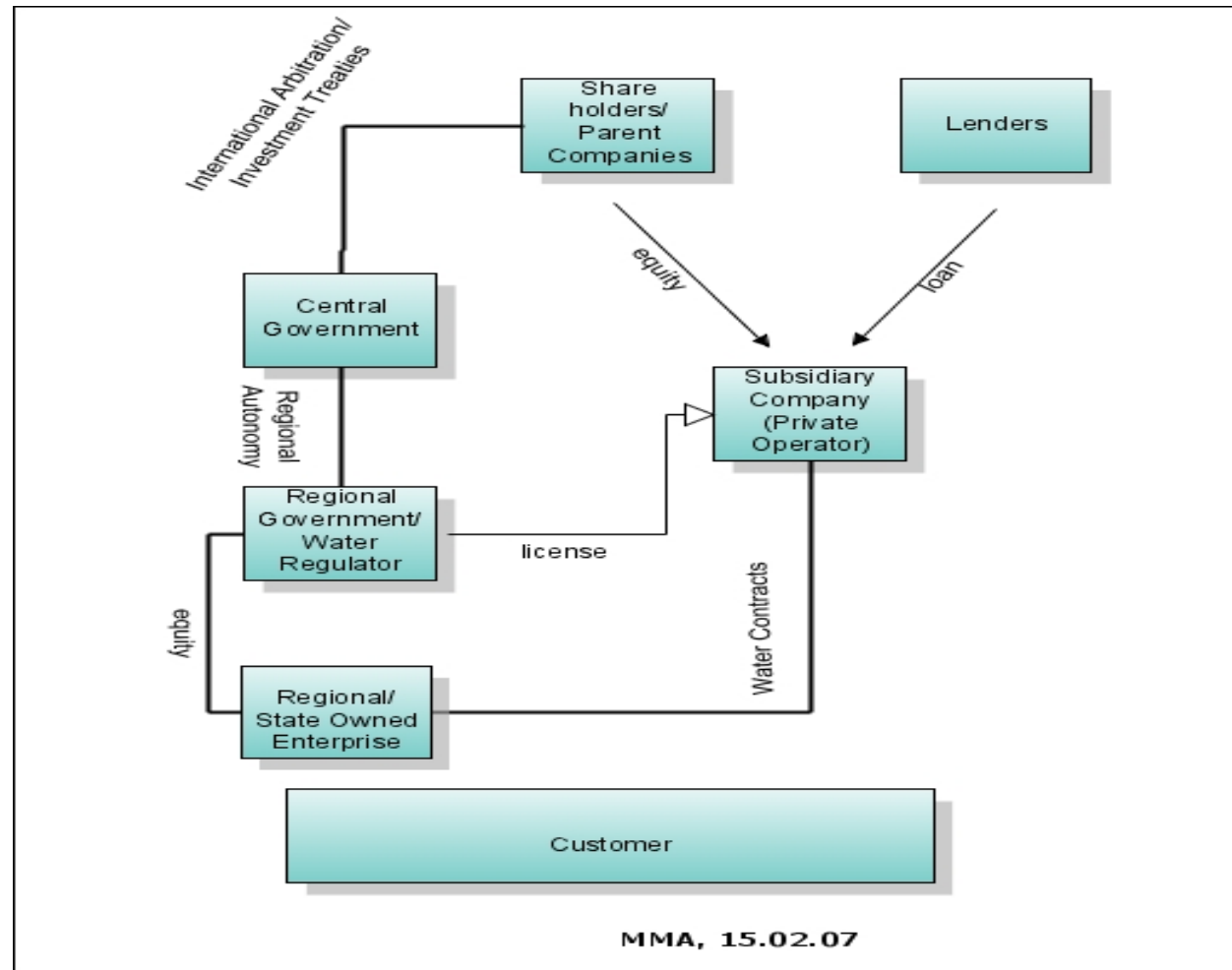


Safeguarding Water Contracts

In Indonesia

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Possible Model of Privatisation involving subsidiary company

Where to safeguard

1. Transnational
2. National
3. Contractual

Transnational

Problems With MNCs

1. “Fluid” Citizenship (agility in arbitration)
2. Single economic entity, but legally distinct
3. Profit oriented (not service oriented)
4. Not (legally) accountable to stakeholders
5. Subsidiary company can be sued for bankruptcy, parent company remained unaffected
6. Not a subject of International Law (but States are)

“Right to water” in a privatised scheme

Attributability Question:

How can the failure to ensure the right to water be attributable to the State, if its implementation is carried out by MNC?

National

Constitutional

Water as:

1. A human Right → Never Explicitly mentioned in the Constitution (but nevertheless, supported by a Constitutional Court's interpretation)
2. Economic Good → Explicitly mentioned, regulated as a “natural resources”. Are to be controlled by the state.

Now the problem:

Since water is both an economical good and human rights under the Constitution, how can these provisions be safely transposed into Implementing Regulations and Contracts?

One idea is to “Constitutionalize” contract. But that would require an expansion of Constitutional Court’s authority so that it can review contracts and licenses made by government. This isn’t likely to occur within 15 years.

Contractual

The



is in the small print

The Devil is in the Small Print

1. Can share ownership be transferred?
2. Can lenders sue for bankruptcy?
3. How effective is the choice of law and forum clause?
4. Pricing? Price readjustment?
5. Non revenue water?
6. Water quality?
7. Termination and Modification?

Thank you