

## NEWSLETTER

28 December 2023

### UMBRA ARBITRATION SERIES: THE SUPREME COURT ISSUES NEW REGULATION ON ARBITRATION- RELATED PROCEDURES

#### *Background*

On 17 October 2023, the Supreme Court issued Supreme Court Regulation No. 3 of 2023 on Procedure for Appointment of Arbitrators by the Court, Right of Challenge, Examination of Petitions for Enforcement and Annulment of Arbitral Awards (**Supreme Court Regulation**) to implement the provisions of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (**Arbitration Law**).

The Supreme Court Regulation sets out a number of provisions regarding various arbitration and arbitration-related procedures, both before and after the issuance of the final award. This client alert will discuss the following key points in the Supreme Court Regulation:

- (i) Registration of Arbitral Awards
- (ii) Enforcement and Annulment of Arbitral Awards
- (iii) Public Policy
- (iv) Appointment of and Challenges against Arbitrators
- (v) Security Attachments

The Supreme Court Regulation firstly clarifies the authority of district courts and religious courts, the latter of which have authority over the enforcement and annulment of sharia arbitral awards. For the purposes of this client alert, “courts” refer to the district court and religious court, as relevant.



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## *Key Provisions*

### *Registration of Arbitral Awards*

#### **Registration of Domestic Arbitral Awards**

The Supreme Court Regulation expands on previously existing provisions on the registration of domestic arbitral awards under the Arbitration Law by stipulating the following:

- (i) The registration of domestic arbitral awards can now be done electronically, in addition to in-person registration.
- (ii) The court registrar must within three calendar days at the latest since the submission of a domestic arbitral award process its registration.

#### **Registration of Foreign Arbitral Awards**

The Supreme Court Regulation also provides further clarity on the registration of foreign arbitral awards. Crucially, it also removes the registration deadline previously stipulated in the 2019 District Court Enforcement Guidelines (**2019 Enforcement Guidelines**). The key provisions under the Supreme Court Regulation are as follows:

- (i) The registration of foreign arbitral awards can now be done electronically, in addition to in-person registration.
- (ii) The court registrar must within 14 calendar days at the latest after all the required documents are submitted process the registration.
- (iii) If an arbitrator or tribunal is appointed by an arbitral institution, the relevant arbitral institution or its proxy must be the submitting party. The Arbitration Law and the 2019 Enforcement Guidelines previously stipulate that the registration must be submitted by the arbitrators or their proxies.
- (iv) The registration of foreign arbitral awards is no longer bound by the 30-calendar-day deadline previously stipulated in the 2019 Enforcement Guidelines.

## *Enforcement and Annulment of Arbitral Awards*

### **Enforcement of Domestic Arbitral Awards**

The procedure for the enforcement of domestic arbitral awards is further clarified by the Supreme Court Regulation, some notable provisions of which are as follows:

- (i) Petitions for the enforcement of domestic arbitral awards can now be submitted for only a part of the award (not the whole award).
- (ii) Petitions for the enforcement of domestic arbitral awards can now be submitted electronically, in addition to in-person submission.
- (iii) If the chairman of the court rejects a petition for the enforcement of a domestic arbitral award, then the rejection must be made in a court decree (*penetapan*) within 30 calendar days at the latest after the submission of the petition.
- (iv) If a party submits an appeal to the chairman's court decree rejecting a petition for the enforcement of a domestic arbitral award, the court registrar will issue a statement noting that the appeal is not admissible, which will subsequently be further confirmed by the chairman through a separate court decree.
- (v) If a petition for the enforcement of a domestic arbitral award is submitted at the same time as a petition for the annulment of the same award, the annulment process takes precedence. The chairman must postpone the enforcement of the award until a first-instance decision on the annulment is issued (whether the decision rejects or declares inadmissible the annulment petition).

### **Enforcement of Foreign Arbitral Awards**

The procedure for the issuance of exequatur of foreign arbitral awards is further clarified by the Supreme Court Regulation, with the key provisions as follows:

- (i) Petitions for exequatur of foreign arbitral awards can now be submitted for only a part of the award (not the whole award).
- (ii) Petitions for exequatur of foreign arbitral awards can now be submitted electronically, in addition to in-person submission.
- (iii) Under Article 16 paragraph (4) of the Supreme Court Regulation, the chairman of the Central Jakarta courts must decide whether

to refuse or grant the exequatur within 14 calendar days at the latest since the exequatur petition is registered. It should be noted that Article 22 of the Supreme Court Regulation stipulates that decisions “to recognize and enforce” foreign arbitral awards must be issued within 30 calendar days at the latest since the enforcement petition is registered. It remains to be seen how these provisions are implemented in practice.

### **Annulment of Domestic Arbitral Awards**

The Supreme Court Regulation provides further clarification on the procedure for the annulment of domestic arbitral awards. Some key provisions are as follows:

- (i) Arbitrators and/or arbitral institutions are not to be involved as parties in annulment proceedings.
- (ii) The bases for annulment are limited to the three bases stipulated in Article 70 of the Arbitration Law, which need not be proven by a court decision.<sup>1</sup> This is in line with previous Constitutional Court decisions that decided that the reasons for annulment are limited to those provided under Article 70, which are to be interpreted as an exhaustive list and need not be proven by a prior court decision.<sup>2</sup>
- (iii) The bases for annulment must be invoked in the petition for annulment, and the relevant evidence must be attached to the petition.
- (iv) Annulment petitions can now be submitted electronically, in addition to in-person submission.
- (v) The examination will only consist of a maximum of five hearings: reading of the petition, submission of the statement of defense,

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<sup>1</sup> An arbitral award may be annulled if it is suspected that:

- (i) a letter or document submitted during the examination phase of the arbitration is admitted or declared to be forged;
- (ii) after the arbitral award was issued, a decisive document is found that was previously hidden by the opposing party; or
- (iii) the arbitral award was issued based on the deceit of one of the parties during the examination of the dispute.

<sup>2</sup> Constitutional Court Decision No. 15/PUU-XII/2014 dated 11 November 2014 and Constitutional Court Decision No. 26/PUU-XV/2017 dated 31 August 2017.

interlocutory decision (if any), examination of evidence, and reading of the decision. From our experience, the court strictly applies this order – foregoing the submission of the statement of reply, rejoinder, and summation.

- (vi) The decision must be issued within 30 calendar days at the latest since the reading of the petition, which can be held in person or electronically. This is slightly different from the requirement under the Arbitration Law, where the deadline is counted from the date of the submission.
- (vii) If the court grants the petition, an appeal can be filed to the Supreme Court against that decision within 14 calendar days at the latest since the reading of the decision. If the court rejects the petition, an appeal cannot be filed against the decision.

### *Public Policy*

For the first time in more than 30 years, we are provided with regulatory guidance on the scope and meaning of public policy in Indonesia. While the Arbitration Law contains provisions on public policy, it does not define it or limit its scope. The only regulatory framework that provided a definition on public policy was pre-Arbitration Law Supreme Court Regulation No. 1 of 1990 on the Enforcement Procedures for Foreign Arbitral Awards (**1990 Supreme Court Regulation**).

Under the 1990 Supreme Court Regulation, a foreign arbitral award may not be granted an exequatur if it “clearly contradicts the fundamental principles of the entire legal system and society in Indonesia (public policy).”

On the other hand, the Supreme Court Regulation adopts a broader definition of public policy, i.e., “anything that constitutes the fundamental principles necessary for the operation of the legal system, economic system, and socio-cultural system of the Indonesian society and nation.”

While public policy is difficult (and was not designed) to be rigidly defined, the Supreme Court Regulation provides a more comprehensive

definition of public policy and clearly recognizes that it not only encompasses the legal system or violations of law.

### *Appointment of and Challenges against Arbitrators*

The Supreme Court Regulation further regulates the procedure for appointing arbitrators through the courts and the challenge procedure against such court-appointed arbitrators. The key provisions are as follows:

- (i) Parties may submit a petition to the chairman of the court to appoint an arbitrator or tribunal for them. The chairman will then make the appointment within 14 calendar days at the latest since the submission in the form of a court decree.
- (ii) Any challenges against an arbitrator appointed by the chairman must be submitted within 14 calendar days at the latest since the appointment. The party submitting the challenge must sufficiently prove that there is doubt on the arbitrator's ability to act freely and impartially or if the arbitrator has any family, financial, or work relationship with one of the parties or its counsel.
- (iii) After hearing the parties, the court must decide on the challenge within 14 calendar days at the latest after the submission of the challenge.

### *Security Attachment*

The Supreme Court Regulation regulates the procedure for implementing security attachments (*sita jaminan*) in arbitration, which is a welcomed addition considering that there were previously no procedures on this issue.

If the arbitrator or tribunal issues an order for security attachment during the examination of the arbitration, the arbitrator or tribunal must register the order to the court. After the order is registered, the party requesting the attachment may petition the court to implement the attachment. The minutes of the court's enforcement of the attachment will then be sent to

the arbitrator or tribunal within two calendar days at the latest since the attachment is implemented.

## Closing

The Supreme Court Regulation is a welcomed development in the arbitration space in Indonesia. The regulation not only consolidates many previously existing rules, but also streamlines a number of processes and provides long-awaited clarity on some of the more technical aspects of arbitration and arbitration-related procedures.

We look forward to seeing the Supreme Court Regulation being implemented in practice, especially with respect to the enforcement of security attachments – which previously lacked regulatory guidelines. Our hope is that the Supreme Court Regulation will result in arbitration becoming a more effective and predictable tool in Indonesia to assist businesses in resolving their disputes.

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