2021 Maritime Arbitration Enforcement Series

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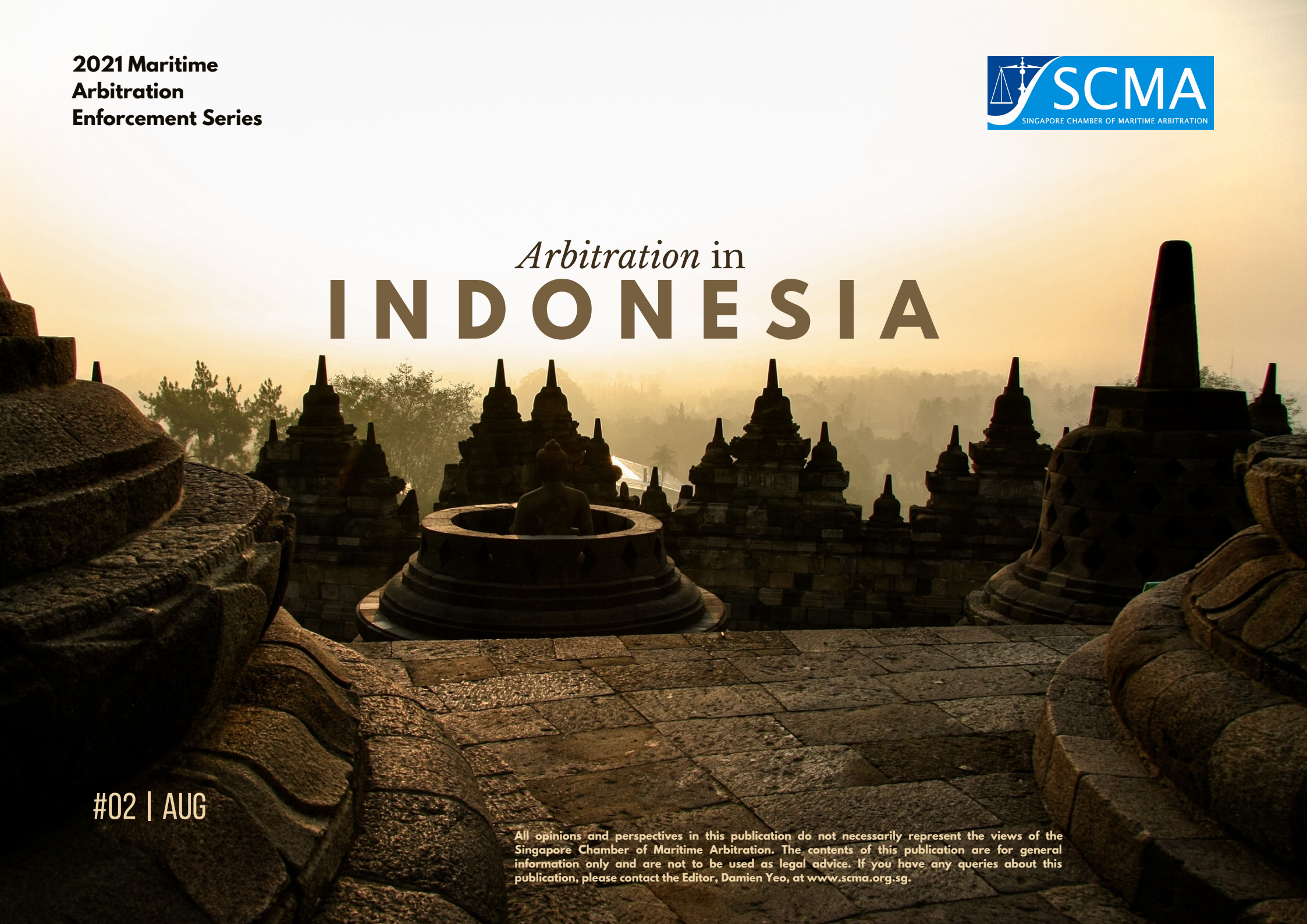
SINGAPORE CHAMBER OF MARITIME ARBITRATION

Arbitration in INDONESIA



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Maritime Dispute Resolution and Arbitration Enforcement: An Indonesian Law Perspective

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Summary

This article provides a brief overview of the Indonesian legal framework pertaining to maritime matters, as well as arbitration proceedings under Indonesian law as one of the means of dispute resolutions available in the country. This article also discusses the enforceability of foreign arbitral awards in Indonesia.

Maritime-related disputes are settled through court proceedings or via arbitration, subject to the parties' agreement on a dispute resolution mechanism stipulated in their contractual documents. While foreign court judgments are not enforceable in Indonesia, foreign arbitral awards – including awards from Singapore Chamber of Maritime Arbitration ("**SCMA**") – are enforceable to the extent that local requirements and procedures under the Indonesian Arbitration Law have been duly complied with.

Overview of Indonesian Law on Arbitration

Matters regarding arbitration in Indonesia are mainly governed under Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolutions ("**Indonesian Arbitration Law**"), which provides general guidelines for dispute resolutions through arbitration proceedings. In addition, Indonesia is also bound to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**1958 New York Convention**"), which affects the recognition and enforcement of foreign arbitral awards in Indonesia, as detailed in the section on enforceability below.

In principle, all arbitration proceedings must be initiated pursuant to an arbitration clause or arbitration agreement as agreed by the relevant parties prior to or after the occurrence of the relevant disputes.

Article 2 of the Indonesian Arbitration Law states that "*the settlement of disputes or differences of opinion between parties in a particular legal relationship* [shall be based on] *an explicit arbitration agreement between the parties which states that any disputes or differences of opinion that arise or are likely to arise of such legal relationship will be settled by way of arbitration or by alternative dispute resolution*".

Under Article 3 of the Indonesian Arbitration Law, no district court in Indonesia shall have jurisdiction to hear disputes between parties that are bound by an arbitration clause or arbitration agreement.

Any arbitral award published is final and binding in nature and therefore, no further legal remedy (appeal to an Indonesian court or otherwise) is available against the validity of the arbitral award.

Overview of Maritime Law in Indonesia

Framework of Maritime Law in Indonesia

In Indonesia, matters relating to maritime law are governed by various laws and regulations, including but not limited to Law No. 6 of 1996 on Indonesian Waters, Law No. 32 of 2014 on Maritime (as amended with Law No. 11 of 2020), Law No. 17 of 2008 on Shipping (as amended with Law No. 11 of 2020) ("**Shipping Law**"), Law No. 31 of 2004 on Fisheries (as emended with Law 45 of 2009) ("**Fishery Law**") and the Indonesian Commercial Code ("**ICC**").

In general, the Shipping Law provides a regulatory framework for the management of maritime resources in Indonesia and its related aspects, including environmental protection, law enforcement, and safety standards. It regulates the conduct of parties engaged in maritime transport and promotes the development of marine transport within the archipelago.

The Fishery Law was promulgated to regulate fishing activities in the country's waters, with some emphasis on ensuring that proper legal enforcement options (including criminal sanctions) are available against violators. These cases are heard in fisheries courts which are under the supervision of the nation's Supreme Court.

The ICC regulates commercial aspects of shipping matters, including the allocation of liability amongst parties involved in collision between vessels. The general rules for liability allocation established under the ICC in the event of vessel collisions are:

(a) If a collision occurs by accident without fault or due to a force majeure or of uncertain cause, damages are to be borne by the party that suffers them (Article 535 of the ICC).
(b) If a collision occurs due to the fault of one party, the party at fault is liable for the damages that were caused. Any loss or damage arising or resulting from non-seaworthiness of the vessel will be added to the liability of the party at fault (Article 536 of the ICC).
(c) If a collision occurs due to the fault of more than one party, the parties at fault are liable in proportion to their respective level of fault in regard to the collision (Article 537 of the ICC).

In addition to these domestic laws, Indonesia is also bound by several international treaties, *inter alia,* the International Convention on Civil Liability for Oil Pollution Damage (CLC Convention) as ratified under Presidential Decree No. 18 of 1978, the Convention on the International Regulations for Preventing Collisions at Sea (COLREG Convention) as ratified under Presidential Decree No. 50 of 1979, and the International Convention for the Safety of Life at Sea (SOLAS) as ratified under Presidential Decree No. 65 of 1980 and Presidential Decree No. 21 of 1988.

In Indonesia, international treaties are not automatically enforceable and have no legislative effect in the absence of further ratification by the legislature (or in some cases, the president). Under Law No. 24 of 2000 on International Treaties (Treaties Law), these treaties need to undergo a ratification process through the issuance of a law (*undang-undang*) or presidential decree (*keputusan presiden*), as relevant, in order to be enforceable in Indonesia.

Maritime/Shipping Disputes Resolution in Indonesia

Other than the Maritime Court (*Mahkamah Pelayaran*) which was established to adjudicate disputes where there are indications of negligence or other violations in the application of standards of seamanship in the event of an accident, Indonesia does not have a special court to deal with shipping disputes.

Pursuant to the Shipping Law, the Maritime Court has jurisdiction over all cases involving seamanship standards where marine

accidents occur within Indonesian waters or territory, as well as accidents that take place in or with respect to Indonesian flagged ships outside Indonesian waters and territory, including sinking, collision, and grounding cases. The authority of the Maritime Court, however, is limited to the imposition of administrative sanctions with regards to the violations of the seamanship professional standards.

Any other shipping-related contractual disputes are generally resolved through (i) court proceedings; or (ii) arbitration, depending on the parties' choice of forum. In this regard, a district court has broad jurisdiction to hear various types of disputes, including disputes with an unlawful act / tort element, whereas the jurisdiction of arbitration is limited to disputes involving "commercial" matters, which under the Indonesian Arbitration Law include disputes in commerce (*perniagaan*), banking, finance, investment, industry, and intellectual property.

Court proceedings in Indonesia are attractive to some because its conduct is open to public, and they generate records. Court proceedings also afford the losing party with the opportunity to lodge opposition efforts against the court's decision (i.e. appeal, cassation or judicial review).

On the other hand, arbitration proceedings are less time-consuming in comparison to court proceedings in Indonesia. Additionally, arbitration awards are final and binding in nature. As such, parties that are dissatisfied with an award would not be able to appeal or oppose such awards.

There is no specialist arbitral body dealing specifically with maritime disputes in Indonesia. Instead, to the extent the parties have agreed to resolve their disputes via arbitration, Indonesia's domestic arbitration body *Badan Arbitrase Nasional Indonesia* ("**BANI**") has maritime law specialists capable of handling disputes in this context. International arbitration bodies specialising in maritime disputes, such as the SCMA, are also attractive options. We discuss the enforceability of SCMA awards in Indonesia in a later section below.

Enforceability of Foreign Awards in Indonesia

Foreign Court Judgments are not Enforceable in Indonesia

Indonesia is not a signatory to any multilateral or bilateral treaties that regulate the enforcement of foreign court judgments. This means that judgments rendered by foreign courts are not enforceable in Indonesia (Article 436 (1) of the *Reglement op de Rechtvordering* ("**RV**")).

What commonly takes place in practice is that a party who has obtained a favourable foreign court judgment would file a fresh claim at the relevant Indonesian court to re-litigate the case. As part of the fresh proceedings, the party may submit the foreign court judgment as *prima facie* evidence (Article 436 (2) of the RV). Although they are not bound by foreign court judgments, when examining cases, Indonesian judges may exercise their broad discretion to weigh the evidentiary value and relevance of any submitted foreign court judgment. In exercising such discretion, the court will examine whether the relevant foreign court judgment violated any principles of public order or public policy in Indonesia.

Enforcement of Foreign Arbitration Award in Indonesia

Indonesia is bound by the 1958 New York Convention, which is ratified by the Presidential Decree No. 34 of 1981 on the Ratification of "Convention on the Recognition and Enforcement of Foreign Arbitral Awards". Therefore, any "foreign arbitral award" issued in a country that is also a signatory to the 1958 New York Convention may be recognised and enforced in Indonesia.

The Indonesian Arbitration Law defines a foreign arbitral award as an award handed down either by an arbitration institution or arbitrators under a self-administered arbitration proceeding outside Indonesia. Enforcement of a foreign arbitral award in Indonesia is subject to certain administrative procedures required by the Indonesian Arbitration Law, including foreign arbitral award registration and obtaining a writ of execution (known as an *exequatur* order) from the Central Jakarta District Court ("**CJDC**") – this is detailed below.

Under the Indonesian Arbitration Law, a foreign arbitral award is enforceable in Indonesia if it fulfils the following requirements and procedures:

a. the award must have been rendered by an arbitrator or arbitration panel in a country that is bound to Indonesia by a bilateral or multilateral treaty on the recognition and enforcement of foreign arbitral awards (i.e. the 1958 New York Convention);
b. the award must be within the scope of commercial law under Indonesian law;
c. the award does not contravene public order;
d. the award must be registered at the CJDC; and
e. the award has obtained a writ of execution (*exequatur* order) from the CJDC Chairman.

Registration with the CJDC and Procedures in Obtaining Exequatur Order

The foreign award must first be registered at the CJDC by the arbitrator or the arbitrator's proxy, attaching the following documents:

a. power of attorney from the arbitrator (if registered by the arbitrator's proxy);
b. certified true copy of the award, in accordance with the provisions on foreign document authentication, together with its official Indonesian translation;
c. certified true copy of the underlying agreement, in accordance with the provisions on foreign document authentication, together with its official Indonesian translation; and
d. statement from the Indonesian embassy in the country where the award was handed down, stating that the country is bound to Indonesia by a bilateral or multilateral treaty on the recognition and enforcement of foreign arbitral awards (i.e. the 1958 New York Convention).

After the award has been registered, the applicant must file an application to obtain a writ of execution (*exequatur* order) from the CJDC Chairman.

Once an exequatur order has been issued, the CJDC will summon the defendant and order them to comply with the arbitral award (*aanmaning* order). If, after the *aanmaning* order, the defendant fail to comply with the arbitral award, execution will be commenced over the defendant's assets by selling them through public auction or private sale.

Attempt to challenge the enforcement of foreign arbitration award

Theoretically, no further legal action can be taken by the parties against the arbitral award. In practice, however, there are a few precedents where enforcement of a foreign arbitral award was challenged on ground that they contravened public policy or order. In the absence of any detailed definition and guidelines on the interpretation of "public policy or order", unsuccessful parties to foreign arbitrations often seek to avoid award enforcement in Indonesia by presenting arguments that enforcement would be against public policy or order. There is no specific timeframe as to when such challenge may be submitted.

Institutional vs ad hoc Arbitration – an Indonesian perspective

The Indonesian Arbitration Law recognizes both "institutional" arbitration (for example, Indonesia's BANI) and "ad hoc" arbitration (i.e. without specifying any institution to administer the proceedings under its rules) as valid means to resolve disputes. As such, the parties are entitled to determine their preferred type of arbitration in their agreement.

The "institutional" approach appears to be dominant in agreements governed by Indonesian laws. However, the parties may also agree on a set of procedural rules to govern their arbitration proceedings under a self-administered arbitration (such as the SCMA) or an "ad hoc" arbitration to the extent that such rules do not contradict mandatory provisions under Indonesian Arbitration Law.

Enforcement of foreign arbitral awards rendered under the two approaches will follow the same procedures as set out in the Indonesian Arbitration Law. Please see discussion in the enforceability section above for the detailed explanation.

Status of SCMA Awards in Indonesia

An SCMA award is considered as a foreign arbitral award under the Indonesian Arbitration Law provided that such an SCMA award is issued outside of Indonesia territory. As such, an SCMA Award obtained shall be enforceable once it has obtained a writ of execution (*exequatur order*) from the CJDC Chairman.

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