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Moot Case Continues to Wind its Way Through Alberta Courts

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Cases Considered:

Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 2007 ABQB 616

This October 2007 decision by Mr. Justice Robert A. Graesser is one very small part of a long and complex tale that is all too well known in international commercial arbitration circles. The parties' dispute has been litigated extensively in several countries over the past nine years. With Mr. Justice Graesser's decision, it will continue to be litigated in this province even though the parties and their dispute have no connection to Alberta and a decision in Alberta would have no effect on the rights of the parties, would not create a useful precedent, and would not put an end to the adversarial relationship between the parties.

Karaha Bodas Company (KBC) is a Cayman Islands limited liability company owned by American power companies and other investors. Pertamina is an oil and gas company owned and controlled by the Republic of Indonesia. In 1994, the two parties entered into a joint venture agreement for a project to explore and develop certain geothermal energy sites in Indonesia. The Indonesian state electric utility, PLN, agreed to buy the electricity the sites would produce if they were feasible on a take-or-pay basis at a set price. As part of their joint venture, the parties agreed to settle any disputes between them by binding arbitration in Geneva, Switzerland, under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). After Indonesia was hit by the Asian Currency Crisis in 1997, it became clear that PLN did not need and could not pay the price contracted for the power from this or 27 other similar projects. Acting by Presidential decrees, the Indonesian government first postponed the KBC project, then reinstated it, and finally suspended it again in 1998. KBC initiated arbitration proceedings in Switzerland.

The arbitral panel issued their final decision in December 2000. Their award found that Pertamina and PLN had breached their agreements with KBC and the two state companies were condemned to pay US$111.1 million for lost expenditures and US$150 million for loss of profits — more than US$261 million in total. The award added interest at 4% per annum until those sums were paid and assessed the costs of the arbitration against the Indonesian parties as well. KBC sought to confirm and enforce the award against Pertamina in the United States, Hong Kong, Singapore, and Alberta pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Under the New York Convention,

courts being asked to enforce arbitration awards have only a limited authority to review those awards. Master Breitkreuz of the Court of Queen's Bench of Alberta granted KBC summary judgment in December 2004, allowing the award to be registered as a judgment in Alberta against Pertamina and PLN. Master Breitkreuz also awarded approximately $112,000 in costs against them.

Although Pertamina had filed an appeal from the decision of Master Brietkreuz early in 2005, that appeal lay dormant until 2006. However, by late 2006, Pertamina had exhausted all avenues of appeal in the United States and the award was paid in full by the application of monies which had been garnisheed by KBC in United States. Payment in full — however involuntarily — did not end matters. In September 2006, Pertamina commenced action in the Grand Court of the Cayman Islands where KBC was incorporated, alleging fraud in the procuring of the award based on newly-discovered documents questioning the viability of the project. Fraud had not been alleged before Master Breitkreuz but it was an allegation on which Pertamina based its appeal to Mr. Justice Graesser. Pertamina claimed that the award should not be recognized in Alberta because enforcement of an award obtained by fraud would be contrary to one of the seven enumerated defenses to enforcement of foreign arbitral awards in Article V of the New York Convention, namely, that "recognition or enforcement of the award would be contrary to the public policy of the country where enforcement is sought" (Article V.2.(b)). Despite having paid the full amount of the award, Pertamina wanted to proceed with the appeal of Master Breitkreuz's order. They posted approximately $70,000 as security for costs for the appeal. In January 2007, the Chief Justice of the Court of Queen's Bench of Alberta, Allan Wachowich, directed that the issue of whether Pertamina's appeal was moot should be heard first, before the merits of the case were scheduled for hearing. The October 2007 decision by Mr. Justice Graesser, therefore, deals only with the issue of mootness.

Was Pertamina's appeal moot? The proceedings before the Swiss arbitration tribunal are final; the tribunal refused to set aside or vary their award. Proceedings in Switzerland to set aside or vary the award in the courts are final as the Swiss courts refused to intervene. The proceedings in Indonesia are also at an end, with the Indonesian courts refusing to set aside or vary the award. Proceedings in the United States to set aside or vary the arbitration award are final, as are proceedings to enforce the award. The debt declared owing by the arbitration award has been collected in full. Nothing was ever collected in Alberta. All that happened here was this case concerning recognition of the award, payment of costs in relation to KBC's summary judgment application, and matters surrounding this appeal. Graesser J. held that, with the exception of the issue of costs, there were no live issues, legal or practical, which might be affected by the appeal. It was moot. Graesser J., however, went on to consider whether the Court should allow the appeal to proceed, notwithstanding its mootness, and decided the appeal should proceed in Alberta's courts. Why? Because the effect of a successful appeal would be to reverse the orders for costs made in the courts below; costs will follow the cause. Not all costs orders will, of course, justify hearing a moot appeal, but Mr. Justice Graesser held that the amount of these costs was "substantial." More than $110,000 certainly is substantial for most of us, but isn't it pretty small potatoes for Pertamina compared to the US$261 million award that it paid? And

isn’t it a pretty small amount compared to how much hearing the appeal(s) will cost the Alberta courts and taxpayers?