesia, 'Indonesian Arbitration' (Indonesia 1999)..

[46] Noah Rubins.*Op.Cit.*[92-398]; and Irna Nurhayati, 'Legal Issues in the Annulment of International Arbitral Award in the Himpurna and Karaha Bodas in Indonesia' (2006) 18 Mimbar Hukum.[353].

[47] 'The New York Convention 1958: An Overview'.[9]. will be discussed on the issue related to Part III of this paper. See: *Infra*.[9].

according to Article V(1)(e) of the convention, when defeated party is successful to set aside the award in competent authority, the award has no further legal force or effect, and cannot be enforced in any other jurisdiction,[48] and certainly the award cannot be enforced in the jurisdiction where it was set aside.

In most cases, the enforcement courts will follow the rule of Article V(1)(e), and not to enforce a vacated award. However, such principle does not absolutely work, because Article V(1)(e) provides the enforcement courts with some discretion. The first sentence of the Article V(1) states that recognition and the enforcement of the award may be refused – and not "must" be refused – if the defenses listed in the article are proofed. Therefore the enforcement courts have discretion whether they will or will not enforce an award which has been vacated in the country of origin.[49] Some jurisdictions have taken position that a vacated award has possibility to be enforced in their jurisdiction. For instance in France, the law governing international arbitration in that country provides five grounds for the court of appeals to refuse the enforcement.[50] If the grounds for setting aside of an award decided by the court in the country of origin is not in the listed grounds as provided in the French arbitration law, thus the French Court will enforce the award although it has been set aside by the competent court in the country of origin.[51] The German arbitration law also provides a list of grounds on which an award can be challenged.[52] In the United States, a vacated arbitral award also has been enforced in Chromalloy case.[53] The U.S. Court determined that under Article V of the New York Convention 1958, it had discretion whether or not to enforce the vacated award.[54] The court also held that applying Article VII of the convention, the U.S. Federal Arbitration Act was

[48] Richard B Lilich and Charles N Brower, 'Annulment of Awards in International Arbitration' in Albert Jan van den Berg (ed), International Arbitration in the 21st Century, Towards Judicialization and Uniformity (Transnational Publishers 1994).[133, 137].

[49] Margaret L. Moses.*Op.Cit*.[214].

[50] 'French Code of Civil Procedure', , *Book IV Arbitration* (France).[1502].

[51] *Hilmarton v OTV, Versailles Court, 29 June 1995*.[5]

[52] *German Arbitration Law*.[1061].

[53] *Chromalloy Aeroservices v the Arab Republic of Egypt* (1996) 939 F. Sup.[907].

[54] *ibid.*[909-10].

more favourable law that should permit the award to be enforced.[55]

The Effect of Pending Proceedings in Country of Origin against the Enforcement of the Award

Article VI of the New York Convention 1958 states that:

> "If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security".[56]

From the article, the enforcement court has discretion, at the request of the party who seeks for setting aside or suspension of an award, whether it will decide or retain the decision to enforce an arbitral award until the proceeding in the country of origin has established its decision.

The provision has an intention to prevent the party who wants to frustrate the enforcement proceeding, by applying for setting aside the arbitral award in the competent authority, with empowering the enforcement court to order the party to give suitable security on the request of the other party.[57] The enforcement court may also have authority to consider the grounds on setting aside whether or not it will give serious impact to the risk if the award in fact will be set aside. If that is the case, the enforcement court can refuse the recognition and enforcement, or grant it on condition that security be given, so that in the event that the award was set aside, the previously existing situation can be restored (*restitutio in integrum*).[58] On the other hand, the provision also wants to ensure that if the award is set aside by the competent authority and thus loses the benefit of the convention, it could not be

[55] *ibid.*[912]. Article VII of the New York Convention 1958 contains two provisions, the first is the compatibility provision, in which that the New York Convention does not affect the validity any other treaties in the field of arbitration; and the second provision is the more favourable right provision (mfr provision) which provides the freedom of the party to base its request for enforcement of an arbitral award on the domestic law concerning enforcement of foreign arbitral awards, instead of the New York Convention 1958. See also: 'The New York Convention 1958: An Overview'.

[56] *ibid.*[6].

[57] Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999).[981].

[58] *ibid.*[982].

bypassed with a rapid enforcement decision in another jurisdiction while the issue was still pending in the country of origin.[59]

The Effect of Pertamina's Action in Indonesian Court against the Enforcement of the Award in Karaha Bodas Case

In Karaha Bodas case, the U.S. Court of Appeal for the 5th Circuit did not give effect to the Indonesian Court's decision which had been set aside the Swiss arbitral award. The U.S. Court of Appeals upheld the decision of the U.S. District Court to confirm the enforcement of the award and only remanded the injunction.

The U.S. Court of Appeals considered that under the New York Convention 1958, the Indonesian courts are not the competent courts to annul the award,[60] because the Indonesian courts, as secondary jurisdiction, only have jurisdiction to give its recognition and enforcement over the award. In its consideration, the U.S. Court of Appeals then referred to Article VI of the New York Convention 1958, that a court may maintain the discretion to enforce an arbitral award even when nullification proceedings are occurring in the country where the award was rendered.[61] Furthermore, an American court and courts of other countries have enforced, or permitted their enforcement, despite prior annulment in courts of primary jurisdiction.[62] The U.S. Court of appeal then confirmed that although it may some temporary delay, an Indonesian annulment is wholly ineffective in curtailing the ability of any court of secondary jurisdiction, including U.S. courts, to enforce the arbitral award. As an enforcement jurisdiction, U.S. courts have discretion under the New York Convention 1958 to enforce an award despite annulment in another country, and have exercised that discretion in the past.[63]

Related to the position of the Indonesian court proceedings towards the U.S. district court's decision to enforce the award, the U.S. Court of Appeal opined that

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[59] *ibid.*[981-982].

[60] *Karaha Bodas Company LLC v. PT. Pertambangan Minyak dan Gas Bumi Negara et al (Karaha Bodas IV)*.[13].

[61] *ibid.[30].*

[62] *ibid.*

[63] *ibid*.[37], the U.S. Court of Appeals also cited Chromalloy case.

the Indonesian court proceedings do not threaten the integrity of the U.S. courts' jurisdiction or its judgement in enforcing the award. U.S. courts, as the secondary jurisdiction, are restricted only to enforce or refuse to enforce the award. Thus, the integrity of the U.S. courts will not be affected, unless U.S. courts decide that the Indonesian annulment is in fact valid. Otherwise, under the convention, U.S. courts maintain the discretionary authority to ignore the Indonesian proceedings and affirm the district court's decision to enforce the award.[64] Legal action in Indonesia, regardless of its legitimacy, does not interfere with the ability of U.S. courts, or courts of any other enforcement jurisdictions for that matter, to enforce a foreign arbitral award.[65]

The consideration of the U.S. Court of Appeals was also supported by High Court of the Hong Kong Special Administrative Region Court of First Instance, 27 March 2003, which also confirmed the enforcement of the award in Hong Kong. This illustrates that Indonesian court's annulment fails to jeopardize enforcement of the award elsewhere as well.[66]

In its summary, the U.S. Courts of Appeals stated that although Indonesian court has already purported to annul the award, such annulment in no way affects the authority of the U.S. courts to enforce the award in the United States.[67]

Conclusion

Indonesian courts obviously were not the proper forum to set aside the Swiss arbitral award in the Karaha Bodas case. The parties had agreed that the arbitration would be in Geneva Swiss, and there was no sufficient evidence that Indonesian Civil Procedure was applicable on the arbitration process. There is no arbitration principle or practice could support Pertamina's argumentation that the Indonesian courts were primary jurisdiction over the award. Pursuant to the New York Convention 1958, the Indonesian courts were secondary jurisdiction which only

[64] *ibid*.[39].
[65] *ibid*.[43].
[66] *ibid*.[39].
[67] *ibid.*

have jurisdiction to enforce or refuse to enforce the award in Indonesian territory and not to set aside the award.

The Indonesian court's annulment decision, however, did not give any implication to the other secondary jurisdiction. Regardless its legitimacy, according to Article VI of the New York Convention 1958, the enforcement jurisdictions may have discretion to enforce an arbitral award even the setting aside proceedings are pending in the country of origin. In addition, the U.S. courts – and also several other jurisdictions – have experience to enforce the awards which have been set aside in its country of origin.

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