

Indonesia's Supreme Court issues Regulation on Court-Ordered Mediation

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On 11 September, 2003, the Chief Justice of the Supreme Court of Indonesia, Bagir Manan, issued Supreme Court Regulation No. 02 of 2003 ("PerMA 02/03" or the "Regulation") concerning the Procedure for Mediation in the Courts. PerMA 02/03 requires judges to order parties in any civil suit submitted to a court of first instance to attempt to mediate their dispute before the first hearing can be held in the court. The language of the Regulation is very broad and would seem to apply to any court action, and not to contain any limitation to commercial cases only, as does the Arbitration Act (Law No. 30 of 1999).

PerMA 02/03 went into effect upon its promulgation and should be followed now by all courts of first instance. But no implementing regulations have as yet been issued, and thus a number of questions remain unanswered regarding the implementation. Courts are gradually beginning to comply, as a procedural step if not a wholehearted effort to resolve the disputes, and it has already become standard procedure, in many the district courts in Jakarta and other provinces. But PerMA 02/03 is not yet very widely known in the legal profession, particularly in outlying areas. Considerable education and publication will be necessary so that the parties will be aware of this service and will be able to insist it be applied prior to the commencement of hearings in court cases.

Unofficially the first year was considered a "pilot period" in which experts were asked to identify weaknesses and suggest clarifying language or provisions. This excellent idea is not often applied here, and gives the Regulation increased potential to ensure that its purpose - alleviation of both court congestion and unjust results - could be fulfilled. This note will outline the main provisions of PerMA 02/03 and also discuss some of the problems and ambiguities which it is hoped will be clarified or revised in the near future.

Appointment of Mediator

At the first hearing of any court action, the judges must adjourn the hearing to allow mediation to take place, and should clarify the procedures and costs, to enable the parties properly to benefit. The parties are given only one business day to agree upon a mediator, who can be chosen either from a list to be provided by

the court or may be any other person the parties both (or all) agree upon. If the parties cannot agree upon their mediator within one business day, then the presiding judge will designate a mediator from the court's list. The court's list will be comprised of "*judges and non-judges who have acquired a certificate as mediator*" (Article 6 (1)). None of the examining judges themselves may act as mediator.

The limitation of a single day to agree upon a mediator has proven to be a bit too short to be effective, with the result that such facility is not often able to be utilised. One day simply does not give the parties time to consider the qualifications required against those of the proposed mediators or to find out whether there is any conflict of interest. In many cases, the counsel will need to consult the client, seeing that at that early stage there may not be anyone available who has authority to agree upon the mediator. If a foreign-based company is one of the litigants, such counsel will usually need to take instructions from abroad. If the client is in the U.S. or Europe, the time difference will probably make it impossible to request and receive instructions in less than two or three days at the least. Thus it is hoped that this time limit will be reconsidered. Nor is it made clear whether the parties may extend this, and other time limits set out, by their mutual agreement as would be consistent with Indonesia's freedom of contract regime.

The Regulation gives no guidance as to how the courts are to compile their lists of approved mediators, nor what qualifications will be required. It states that a "certificate" is required for listed mediators, but there is no clarification as to what is intended by that. Indonesia has very few qualified or experienced mediators at this time. Efforts are commencing for the training of more lawyers and non-lawyers in mediation practice and principles, but there is no coordination of such effort as yet.

One aspect that certainly needs to be considered is whether currently active judge should be permitted to act as mediator, which the Regulation now not only allows but seems to encourage. Indonesia's recently promulgated Arbitration Act (Law No. 30/1999), mirroring the prior legislation, makes it very clear that judges, clerks of courts or similar may not act as arbitrator. The same standard might best be applied for mediators, at the very least those mediating under this court-ordered mediation, lest either the reality or public perception of transparency and impartiality become undermined. It should at least be made imperative that before a judge may be included on a list of approved mediators, he or she must properly and diligently study for and obtain qualification certification from a transparent

institution, whether domestic or foreign, which is not linked to the courts or to the Ministry of Justice. Thus far, most judges are simply appointing other judges from the same courts, regardless of whether they have any qualifications to act as mediator.

Nor does the Regulation specify any right of the parties to object to, or request recusal of, a mediator if they have reasonable grounds to believe that the mediator is not independent and impartial. Certainly if both parties were dissatisfied with a mediator the latter could be recused by mutual consent. But if one party is satisfied and the other not, based upon some perceived or actual lack of independence or impartiality, there ought to be some mechanism provided for evaluation and replacement.

Procedure

There is a 30-day period in which the mediation is to be held. The language would seem to imply that this time limitation applies only where the mediator is not taken from the court's approved list, but there is no corresponding time limit expressed where the mediator is on such list. However, subsequent language seems to impose a 22-day limit on meetings. Again, it should be made explicit that the parties will be free to extend this period in order not to have the mediation effort fail simply because it is taking too long. Too much restriction can hinder rather than help in Alternative Dispute Resolution, as the parties must be free to shape their own resolution mechanism.

PerMA 02/03 sets out the basic procedures very generally, allowing seven days for the parties to provide whatever documentation it will rely upon to the mediator, and thereafter calling for meetings among both parties and the mediator and also individual meetings between the mediator and each of the parties separately, but leaving the scheduling to the mediator. No detailed procedural rules are set out in the regulation, nor are there any prevailing rules in this jurisdiction. It is also not made clear whether the court will design the procedure or leave that to the parties or the mediator.

It would be helpful if the Regulation, or perhaps its elucidation, were to include a requirement that in the mediation process each party must be represented by at least one person who has full authority to bind that party to any settlement agreement. Once a settlement is reached, it should be documented then and there without the necessity of going back to consult "head office" first, lest the resolution

momentum be lost.

The mediation process is closed to the public, except to the extent that the parties may agree otherwise, and except for cases of “public disputes” which must be open. No other requirement of confidentiality is specified, and thus if the parties wish a higher standard of confidentiality they would be wise to agree upon it at the outset even before the mediator is engaged, if possible.

Settlement

If the mediation is successful and the dispute can be thus settled amicably, a settlement agreement is to be drawn up, by or with the assistance of the mediator, and signed by both parties. It is not explicit in the Regulation itself that a mediated settlement agreement executed before or endorsed by the court will be enforceable the same as a final and binding judgment or arbitral award, without the necessity of further court hearings to prove the case. Such enforceability is set out elsewhere in Indonesia’s mid-nineteenth century procedural laws, and the implication is that it will apply here, but it would be much clearer and more functional if it were to be restated in PerMA 02/03 or in its eventual implementing regulations.

Needless to say, even assuming a settlement agreement resulting from such mediation to be immediately executable in the Indonesian courts, PerMA 20/03 being effective only in Indonesia does not, and cannot, give any executorial powers to courts outside of this jurisdiction. This means that if there is a dispute between an Indonesian and a foreign party any agreement reached through court-ordered mediation will be able to be enforced against the Indonesian party here, but not necessarily against the foreign party in the jurisdiction of its domicile or elsewhere, absent similar laws or regulations there. This kind of court-ordered mediation, as well as affording a mediated settlement agreement executable status, is not yet common in Asia or most of the rest of the world, and the Chief Justice is to be congratulated for installing such a progressive innovation, regardless of the prejudicial effect the above-mentioned wrinkle might have on Indonesian parties.

If no settlement agreement can be reached within the time limit, then the parties may go ahead and adjudicate their dispute before the court and the judges will decide the issues, as in normal court cases previously. However, the Regulation makes it clear that the mediator cannot be asked to serve as a witness in the case

and anything told or given to the mediator will remain confidential and cannot be used in the court case. This is a protection which is essential if the parties are to be able to deal openly with the mediator.

Costs

The court will offer its courtrooms free of charge for the holding of mediation if the parties wish to hold it there, and if a judge acts as mediator there is no charge for his services. Since under the Regulation judges are allowed to mediate, it remains to be seen whether their position will be used to extract unreceipted compensation from the parties, a practice which is still far too common in Indonesia.

If the parties use a non-judge mediator and/or mediate outside of the court's premises they shall cover the costs themselves, according to their mutual agreement.

Effectivity

By its terms PerMA 02/03 went into effect on 11 September, 2003. However one of the shortcomings of the PerMA is that it did not contain any transitional provisions, similar to those contained in the 1999 Arbitration Act, indicating what is to happen with cases that had already been filed by that date, but where there had not as yet been any hearings. Unfortunately, as far as we are aware, the courts are continuing with these cases without requiring or even mentioning mediation. And, as usual, there are no sanctions provided if PerMA 02/03 is not followed. The Regulation does not go the extra step and invalidate a court decision if mediation has not been ordered first.

And an even more serious omission is that PerMA 02/03 does not deal at all with the practice of granting wholesale "conservatory attachments" which seems to have reached epidemic proportion in recent months, often being used as instruments of economic terrorism. It would be most helpful to the cause of justice were PerMA 02/03, or its eventual implementing regulations, to make it clear that there can be no such attachment ordered until the parties have attempted to settle their dispute amicably through ADR, unless an extremely persuasive showing can be made of the perishability of property in dispute, or that a potential defendant intends to remove or transfer its assets out of the jurisdiction of the Indonesian courts and a bond is posted by the plaintiff to cover the amount of the claim or

value of the property attached, as well as any losses suffered by the defendant as a result of such attachment.

Experience to Date:

Indonesia being a civil law jurisdiction, where there is no requirement to follow precedent, judgements are not published, and there is no mechanism to fully ascertain how the Regulation has been implemented. Thus we can only base our evaluation upon the results of a survey which was sent out to most litigators in and around Jakarta and discussions with some of these. Almost two years after promulgation, it seems that PerMA 02/03, it is not yet being fully complied with nation-wide. And for the most part, when it is complied with, the court-ordered mediation remains more as a procedural step before hearing than as a sincere means to achieve resolution of the dispute. Invariably the mediations have proved unsuccessful and parties are back in the normal litigation process.

Most of the mediators appointed are judges of the same court as that in which the case is brought, who are listed on that court's mediator list. Although often the parties are advised of their right to agree upon and appoint their own mediator, the time limitation almost always proves too short to allow any such agreement, so invariably the mediators have been judges. And we have not had any reports of such mediations proving successful as yet. Whether this is because the judge/mediators are not skilled at mediation or that neither they nor the parties tend to make a sincere effort is not possible to ascertain on a general basis. Individual lawyers interviewed did not believe that the courts were making a serious effort to reduce their caseloads by encouraging mediated settlement in this way.

Conclusion

Despite many unanswered questions, PerMA 02/03 is nonetheless a badly needed step in the right direction and all concerned are hoping that it shall begin to be widely and sincerely followed so that its operation may significantly reduce the courts' overloaded case loads and result in more cost and time-efficient, just and acceptable results for disputing parties in Indonesia.

And it must not be forgotten that the time limits and other requirements of the Regulation apply only to mediations ordered by the court on commencement of litigation. The regulation has no effect upon private mediation started by the parties on their own when no case has as yet been brought in court or arbitration.

The parties have complete freedom to structure their own kind of mediation as long as it is commenced before one party brings the action in court. And it is always preferable to settle things privately if possible.

There are at least two major reasons why Indonesia has not heretofore seen a significant growth in mediation. One is, of course, that not only judges but also most litigating lawyers do not wish to encourage such quick, simple and inexpensive form of resolution of disputes because it reduces the amount of their own fee or compensation which they would earn if the cases were to run the course of a full court litigation, including the customary two levels of appeal, as is normal. The other reason is that many parties still have the perception that if they suggest mediation the other side may take it as an admission of weakness in their position. They perceive that they may lose face if they suggest a dispute be resolved through mediation. Thus the Supreme Court has sought to do a great service in promulgating PerMA 01/03. Without the mandatory element nothing would be likely to change.

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