LEGAL ISSUES IN THE ANNULMENT OF INTERNATIONAL ARBITRAL AWARD IN THE HIMPURNA AND KARAH BODAS IN INDONESIA

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Abstract

Law enforcement of international arbitral award in Indonesia is still lacking. Some annulments of the award have occurred in Indonesia. The Himpurna and Karaha Bodas are two notorious cases that show the annulment of the international arbitral awards by a court in Indonesia. However, several legal issues have arisen on this annulment, because the judges in their decision relied on a wrong interpretation to the provision of the United Nation Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), and the parties agreement.

This paper will analyse the error of the Indonesian court in annulling the Himpurna and Karaha Bodas awards. This paper will then demonstrate the judges’ misinterpretation to the New York Convention provision concerning refusal and annulment of foreign arbitral award. This paper ultimately will suggest how to create a proper legal environment in Indonesia to apply international arbitration.

Keywords: international arbitral award, annulment, legal issues

A. Introduction

The rise in activity among traditional trading partners, as well as the entry of new nations into the stage of world trade, inevitably has resulted in more disputes and arbitration. Parties in a foreign investment contract generally choose international arbitration as the method to settle disputes among them. Subsequently, international arbitration is the most important instrument for the settlement of disputes over foreign investment.

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* The original version of this paper was submitted as the assessment of Alternative Dispute Resolution subject at the Graduate Program of the University of Melbourne. The author is grateful for helpful comments on the original version provided by Professor Allan Snyder, and for language assistance on the original version provided by Dr. Issac Miller, Scott McDonald, and Anthony McClosker.

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Dispute resolution through international arbitration has more advantages than litigation before the court, namely, reasonable cost and speed, flexibility and adaptability, customisation, party participation, understandability, process, expertise and neutrality of arbitrator, procedural advantages, privacy and public interest (finality of decision, enforceability, party satisfaction). The main advantage of this, however, is that its awards are "readily enforceable" in many countries than judgments issued by forum selection clause or foreign courts, because the later is not legally binding and cannot be directly enforced in the other countries.

Enforcement of arbitral award is the actual execution of the award that is intended to ensure that the losing party carries out the arbitral award. International or foreign arbitral award is defined as an award, which is made in another country, while a domestic award is an award that is recognised and enforced in the country in which it is made. Statistics indicate that the vast majority of defeated companies comply with the terms of international arbitral awards against them or settle soon after the award is rendered. Nearly all arbitral awards, 98%, are executed voluntarily by the parties to the arbitration. However, several countries refuse to enforce, even annulled the international arbitral award.

The annulment of international arbitral award has also occurred in Indonesia. The Himpurna and Karaha Bodas are two notorious cases that show this annulment by the District Court of Central Jakarta, Indonesia. However, the judges in their decision relied on an error of interpretation to the provision of the New York Convention. Therefore, several legal issues have arisen here. Concerns to that, this paper will analyse the error of the Indonesian court in annulling the arbitral award of the Himpurna and Karaha Bodas. This paper will then discuss the judges misinterpretation of Article V of the New York Convention concerning refusal and annulment of an award. This paper finally will suggest how to create a proper legal environment in Indonesia to implement international arbitration.

1. Enforcement of Domestic and International Arbitral Awards in Indonesia

Generally speaking, law enforcement in Indonesia is weak. This also occurred in both domestic and international arbitral award. Since Indonesian National Arbitration Board (BANI) was built in 1977, there have been slightly 300 cases decided by BANI. Application for the annulment of domestic arbitral award succeeds in approximately six in 100 cases. Indonesian courts have also exercised annulments of international arbitral award in several cases, even after Indonesia became a party of the New York Convention. The Himpurna, Karaha Bodas and Patulja illustrate this situation.

2. Project Financing Agreement in Himpurna and Karaha Bodas

To fund such development, developing countries have begun to allow foreign investors to finance, operate, and own infrastructure projects. Indonesia, as a developing country, has collaborated with foreign investors in financing infrastructure development due to both the lack of funds and technology. In the nineties, when the Indonesian economy was booming, the project need for energy led the government to call for foreign investment in the energy sector. As a result, many foreign investment project financing were established. Two well-known geothermal projects in Indonesia are the Himpurna and Karaha Bodas. These large-scale projects financing have become notorious due to their controversial dispute resolution, which resulted in arbitral awards, and ended with annulment of the awards by an Indonesian court based on improper grounds.

In Himpurna, the parties are a Mid American companies, Himpurna California Energy Ltd. (HEC), and Indonesian state-owned electric corporation, PT Persero Perusahaan Listrik Negara (PLN). In Himpurna, there are two contracts, Energy Sales Contract (ESC) between HEC, PLN and PERTAMINA; and Joint Operating Contract (JOC) between HEC and PERTAMINA. The JOC is known as "upstream" contracts (related to extraction of an energy resource), whereas the ESC is "downstream" contracts (related to sales of the power generated). Under the JOC, HEC had exploration and extraction rights, while PERTAMINA had exploration and exploitation rights. The ESC entitled HEC to build, explore, and exploit two power plants geothermal resources in Dieng.
Central Java-Indonesia, and sell the power to PLN. The contracts were regarding 'take or pay' (i.e., PLN was required either to take a certain quantity of power from MidAmerican's plants or pay for the power even if it were not taken). The government of Indonesia assured MidAmerican in a guarantee letter that PLN would fulfill its obligations.

In Karaha Bodas, the parties are Karaha Bodas Co., L.L.C. (KBC), a Cayman Islands limited liability company, primarily owned by United States investors, and Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (PERTAMINA). There are two agreements conducted in 1994, a Joint Operating Contract (JOC) between KBC and PERTAMINA for exploration and exploitation of the geothermal resources (energy extraction facilities) in Karaha Bodas, West Java-Indonesia; and agreement between PERTAMINA and PLN for the construction of a power plant and production of electrical energy for ultimate use by the public. The Ministry of Finance of Indonesia gave a guarantee letter to back up its financing.

3. Arbitration Clause in Himpurna and Karaha Bodas

Most international commercial contracts routinely contain an agreement to arbitrate. Arbitration is part of the protection process to the contracting parties. The agreement to arbitrate is manifested in an arbitration clause, which may be either included in the main agreement or separated from the main agreement.

In Himpurna, the parties agreed to resolve any disputes by arbitration. The ESC provided that "disputes were to be settled by a three-member arbitral panel under the United Nation Convention of International Trade Law (UNCITRAL) arbitration rules. The Secretary General of the ICSID was designated as appointing authority and Jakarta was specified as the site of arbitration." Moreover, the parties agreed to neither seek judicial intervention in the arbitral proceedings, nor to commence or maintain any suit or legal proceeding concerning a dispute hereunder until the dispute has been determined in accordance with the arbitration procedure provided for enforcement of the award rendered in such arbitration.

In Karaha Bodas, the parties also agreed to arbitrate any disputes arise between them. Both ESC and JOC called for disputes to be arbitrated by an ad hoc Arbitral Tribunal (hereinafter Tribunal) in Geneva under the UNCITRAL Arbitration Rules, and renounced choice of law clauses that specified

Indonesian law to appeal the decisions of the Tribunal.

4. Disputes in Himpurna and Karaha Bodas

The Asian financial crisis in 1997-1998 impacted seriously on Indonesian economy. After the crisis, the Rupiah depreciated sixth to one its value against the dollar at the time the parties entered the agreements, while the contracts called for payment denominated in US dollars. The government, on the insistence of the IMF, issued Presidential Decree in 1998 suspending a number of infrastructure projects, includes Himpurna and Karaha Bodas.

In Himpurna, at the time of crisis of the four turbine units was near completion while the others were still in the process of construction. The depreciated of Rupiah make PLN failed to fulfill its payment obligations under the take or pay clause, although the Indonesian government inform HCE that PLN will pay. The Himpurna was suspended and PLN declined to accept power. In August 1998, HCE then initiated arbitration proceedings seeking damages in the amount of USD 2.3 billion out of which nearly 2 billion was for lost profits. This proceeding is against PLN under the two ESC, and against the Indonesian government under the two MoF Letters. However, HCE did not name PERTAMINA as a respondent in the proceedings. The Indonesian government then signed "Terms of Appointment" deferring proceedings by the claimants against the Indonesian government until final awards in the PLN arbitrations were rendered.

In Karaha Bodas, upon confirmation of the Presidential Decree 1998, KBC informed PLN that it considered the postponement to be an event of force majeure under the ESC and submitted a revised work schedule. KBC offered negotiations on how to proceed further, but PLN did not consent to the consolidation. PLN informed KBC that it should abide by the Presidential Decree 1998 and any further activity would be at KBC's own risk. KBC, in April 1998, then initiated arbitration proceedings to ad hoc arbitration in Geneva by applying UNCITRAL rules, claiming damages for breach of contract against PERTAMINA in the case of JOC; against PLN and PERTAMINA in the case of ESC; and against the Minister of Finance under the alleged guarantee letter.

5. The International Arbitral Award of The Himpurna and Karaha Bodas

In Himpurna, the Tribunal rejected the defence of the PLN that the Presidential Decrees 1998, which suspended the projects, excused PLN from breach the contract. The Tribunal argued that only a judge could order such a termination, and the project companies also failed to satisfy contractual requirements in the ESC to engage in good faith settlement negotiations prior to initiat-
ing arbitral proceedings. Finally, the Tribunal decided that the doctrines of changed circumstances, force majeure, and good faith excuses non-performance by PLN.39

In May 1999, the Tribunal subsequently issued parallel awards, holding that PLN had breached the ESC. The Tribunals terminated the ESC and awarded damages to HCE of US$391,711,652, which included lost profits in the amount of 117,244,000 USD.40 This amount of lost profits determined by the Tribunal was limited to the loss arising out of the one unit, which had already been completed.41 The Tribunal considered that it would be an abuse of right if HCE could claim for lost profits for investments not yet made (projected profits).42 PLN was required to pay the award within 30 days, but failed to do so. In June 1999, HCE then filed a second arbitration against the government of Indonesia to enforce its guaranty.43 In September, the Tribunal issued an order holding the government in default of the “Terms of Appointment” of the Tribunal regarding the injunction of the District Court of Central Jakarta. The Tribunal convened a second arbitration in September in The Hague,44 but the Indonesian government refused to participate in, even filed a suit in The Hague to block the Tribunal from going forward with the arbitration.45 However, the Dutch District Court denied the application. Indonesia then coercively removed its appointed Tribunal member from Schiphol Airport in Amsterdam to Jakarta.46

Interim Awards were issued in September 1999, granting default awards against the Indonesian government. In October 1999, the Final Awards were issued, stating that the Indonesian government, as a result of its guaranty, was obliged to pay the two awards that were issued in the first arbitration in May 1999.47 The Indonesian government failed to pay the award, HCE then filed a claim with the Overseas Private Investment Corporation (OPIC) under its political risk and dispute resolution policy. In November 1999, OPIC and syndicates of Lloyd’s of London honoured claims HCE $290 million under their political risk policies.48

Unlike the Himpurna, in Karaha Bodas, the Tribunal considered PLN not to fulfill its contractual obligation amounting to a breach of contract, since according to the force majeure clause only KBC could rely on governmental actions to excuse performance. Furthermore, PLN’s failure to give the required assurances that it would honor its obligations was considered to be a breach of the duty of good faith in performance.49 The Tribunal, after releasing the Minister from the reference on the basis that no guarantee letter had in fact been executed, then awarded substantial damages to KBC in the amount of over 261.1 million, out of which USD 150 million was for lost profits, while the rest covered expenses made to KBC against PERTAMINA and PLN.50 The Tribunal relied on the calculation of the projected cash flow on the term of the contract as originally agreed upon. This differs to the Himpurna, where the investor was prohibited from relying on the original contractual term.51 As a result, PERTAMINA appealed to the Fifth Circuit Court of Appeals but did not post a supersede bond on time.52 Subsequently, the Switzerland court declined to hear the challenge of PERTAMINA.53

KBC in mid-2001 began enforcement proceedings in the United States, Hong Kong, Canada and Singapore, but not in Indonesia, against Indonesian assets held in such jurisdictions in the name of PERTAMINA on behalf of the Indonesian treasury.54 The United States district court held that KBC could attach only the five percent of the funds (“retention”) that PERTAMINA owned located in 15 trust accounts at The Bank of America. These accounts contain funds from the sale of liquefied natural gas extracted in Indonesia under Production Sharing Contracts (PSC), which are governed by Indonesian law.55 PERTAMINA sued to the Central Jakarta district court claiming that the funds are not belong to PERTAMINA. The Ministry of Finance joined in the appeal of the Karaha Bodas claiming to be a “Non-Party with Interest,” on behalf of the government. The Ministry filed a memorandum of law, arguing that the restraining notices and writ should be quashed.

6. Indonesian Court Intervention in the Arbitral Awards

In general, parties allow for the arbitral award granted by an arbitration tribunal. However, several cases demonstrate that a party defends an arbitral award by litigating the arbitrated disputes before the court. It is well-known that local courts often control over national or foreign arbitral awards,56 by penetrating the arbitral process, adjudicating cases subject to arbitration agreements, enjoining ongoing proceedings, and reopening the merits of final awards.57

Court intervention into arbitration cases has also occurred in Indonesia.58 This has remained a difficult issue for transactions of project financing in Indonesia in the aftermath of the financial crisis.59 Generally, court intervention during the period of time of an arbitration proceeding is rare. How-
ever, the Himpurna and Karaha Bodas show the intervention actions during the process of arbitration.

There are two actions in Himpurna. First, PLN moved to vacate the arbitral award. HCE moved to dismiss, but the Indonesian court denied the motion and refused to enforce the award. Second, PERTAMINA sued HCE for excluding it in the first arbitration, and claimed it as a party to the agreements between HCE and PLN. The Central Jakarta District Court granted PERTAMINA an injunction, a fine of U.S $1 million a day, suspending execution of the awards and any further arbitration against the government of Indonesia. The annulment of the award primarily based upon breach of natural justice in the appointment of the Tribunal and consolidation of the proceedings without parties consent. As a result, the HCE then appealed to the Supreme Court in the United States, Hong Kong, Canada and Singapore.

In Karaha Bodas, after unsuccessful attempts to contest the award in Switzerland, PERTAMINA brought an action in the Central Jakarta District Court to annul the award based on various procedural and substantive defects, breach of natural justice and fraud. Indonesian courts asserted jurisdiction over an arbitration the parties had explicitly sought to isolate from its power, and then annulled an award on unprincipled grounds. The United State District Court for the Southern District of Texas then issued contempt orders against PERTAMINA for seeking an annulment in the Indonesian court.

Looking at the court’s intervention in the Himpurna and Karaha Bodas, there are several legal issues. First, the court intervention to arbitration contradicts provisions of Indonesian Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Settlement, which state that the District Court shall have no jurisdiction to try disputes between parties bound by an arbitration agreement. This also states that (1) the existence of a written arbitration agreement shall eliminate the right of the parties to seek resolution of the dispute or difference of opinion contained in the agreement through the District Court, and (2) the District Court shall refuse and not interfere in settlement of any dispute which has been determined by arbitration except in particular cases determined in this Act.

Second, the court intervention also contradicts the party agreement (ESC) that states parties agreed to neither seek judicial intervention in the arbitral proceedings, nor to start or maintain any suit or legal proceeding concerning a dispute hereunder until the dispute has been determined in accordance with the arbitration procedure provided for enforcement of the award rendered in such arbitration. Court must honour the parties’ agreement, which vest the power in an arbitral tribunal to adjudicate their disputes.

The Judges’ Misinterpretation of the Agreement and New York Convention

In principle, annulment is a necessary remedy against improper conduct of arbitral proceedings, denying a party to be properly heard. However, annulment may unfortunately be an effective weapon where the state courts are more inclined to serve as instrument of the host government, as was the Himpurna and Karaha Bodas.

In Himpurna, the annulment of the award was caused by the wrong interpretation of the judges of the arbitration clause in the parties’ agreement. The court based its decision on the Presidential Decree 1998 that states that an economic crisis is a condition of force majeure, which, in turn, released PLN from its obligation to HCE. Previously, however, the Tribunal held that the parties explicitly allocated the risk of currency devaluation to PLN by pricing the contract in USD. The tribunals viewed that the risk remains with PLN, because the wording of the force majeure clause stated that PLN could not rely on any governmental currency restrictions as force majeure. Indeed, legal arguments of changes in circumstances, impossibility of performance, hardship, and force majeure were unlikely to offer the Indonesian obligors an excuse from their payment obligations, as the energy project documents all contained very detailed force majeure and other provisions allocating the risks of foreign exchange fluctuations, change in law and payment defaults to the Indonesian side. Although ESC provided for Indonesian law as the governing law, the parties to the ESC also agreed that the Tribunal needed not be bound to strict rules of law where they consider the application thereof to particular matters to be inconsistent with the spirit of the contract and the underlying intent of the parties. The judgment of the Tribunal based on correct interpretation of all relevant terms in the agreement and the correct and just enforcement of the agreement in accordance with such terms.

In Karaha Bodas, the misinterpretation of the judges related with jurisdiction. The Central Jakarta District Court made errors with regard to the applicability and interpretation of The New York Convention concerning annulment by a competent authority of the country in which, or the country under the law of which, the award was made. The Central Jakarta district court assumed that the Indonesian court is a competent authority to vacate the Switzerland Award under The New York Convention, and decided the annulment departed sharply from the provisions of Law No. 30 of 1999. However, Switzerland had primary jurisdiction and the Indonesian courts only secondary jurisdiction over the proceedings. The New York Convention compelled separate and limited roles of primary jurisdiction courts and of secondary jurisdiction courts.
risdiction courts may annul awards; while secondary jurisdiction courts have roles to enforce, or refuse to enforce, awards in their own countries. 67 Despite the fact that the JOC and ESC each called for the application of Indonesian substantive law, 68 the arbitration agreements chose the forum position was in Switzerland. 69 Switzerland law was the chosen lex arbitri, because the award was rendered in Switzerland, 70 as the law applicable to any arbitral procedure is the lex arbitri, the law of the arbitral situs (place). Based on lex arbitri, the valid jurisdiction to annul an international arbitral award is the court where the award is granted. 71 The Indonesian court, therefore, made an error by annulling the award.

Indonesia, as a contracting state of the New York Convention, 72 should recognize and enforce the awards. Indonesia may refuse to either recognise or enforce the awards if the subject matter of the difference is not capable of settlement by arbitration under the law of Indonesia; or the recognition or enforcement of the award would be contrary to the public policy of Indonesia. 73 Under Indonesian Law, courts are allowed to refuse enforcement of an international arbitral award if the following conditions exist: do cument for the trial in court is a forgery or is stated as a forgery; after the award a document is found; or award is taken by the influence of another party which is deceitful. 74 Specifically, the Indonesian court referred to Article V(2)(b) of The New York Convention, which states that courts may deny the enforcement of an arbitral award if enforcement would violate public policy of the place of enforcement. The court also referred to Indonesian Supreme Court Regulation No. 1 of 1999, which provides that the enforcement of foreign arbitral awards in Indonesia imitates applies to awards which do not violate public order in terms of all underlying principles of the legal system and society in Indonesia. 75 However, the denial of recognition or enforcement based on public policy grounds may have been acceptable only if PERTAMINA or KBC had petitioned for recognition or enforcement of the Switzerland Award before the court. 76

It is clear, both from the Indonesian court's reference to The New York Convention and its continuous use of the terms enforcement and recognition in its opinion, that the court confused the proceeding before it as one of enforcement or recognition, as opposed to what it really was, an annulment proceeding under domestic law.

8. The Law Enforcement Aspects of the Annulment of the Awards

The annulment of the Himpurna and Karaha Bodas awards is influenced by the adequate law enforcement in Indonesia. This is a complex problem. However, this problem may be categorized into several factors, namely, the legislations, the law enforcement officials, the infrastructures, and the legal awareness of the people.

The annulment of Himpurna and Karaha Bodas awards is mostly due to the weak of the law enforcement officials and the legal awareness of the people. Problems regarding Indonesian law enforcement officials in the annulment of the two awards are resulted from their narrow understanding to the provision of the New York Convention and the arbitration in general. 77 Court intervention, which often happens in arbitration, is caused by the low respect of the courts to the arbitration. 78 Courts often view the arbitration method as competitor rather than partner. 79 As a result, law institutions failed to be a shelter of people who seek justice.

The legal awareness of Indonesian people in general is low. Some people obey the law not because of their legal awareness, but the sanctions. Because the mostly laws sanctions do not work properly in Indonesia, people seem reluctant to obey the law. Related to the Himpurna and Karaha Bodas, the action of PERTAMINA and PLN to sue in the Central Jakarta district court reflects the low degree of their legal awareness. They should obey the agreement in ESC and JOC, which prohibits parties to seek judicial intervention during the arbitral proceedings.

9. Non-Legal Issues in the Annulment of the Awards

Several factors existed to give an understanding to the legal issue, in the annulment of the Himpurna and Karaha Bodas awards. These are political, economic and cultural factors. Political, economic and cultural realities in many countries have dominated the rule of law. 80 A country may use these non-legal context and political powers to get rid of burdensome legal obligation. 81

The judiciary in Indonesia is well-known as vulnerable to outside influence. 82 Politics are a crucial threat to the judicial system in Indonesia. The upheaval in political authority is a significant element of the Indonesian situation. Indonesia is a weak state with a history of instability and unreliable political and judicial systems. 83 The annulment of the awards in Himpurna and Karaha Bodas is the result of political inter-
tions in any jurisdiction often run across corruption in its more common, lower, levels. The crisis circumstances and corruption allegations surrounding Indonesian infrastructure projects offer a significant explanation of the motives of the Indonesian parties in seeking court interference with arbitral proceedings.

10. Recommendations to Create A Proper Legal Environment in Indonesia

The Himpuh and Karaha Bodas showed that Indonesia is not an inappropriate legal environment for the implementation of international arbitration. Even though the new government of Indonesia was partially reformed, the Himpuh and Karaha Bodas can serve as evidence that the Indonesian legal enforcement system is not wholly beyond repair.

The lack of law enforcement of arbitral award may reduce foreign investment in Indonesia, because foreign investors, if they faced a dispute, in any case may not intend to invest again in that particular host country. Foreign investors may eager to entering Indonesian markets to build large infrastructure projects, so they are wary of the investments. If this occurred in Indonesia, the prospect of foreign investment in Indonesia will be getting worse. To anticipate, therefor, some steps concerning law enforcement and influenced factors should be exercised.

As analysed before, the annulment of Himpuh and Karaha Bodas awards was rich of political nuance. The first step to improve legal environment in Indonesia is, therefore, to reform political life in Indonesia. Political reformation should be done immediately to anticipate the worse of judicial system and other life aspects in Indonesia. Indonesian political life should be matured to create fair social system and political climate. Any improper political actions should be eliminated. The government should eradicate any forms of intervention to the judicial system, and arbitration process. Disclosure and fairness are needed to enforce international arbitral awards.

The second step is to reform the law enforcement institutions. The skills and capabilities of Indonesian legal officials should be improved to enable them doing their duties better. One cause of the annulment of arbitral award by the courts was the lack of the judge knowledge to the arbitration. Law enforcement institutions should also exist in good standard norm, law order and quality. Indonesian court system is assumed as lack of independent, other collective practices often influence judicial outcomes. Judge should implement the law rely on a well-working, independent judiciary. Courts, with few exceptions, such as to avoid abuse and injustice, have a right to control arbitral award as a counterbalance, however, over interventions of courts could even erode confidence in the international arbitral process, raising doubts as to the advantages of resolving international commercial disputes through arbitration. This also will hamper international commerce, because investors may have no confidence to invest in Indonesia.

Furthermore, people legal awareness should also be developed. As mentioned before, the degree of legal awareness of many people in Indonesia is low. The annulment application of the Himpuh and Karaha Bodas by Indonesian parties shows the party has breached the contract. If parties agreed to settled dispute among them by arbitration, and they agreed the procedures, they should obey the agreement. The legal awareness of the judges in respect to arbitral award, and the good faith to enforce it also needs to be improved. As being recognized, internati-

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93 Ibid., p. 13.
95 Ibid., p. 25.
104 Priyotma Abdurrasyid: 99.9% Hakim Tidak Mengerti Arbitrase, _Loc. Cit._
105 Indra Saifurri, Jendela Pergulatan Hukum Negeri Ini, p. 1 <http://www.hakumonline.com/detail.asp?id=8611276013>
at 8 March 2006.
109 Ibid.
111 Priyotma Abdurrasyid: 99.9% Hakim Tidak Mengerti Arbitrase, _Loc. Cit._
narial arbitration awards pursuant to the New York Convention has generally been uniform worldwide. However, the Himpurna and Karaha Bodas demonstrate that uniform interpretation has not been accomplished in all signatory countries. The Karaha Bodas shows that the relative universality of The New York Convention is no guarantee of uniformity or certainty of enforcement. The home court advantage still is a factor, because ultimately, enforcement of awards still requires the participation of national courts, applying national laws and subject to national influences. The efficacy of The New York Convention depends in large part on the good faith of its sovereign signatories.

The annulment of the Himpurna and Karaha Bodas awards could deal a serious blow to international business operators’ and states’ confidence towards international arbitration. Indonesia, therefore, should re-establish trust in Jakarta as an arbitral situs. Fertile legal environment is needed. Indonesia can still attract foreign investment by stabilizing their economic, political, and legal environments. However, economically, Indonesia need for restructuring companies to create a positive environment for future investment in the country and the industry. The lack of law enforcement in Indonesiastyle is both complex and crucial problem. Aspects of legislations, law enforcement officials, infrastructures, and the low degree of people legal awareness are the background of the legal factor. However, political, economical and cultural aspects also have important roles in the existence of the legal factor. Subsequently, the annulment of the Himpurna and Karaha Bodas leave Indonesia as an inappropriate venue for the enforcement of international arbitration. Indonesian reputation among countries in the world also becomes worse. Indonesia may become less attractive for foreign investors, which may result in the decline of economic growth in Indonesia. Globally, the annulment of the international arbitral awards may create distrust of international business operators and states towards arbitration method.

In the future, Indonesia may still attract foreign investment in project financing. Indonesia also possibly becomes an appropriate venue of the international arbitration. However, Indonesia should stabilize their political, economic, and legal environments.

C. Conclusion

Himpurna and Karaha Bodas are two notorious cases, which show the annulment of the international arbitral award in Indonesia based on wrong ground. In the both Himpurna and Karaha Bodas, the judges misinterpreted the arbitration clause under ESC. ESC states that the risks of foreign exchange fluctuations are not included in the term force majeure, and this is belong to the Indonesian party. In the Karaha Bodas, the judges made an error of interpretation regarding the authority to annul the award under the New York Convention. The judges assumed that the Indonesian court competent to vacate the award. However, the Switzerland is the lex arbitri, which has the right.

The Himpurna and Karaha Bodas demonstrate that the enforcement of international arbitral award in Indonesia is inadequately.

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