

Tactics to Delay Settlement of Dispute Will Eventually Backfire

Written by Todung Mulya Lubis



When Susilo Bambang Yudhoyono's administration took over the government, one of the items in its first-100-day agenda, as put forward by coordinating Minister for the Economy Aburizal Bakrie, was to settle the Karaha Bodas and Cemex cases. One of the Cabinet members told me privately that aside from these two cases, the Newmont case was also included in this first-100-day working agenda of the United Indonesia Cabinet. The first 100 days have long passed, but none of these cases have been settled. What is really going on here?

I'm afraid there is something wrong in the way the government views the cases involving Karaha Bodas, Cemex and Newmont. The government has shown no sense of urgency and, unfortunately, this absence of a sense of urgency is also found in our judicial and semi-judicial institutions.

Just take a look at what has happened to the case involving the sale of two Pertamina's supertankers, which the Business Competition Supervisory Commission (KPPU) has found to be in violation of Law No. 5/1999 on the ban on practices of monopoly and unhealthy business competition.

In this context, we fail to see the KPPU realize that there was really an urgent need to sell the two supertankers because if Pertamina had been a little late in selling these supertankers, Karaha Bodas would have seized them.

Indeed, the supremacy of the Law must be enforced. However, in business cases, a good

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understanding of business realities is a necessity as this will make the law actual and relevant. If you approach business cases only in the spirit of the law, you are bound to be misled because this will only complicate the settlement of these cases.

Ideally, we all should have an economic legal paradigm that is responsive not only to the supremacy called for the government to seek a win-win settlement. I'm convinced that all businessmen who are in pursuit of business opportunities will keep their doors wide open for a win-win business settlement.

The only thing that a matter here is that time is very important. People always say that "time is off the essence", which implies that once we are too late, it is highly likely that a win-win settlement will be out reach. I'm afraid the government has begun to lose this time.

Pertamina's defeat is also the government's. The world knows that. Pertamina has always been a government owned enterprise. Therefore, the government is indeed required to take swift action to settle this case. The arbitration ruling that decided that Karaha Bodas won the case is final and binding. No legal attempt can revoke this ruling even if Law No. 30/1999 on arbitration gives room for this.

In the context of international arbitration, it is very difficult for a state that loses a case to suddenly revoke the arbitration ruling even if this is done thorough a court of law. The only way to contest it is to fight in the arbitration proceedings, something that Pertamina, alas, failed to do.

My conclusion is that Pertamina's defeat was not attribute table to the company's weak legal position but, rather, because Pertamina had not gone out of its way to fight.

It was strange, indeed. Pertamina should have made the cancellation of a geothermal power plant caused by the regional economic crisis a justification that would strengthen its legal position. In addition, alleged practices of corruption, collusion and nepotism in this project should have been exposed as a very effective means of defense.

The negligence during this arbitration had to be paid for dearly with a defeat with a very devastating implication, particularly because Pertamina, as a result, cannot freely do business overseas. The fact that several of Pertamina's accounts in overseas banks have been blocked

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shows huge losses will be bigger taking into account the legal fees for the foreign attorneys hired by Pertamina. That is why there is no other option but to thoroughly settle this Karaha Bodas case.

Unfortunately, even today this case is still not settled.

It is very difficult to understand the policy of the government, which, reportedly, will probe into the graft and tax manipulation in Karaha Bodas. I am not saying that Karaha Bodas is corruption free and does not have any tax arrears. All this may be correct. The question is why didn't this probe start much earlier? If the probe into the graft and tax manipulation had been conducted prior to or during the arbitration process, the finding could have been used to show to the Arbitration court that Karaha Bodas what indeed a problem-embroiled company. Karaha Bodas could also have been held responsible for violating the Foreign Corrupt Practices Act.

Reportedly, Karaha Bodas has manipulated its taxes in huge amounts and if this amount is compared with the damages that Pertamina has to pay, the government's financial burden can surely be significantly alleviated. Here the government wishes to resort to a set-off.

I cannot imagine where this shallow idea has come from. Does the government not realize that Karaha Bodas and the arbitrators will see all this as something "post factum" in nature and very likely to be caused by Pertamina's defeat in the arbitration court?

With all due respect for the efforts that government has made, I must state again that the government will again fail in its attempt to bring Karaha Bodas to any settlement remains what we witness now. It is almost certain that Karaha Bodas will never respond to the government's efforts now will be pointless.

I have said earlier that time is of the essence. It is now time for the government to think in terms of practical business solutions. Rather than having to sustain bigger losses, the government has to resort to the only business solution left, one that gives compensation to Karaha Bodas to enter this country and get a bite of the business project cake here.

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The government's liabilities to Karaha Bodas can be reduced only by allowing a little concession to Karaha Bodas. The other fact is that the Karaha Bodas case is a very dear lesson for anybody wishing to face an arbitration process either at home or abroad.

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