

# ARBITRATION IN ASIA

SECOND EDITION

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**JURIS PART O**

**Indonesia**

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## **PART O**

### **INDONESIA**

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#### **[1] INTRODUCTION**

The world's largest archipelago, Indonesia, consists of over 17,000 islands of which about 6,000 are inhabited, the largest being Sumatra, Java, Kalimantan (Borneo), Sulawesi (Celebes) and Papua (western Papua/New Guinea). The archipelago encompasses an area as wide as the United States, with a total surface area equal to four times the territory of France. The population of approximately 250 million at time of writing makes her the world's fourth most populous country; and the population is expected to surpass that of the United States not long into the 21st century.

In the two decades leading up to the onset of Asia's economic and currency crisis of the late 1990s, Indonesia had become one of the most rapidly developing countries in the world. Rich in natural resources, including manpower, oil, gold and coal, the archipelago also enjoys a climate particularly conducive to staple and cash crops such as palm oil, rice, sugar, tobacco, coffee, timber and many others. In the 1970's and 1980's, revenues from the booming oil industry were sufficient to carry the costs of government and growing infrastructure. However, with the sharp decrease in oil revenues, Indonesia began to look to other sectors and beyond her own borders for funding in order to maintain her rate of development and allow import of new technology and improvement of management skills. New tax laws were enacted, effective in 1984 and have been revised and amended several times, with the intention of increasing the tax base and giving some certainty to what was previously a rather arbitrary system of tax collection. At the same time, the government commenced an ongoing program aimed at encouraging increased foreign investment in the private sector, and has since continued in its efforts to improve the investment and trade climate and encourage economic growth generally. Today there are relatively few restrictions on foreign investment, with foreign interests permitted to own up to 100% of local companies engaged in most activities, at least for the first 15 years, and up to 95% in almost all activities indefinitely.

Foreign participation in so many Indonesian businesses, coupled with recognition of inefficiencies in the judicial process, has increased the awareness and interest in alternative methods of dispute resolution,

particularly those relating to cross-border commercial relationships, yielding an elevated recognition of the need for arbitration.

Indonesia's legal system is civil-law based, as Dutch laws and practice were adopted by the new Indonesian nation at the time of its independence in 1945. A number of laws have since been revised, however, with others in process of revision and, over the past few years, new laws are being drafted all the time to fit in with ever-changing global economic trends. Although many of these new laws include principles from common law jurisdictions such as the United States and Australia, the basis of legal practice remains with civil law.

In contrast to common law, under civil law there is no necessity to follow precedent, and each case is decided anew based upon the presiding court's interpretation of the law and determination of the facts. The body of case law has little legal effect and few cases are published. Only decisions of the Supreme Court (*Mahkamah Agung*) which that Court considers of particular import are published and become jurisprudence which lower courts will be expected to respect. Since enforcement of arbitral awards is a matter for the jurisdiction of the lower District Courts, (*Pengadilan Negeri*), very few cases relating to arbitration will be a matter of public record.

Indonesia is not, on the whole, a litigious culture. Commercial litigation is relatively rare, compared to such jurisdictions as India and the United States, for example, and even Singapore. Aside from the cultural rationale, there are more practical reasons for hesitancy to litigate, which are based generally upon the uncertainty and unpredictability of court judgments and the inordinate amount of time it can take to reach a final and binding decision through the judicial system. As business transactions become more and more sophisticated and complex, we are finding a marked increase in contractual documentation calling for arbitration rather than litigation in Indonesia. It should also be noted that since 2003 Court-mandated mediation has been required, so that the courts must order the parties to any commercial case to attempt to mediate their dispute, within 40 days, before the case may be heard by the court. Despite a slow start, such mediation is proving more and more successful as time goes by.

## **[2] LEGISLATION**

### **[2.1] Arbitration law**

Although arbitration has been recognised, and applied, as a formal means of dispute resolution in Indonesia since the mid-19th Century,

until late 1999 there was no specific law governing arbitration, and for over 150 years all arbitrations were regulated under a handful of provisions of the Dutch Code of Civil Procedure, the *Reglement op de Rechtsvordering* (generally known as the ‘RV’),<sup>1</sup> while the substantive basis for the ability of the parties to agree to arbitrate was to be found in the general freedom of contract provisions of the Indonesian Civil Code,<sup>2</sup> also taken from the Dutch. After years in the drafting, on 12 August, 1999 Indonesia finally promulgated its new comprehensive Law on Arbitration and Alternative Dispute Resolution, Law No. 30 of 1999 (the ‘Arbitration Law’),<sup>3</sup> superseding those articles of the RV covering arbitration.

Although many of the provisions of the old RV are reflected in the Arbitration Law, there are also a number of innovations, some which are found in the laws of few, if any, other jurisdictions. One of these is the incorporation of provisions encouraging alternative dispute resolution (‘ADR’) rather than, or at least prior to, commencement of arbitral hearings.<sup>4</sup> If amicable/mediated settlement can be achieved such is to be set out in writing, becomes binding upon the parties, and, if endorsed by the court, can be implemented as though a final and binding court judgment or arbitral award.<sup>5</sup>

Another unusual provision allows the parties to apply to an arbitral institution for a binding opinion as to a point of law or the interpretation of a provision in their underlying agreement, even where no dispute has arisen.<sup>6</sup> This facility has long been offered by Indonesia’s primary local arbitral institution, *Badan Arbitrase Nasional Indonesia* (‘BANI’), but the Arbitration Law extends the availability of such service to any arbitral institution, domestic or foreign. In practice, unless a foreign arbitral institution already provides a similar service, it is questionable whether this provision can be operative beyond Indonesian borders.

Both Arbitration and ADR are restricted to commercial disputes and only to the extent that the rights concerned fall within the full legal authority of the parties to determine.<sup>7</sup>

The Arbitration Law allows the arbitrators to issue both provisional and interlocutory awards, including security attachments, deposit of

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<sup>1</sup> State Gazette No. 52 of 1847, junct. No. 63 of 1849. Arbitration was covered in articles 615 through 651 of Title I of the Third Book thereof, which have been repealed and replaced by the new Arbitration Law.

<sup>2</sup> Article 1338, Indonesian Civil Code.

<sup>3</sup> Unofficial translation attached as Appendix hereto.

<sup>4</sup> Article 6.

<sup>5</sup> Article 45, Arbitration Law.

<sup>6</sup> Articles 52 and 53, and Article 1 (8).

<sup>7</sup> Article 5, Arbitration Law.

goods with third parties and sale of perishable goods.<sup>8</sup> No such power could be exercised by arbitrators previously. No sanctions are set out in the Arbitration Law for failure to comply with any such order, although the rules of BANI do allow the arbitrators to impose sanctions on parties that fail to comply with their rulings or otherwise impede the arbitral process.<sup>9</sup> However it is unlikely that the courts would enforce any interlocutory orders at all, as courts will only enforce final and binding awards, or court judgments. Thus it remains to be seen how effective this provision shall prove in practice.

The Arbitration Law allows parties mutually to designate in their agreement to arbitrate any rules they may agree upon to govern the procedure, provided such rules do not conflict with the provisions of the Arbitration Law.<sup>10</sup> If no rules are designated, the procedural provisions of the Arbitration Law itself must be followed.

Both the Arbitration Law and the implementing regulation for enforcement under the New York Convention, Supreme Court Regulation No. 1 of 1990, the provisions of which have for the most part been incorporated into the Arbitration Law, make it clear that all arbitrations with their seat in Indonesia are considered ‘domestic’, and only those held outside of this archipelago are characterized as ‘international’ arbitrations, regardless of the nationality of the parties, location of the subject of the dispute, governing law, etc. Thus, there need be only the one Arbitration Law, which applies to all arbitrations held in Indonesia, and to enforcement in Indonesia of any international awards as well.

Parties are free to choose any administering institution they may wish to administer the arbitration, and where an institution is so designated, their rules will prevail, except as otherwise agreed by the parties.<sup>11</sup> But the Arbitration Law also provides basic procedural rules which will apply if the parties have not designated any others.

The Arbitration Law is not based upon the UNCITRAL Model Law and to date of writing, there has been no indicated intention to amend it in order to adopt any of the Model Law provisions with which it differs, although the idea to amend the law is discussed from time to time. The differences include, aside from the fact that all domestically held arbitrations are domestic, as mentioned above, among others:

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<sup>8</sup> Article 32, Arbitration Law.

<sup>9</sup> BANI Rule 19 (6).

<sup>10</sup> Articles 31, Arbitration Law.

<sup>11</sup> Article 34, Arbitration Law.

- The Arbitration Law does not specifically require a court to refer to arbitration a dispute brought before it where there is an agreement to arbitrate. It only states that the courts do not have jurisdiction to hear such case.
- Nor does the Law specify that the arbitrators are competent to rule on their own jurisdiction (*kompetenz-kompetenz*), although this should be implicit.
- The Arbitration Law sets out certain requirements as to who may act as arbitrator, although none of these relate to nationality or residence but primarily to age and experience, also barring sitting judges or court personnel from acting as arbitrator.
- Language: unless the parties otherwise agree, the language will be Indonesian, regardless of the language of the underlying documents. (On one or two occasions BANI insisted that all arbitrations are held in Indonesian, even where the parties have designated a different language.)
- Hearings: The Arbitration Law states that the case is decided on documents unless the parties or the arbitrators wish to have hearings, whereas the Model Law requires hearings unless the parties agree otherwise. In practice, however, virtually all arbitrations do include hearings.
- Incorporation by reference is not recognised in Indonesia unless it can be shown that the party contesting actually read and agreed to the arbitration clause in the document sought to be incorporated.
- Awards must be reasoned.
- The parties may request only typographical errors and similar to be corrected, and have only fourteen days to so request.
- The grounds for annulment of Indonesian awards are far more limited than those set out in the Model Law, and include primarily fraud, forgery or concealed material documents.

Several of these points will be explored later in this Chapter.

## **[2.2] Application**

As mentioned above, arbitration has been favored as a preferable alternative to litigation for many years, and its popularity seems to be increasing considerably in recent years, as the judiciary, the legal

community and the public become more educated about it. But certain recent arbitrations over failed infrastructure projects in the wake of the economic crisis of the late 1990's, as well as a few investor-state cases following the later such crisis, of 2008, have had a considerable dampening effect upon arbitration, which has now lost the trust of the government and state-owned companies, with the government considering terminating most, if not all, of its Bilateral Investment Treaties.

Indonesia being a civil law jurisdiction, there is no necessity even for courts, let alone arbitral tribunals, to follow precedent, and each case is decided anew based upon the presiding court's interpretation of the law and determination of the facts at the time. The body of case law has little legal effect and very few court cases are published. Arbitral awards, of course, are not published and even when registered in the court for enforcement purposes do not become public record, beyond only the registration data. International awards that need to be enforced are registered in a single court, and thus some data on these can be obtained from that court's registry. However, there is no central registry for enforcement of domestic awards, as orders for enforcement and for execution are within the jurisdiction of the District Court that has jurisdiction over the party against which the order is sought. As there are almost 300 Judicial Districts in Indonesia, five within the city limits of Jakarta alone, there is no compilation of any kind of meaningful data on domestic arbitrations. The local general commercial arbitration body, Badan Arbitrase Nasional Indonesia (BANI) does keep data on the arbitrations which it administers, but aside from those and any regional specific statistics which are kept by the ICC for arbitrations in Indonesia which it administers, and those kept, and available online, by ICSID with respect to treaty arbitrations which it administers, there are no statistics on other arbitrations held in Indonesia nor, indeed, those anywhere involving Indonesian parties.

### **[2.3] Arbitrability**

Following the prior legal regime, the Arbitration Law restricts the scope of arbitration to commercial disputes and only to the extent that the rights concerned fall within the full legal authority of the parties to determine.<sup>12</sup> Arbitration is not available in cases of disputes for which no amicable settlement would be permissible, or where state intervention is required.

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<sup>12</sup> Article 5(1), Arbitration Law.

Previously, Article 616 RV specifically enumerated certain disputes which could not be arbitrated. These included any agreement pertaining to gifts and bequests for maintenance, lodging or clothing, those pertaining to divorce, judicial separation or dissolution of marital community property and the legal status of persons. It is assumed that, if contested in court, although not specified these restrictions will still be deemed applicable under the new Arbitration Law. Likewise, as clearly bankruptcy, patent and trademark rights require the intervention of the state, these also may not be determined through arbitration. Recent legislation has given exclusive jurisdiction over bankruptcy and intellectual property disputes to new Commercial Courts which have been set up for the purpose, thereby further strengthening the policy that the same cannot be determined by an arbitral tribunal. Similarly a specific body has been set up to enforce the provisions of the recently promulgated anti-monopoly law, and thus it is doubtful that an arbitral tribunal could have such jurisdiction.

Other matters that cannot be affected by an arbitral tribunal would include transfer of title to land, seagoing vessels or shares in an Indonesian company. A tribunal could order a party to make such a transfer but it is not determined whether a court would enforce such an order and to our knowledge this has not as yet been tested. In the event a situation would occur in which a tribunal were inclined to order such a transfer, it would be wise to award damages in the alternative if such order is not voluntarily complied with. Awards for damages can be enforced by the courts.

#### **[2.4] Arbitration organisations**

As mentioned above, the Arbitration Law makes it clear that the parties may opt to hold their arbitration utilizing any rules or before any administering institution they may mutually agree upon<sup>13</sup>. Some adequate procedural rules are provided in the Law itself, which will govern if parties do not designate others, and these would be supplemented where necessary by the arbitral tribunal. The Arbitration Law also recognises the parties' choice of any arbitral institution to administer the arbitration and provides that if such an institution is designated, the rules of such institution shall govern the procedure.<sup>14</sup> Thus where parties have simply agreed to arbitrate in Indonesia, without designating either an

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<sup>13</sup> Article 34, Arbitration Law.

<sup>14</sup> Article 31.(2), Arbitration Law.

administering institution or rules to govern, the tribunal will be required to follow the procedural rules set out in Chapter IV (Arts. 27 through 51) of the Arbitration Law.

Locally, the most commonly used arbitral body is BANI, which maintains a panel of local and international arbitrators and utilizes relatively modern rules of procedure, which are available in both Indonesian and English. BANI's Chair acts as appointing authority under its own rules which, when chosen, supersede the designation of the court as provided in the Arbitration Law. BANI will also act as appointing authority if so designated by the parties even if BANI is not to administer the arbitration. But parties designating BANI as administrator or appointing authority must be aware that BANI has been known to reject the choice of arbitrator made by parties, even when such arbitrator is listed on its own panel. Thus it is wise to make it very clear in one's agreement to arbitrate that the parties have unimpaired right to appoint their own arbitrator, subject only to conflict of interest or severe lack of qualifications. BANI also maintains hearing rooms, provides basic secretarial and other administrative services, including registering BANI awards with the court. BANI's fees, like those of the ICC, are based upon the quantum of the claim, but prospective arbitrators should be aware that under current policy, only less than half of the designated arbitrators' fee is distributed to the arbitrators themselves. It should be noted that BANI's long time Chair recently passed away and has been replaced by another long- term officer and experienced arbitrator. The arbitration community is optimistic that the new Chair is more likely to modernize BANI's policies to bring them more into line with international practice.

BANI neither trains nor certifies arbitrators. Arbitration training is, however, offered by the Chartered Institute of Arbitrators ('CI Arb'), Indonesia Chapter in conjunction with KarimSyah Law Firm, and scholarships are available to outstanding law students, members of the judiciary and Ministry of Justice officials. Successful students can be certified through the normal CI Arb system, assisted by the Indonesia Chapter.

Another recently established institution administers arbitrations relating to capital market disputes. The Capital Market Arbitration Board (BAPMI) was set up in 2002 by the Indonesian Capital Market Supervisory Agency and other Indonesian capital market organizations/ associations and maintains its own panel which currently includes seventeen registrants. BAPMI has its own rules, and additional rules for the conduct of arbitrators. Qualifications for arbitrators generally follow

those in the Arbitration Law (see below Chap. 4.1) with the addition that, at least to date, BAPMI arbitrators, in principle, must be Indonesian citizens, whereas there is no such requirement under the Arbitration Law nor BANI's rules.

The National Shariah Arbitration Board (Badan Arbitrase Syariah Nasional, or "Basyarnas"), was established by the Indonesian Ulema Council in 1993 (originally under the name of Badan Arbitrase Muamalat Indonesia), to resolve disputes arising out of shariah transactions or transactions based on Islamic principles. It has its own rules and panel of arbitrators, from which the Chair is appointed by Basyarnas itself. So far few cases have been referred to Basyarnas, but the number is expected to grow with the increasing popularity of Islamic finance in Indonesia and vicinity.

In addition, new industry-specific arbitration boards have been established, such as BAPMI for capital market, BAKTI for future commodity, and BAM HKI for intellectual property rights.

There are also some industry-specific groups that administer mediation or other forms of ADR, including The National Mediation Center (PMN) and the Indonesian Insurance Mediation Body (BMAI)

Indonesia is seeing the establishment of a number of other industry-specific or special interest arbitration institutions, but there are no other general commercial administration bodies. *Ad hoc* arbitrations, using UNCITRAL or other rules are common, as are ICC administered arbitrations, and there may be as many Indonesian-related arbitrations held in Singapore as there are in Indonesia, in particular those involving foreign parties. Indonesia has been involved in a few ICSID arbitrations of late, but none have been seated in Indonesia itself, nor have hearings in ICSID cases been held here, as yet.

As mentioned above, the Arbitration Law allows parties mutually to designate in their agreement to arbitrate the rules which shall govern the procedure, provided such rules do not conflict with the provisions of the Arbitration Law. If no rules are designated, the procedural provisions of the Arbitration Law itself must be followed.

In addition, also as mentioned earlier, the Arbitration Law allows the parties to apply to an arbitral institution for a binding opinion as to a point of law or the interpretation of a provision in their underlying contract, even where no dispute has arisen.<sup>15</sup> This facility has long been offered by BANI, and more recently is offered by BAPMI, but the Arbitration Law extends the availability of such service to any arbitral

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<sup>15</sup> Articles 52 & 53, Arbitration Law.

institution, domestic or foreign. In practice, unless a foreign arbitral institution already provides a similar service, it is questionable whether this provision can be operative beyond Indonesian borders

### **[2.5] Requirements for arbitration commissions**

The Arbitration Law allows parties to submit their dispute to any domestic or international arbitral institution they may agree upon or to mutually designate any procedural rules to govern the conduct of the arbitration. However, the Arbitration Law itself also provides basic rules to govern the procedure, to be applied where the parties have not mutually designated other procedural rules, or institutional administration, in their agreement to arbitrate. Incorporation into the Law of such procedural rules is intended to avoid the delays of a deadlock situation sometimes previously encountered where parties had not designated, and could not subsequently agree upon, the procedural rules to be applied.

### **[2.6] Foreign-related arbitration commissions**

There are no foreign-based arbitral institutions in Indonesia, other than the national committee of the ICC and the Indonesia Chapter of the Chartered Institute of Arbitrators. Neither administers arbitrations.

## **[3] ARBITRATION AGREEMENT**

### **[3.1] Requirements**

As in virtually any jurisdiction, the availability of the arbitral process for resolution of disputes is based upon consent of the parties. Courts, as instruments of the government, are vested with the jurisdiction to resolve disputes arising in the territory over which that government has sovereignty. But in commercial matters, because the Civil Code recognises that a commercial contract has the force of law<sup>16</sup> between the parties who have formed and agreed to such contract, the parties have the freedom to agree that disputes under their contract be resolved through arbitration, thereby opting out of the court's jurisdiction for such purpose. But only where the parties both, or all, agree will an arbitral tribunal have jurisdiction to resolve the dispute.

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<sup>16</sup>Article 1338, Civil Code. See also elements of valid contract, outlined below.

Articles 3 and 11 of the Arbitration Law makes it clear that where the parties have agreed to arbitrate, the court does not have, and may not take, jurisdiction.

*'Article 3*

*'The District Court shall have no jurisdiction to try disputes between parties bound by an arbitration agreement.*

.....

*'Article 11*

*'(1) The existence of a written arbitration agreement shall eliminate the right of the parties to seek resolution of the dispute or difference of opinion contained in the agreement through the District Court.*

*'(2) The District Court shall refuse and not interfere in settlement of any dispute which has been determined by arbitration except in particular cases determined in this Act.'*<sup>17</sup>

Article 1 (3) of the Arbitration Law defines an agreement to arbitrate as follows:

*'(3) Arbitration agreement shall mean a written agreement in the form of an arbitration clause entered into by the parties before a dispute arises, or a separate written arbitration agreement made by the parties after a dispute arises.'*

### **[3.2] The contract**

Let us now consider what constitutes a valid contractual agreement under Indonesian law. Contracts are covered in Book III (Obligations) of the Indonesian Civil Code.<sup>18</sup> The relevant provisions are summarised below:<sup>19</sup>

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<sup>17</sup>Translations from the Arbitration Law are prepared by KarimSyah Law Firm. This translation has been proposed by BANI to the Ministry of Justice to be made 'official', but at time of writing there is still no 'official' translation.

<sup>18</sup> S. 1847/No. 23, originally the Dutch Civil Code and adopted by Indonesia upon its Independence in 1945.

<sup>19</sup> The official text is in Dutch and has been translated into a second 'official' text in Indonesian. There is no official translation into English and thus all translations into English included herein are unofficial and prepared by KarimSyah Law Firm, unless otherwise noted.

*'To those who have concluded contracts, the contracts shall apply as acts.'*<sup>20</sup>

A contract is legally concluded when it fulfills the required conditions mentioned in Article 1320 of the Civil Code. Those conditions are:

- a. The parties must each have the legal capacity to conclude a contract. All persons are deemed to have such legal capacity except (i) minors (under 21 years old, unless married)<sup>21</sup> or (ii) persons under official custody.<sup>22</sup>
- b. There must be a meeting of minds, by free consent, without any coercion, error or deceit.
- c. The subject matter must be clearly defined. If necessary the quality and quantity thereof should be firmly stated. The obligations of each of the parties must be clear.
- d. The contract must be for a permissible legal purpose; i.e. no obligation or performance may be contrary to the law, public order or public morality.

If either element 'a' or 'b', above is missing, the contract is voidable and annulment of the contract can be demanded from a judge. In cases of ambiguity about the subject matter or illegal cause, the contract is null and void *ab initio*. In the latter cases the judge shall, *ex officio*, declare the contract null and void. An action for annulment should be brought within five years.<sup>23</sup>

A contract is said to exist the moment there is an agreement between the two parties, whether or not the same is in writing.

A contract which fulfills the requirements mentioned above becomes legally binding<sup>24</sup> and cannot be terminated unilaterally.<sup>25</sup> Some agreements cannot be terminated even with the consent of both parties, e.g. ante-nuptial settlements.

Every contract must be performed in good faith.<sup>26</sup> This requirement has been interpreted to imply that a contract must be fair and equitable,

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<sup>20</sup> Article 1338 paragraph 1 Civil Code.

<sup>21</sup> Article 330 Civil Code.

<sup>22</sup> Article 433 Civil Code.

<sup>23</sup> Article 1454, Civil Code.

<sup>24</sup> Article 1338 Civil Code.

<sup>25</sup> Articles 149 and 1266 Civil Code.

<sup>26</sup> Article 1338 Civil Code.

although the same is not specifically stated in the law. But good faith is considered one of the basic pillars of Indonesian law.

The new Arbitration Law reflects these basic provisions of the Civil Code. Article 7 of the Arbitration Law provides:

*'The parties may agree that a dispute which arises, or which may arise, between them shall be resolved by arbitration.'*

Although the general requirements for a valid contract do not necessarily require that a contract or contractual provision be rendered in writing, the Arbitration Law specifically requires that the agreement to arbitrate be 'in writing' and signed by all parties to the dispute.<sup>27</sup>

Both the Arbitration Law, and the Rules of BANI, recognise electronic communications as 'writings.' The Arbitration Law provides that if the agreement to arbitrate is contained in an exchange of correspondence (including telefax or e-mail), a record of receipt of such correspondence is also required to evidence such agreement.<sup>28</sup>

### **[3.3] Type of arbitration agreements**

#### *[3.3.1] Contract clause*

The most common type of agreement to arbitrate will be embodied in a clause in the underlying commercial contract or agreement between or among the parties. It is at the negotiating stage for the contract that the parties are most likely to be able to agree upon terms and thus if a party does wish to have possible disputes resolved by arbitration it is best to provide for it at the outset. Once a dispute arises it is often difficult for the parties to agree upon anything at all.

There are no specific requirements for an agreement to arbitrate set out as a clause in the underlying contract other than that the contract, or at least the arbitration clause, be in writing, as mentioned above. But there are a few matters that it is wise to include if desired to expedite the process and ensure it will be conducted in a reasonable and smooth manner comprehensible to the parties.

As the Arbitration Law requires all arbitrations to be held in the Indonesian language unless the parties have agreed otherwise, the

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<sup>27</sup> Article 1 (3), Arbitration Law.

<sup>28</sup> Article 4(3), Arbitration Law.

language should be specified if a different language is desired. Note, however, that currently BANI often insists that their arbitrations be conducted in Indonesian even where the parties have designated a different language. If parties do wish to hold their arbitration before BANI but in any other language, very strong language to that effect in the arbitration clause might serve to overcome this policy of BANI, but such cannot be guaranteed.

The place of arbitration should also be set out, as well as the institution to administer or rules to govern if *ad hoc*, the number of arbitrators and means of appointing them and the appointing authority to make such appointment if the parties fail to do so. If the time limits set out in the Arbitration Law, as mentioned below, seem too short or too long, these should be waived and different time limits set. As the Arbitration Law requires only that hearings shall be closed to the public. The parties may also wish to require a higher standard of confidentiality in the arbitration clause.

*[3.3.2] Submission agreement*

Although an arbitration agreement, or clause in the underlying agreement, entered into prior to the time a dispute arises, need meet only the requirements of the Civil Code, as set out above, in the event of an agreement to arbitrate that that is entered into subsequent to the execution of their agreement, i.e. once a dispute has already arisen, the Arbitration Law imposes further conditions. Article 9 of the Arbitration Law provides;

- ‘(1) In the event the parties choose resolution of the dispute by arbitration after a dispute has arisen, their designation of arbitration as the means of resolution of such dispute must be given in a written agreement signed by the parties.*
- ‘(2) In the event the parties are unable to sign the written agreement as contemplated in paragraph (1), such written agreement must be drawn by a Notary in the form of a notarial deed.*
- ‘(3) The written agreement contemplated in paragraph (1) must contain:*
  - a. The subject matter of the dispute;*
  - b. The full names and addresses of residence of the parties;*
  - c. The full name and place of residence of the arbitrator or arbitrators;*

- d. *The place the arbitrator or arbitration panel will make their decision;*
- e. *The full name of the secretary;*
- f. *The period in which the dispute shall be resolved;*
- g. *A statement of willingness by the arbitrator(s); and*
- h. *A statement of willingness of the disputing parties that they will bear all costs necessary for the resolution of the dispute through arbitration*

*'(4) A written agreement not containing the matters specified in paragraph (3) will be null and void.'*

#### *[3.3.3] Incorporation by reference*

Incorporation of an arbitration clause in a third-party agreement by reference in the underlying agreement between the parties to the dispute will not normally be sufficient to constitute a valid agreement to arbitrate. As a general rule, it would have to be shown that the contesting party had read the arbitration clause and consented in writing to its applicability. This position is based upon the writing requirement of Article 4 of the Arbitration Law coupled with Articles 1320 and 1338 of the Civil Code, as outlined above.

#### *[3.3.4] Parties to the arbitration agreement*

Only an individual or legal entity may enter into contracts and sue or be sued in Indonesia. The Arbitration Law defines 'parties' as '*legal entities, based upon civil and/or public law*',<sup>29</sup> which would include individuals, limited liability companies and foundations. Partnerships cannot sue or be sued as such, and thus an agreement with a partnership should be signed by all partners and be binding upon each jointly and severally.

The contractual provisions of the Civil Code require that a party to a valid agreement must have the capacity to contract. All individuals are deemed to have such legal capacity except (i) minors (under 21 years old, unless married) or (ii) persons under official custody. Legal entities, by their nature and their Articles of Association, will also have such capacity. As valid agreement of the parties is a prerequisite for arbitral

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<sup>29</sup> Article 1 (2), Arbitration Law.

jurisdiction, clearly any party to an arbitration must have capacity to contract.

State-owned companies and the government itself have been parties to arbitration, but it is not clear whether agencies of the government, in such capacity, would be qualified as parties to an arbitration, as they are not legal entities.

The Arbitration Law does not distinguish between a two-party reference and one with more than two parties, and there is no guidance as to how arbitrators are to be appointed in the event of more than two parties. The BANI rules do regulate such a situation, however, and anticipate the possibility of having more than three arbitrators in extraordinary cases. Rule 10(5) provides:

*'Multiple Parties*

*In case there are more than two parties in the dispute, then all of the parties acting as Claimant(s) shall be considered as a single party Claimant with regard to designation of arbitrator, and all parties being claimed against shall be considered as a single party Respondent for purposes of designation of an arbitrator. In the event that such multiple parties cannot agree upon the designation of an arbitrator within the allotted time frame, the selection of an arbitrator shall be deemed to have been left to the Chairman of BANI, who shall make the selection on their collective behalf. In special situations, if requested by a majority of the parties in dispute, the Chairman of BANI may approve the formation of a Tribunal comprising more than 3 arbitrators. Additional third parties may join in an arbitration case only insofar as this is allowed based on the stipulation of Article 30 of Law No. 30/1999.'*

Article 30 of the Arbitration Law allows parties not originally party to the agreement to arbitrate to join in an arbitration '*... if they have related interests and their participation is agreed to by the parties in dispute and by the arbitrator or arbitration tribunal hearing the dispute*'.

*[3.3.5] Defective arbitration agreements*

If the agreement to arbitrate does not make it clear that the parties have unequivocally agreed to arbitrate their disputes, for example if it allows an aggrieved party to choose between litigation and arbitration,

the clause may be rendered ineffective and a court might be justified in accepting jurisdiction were a party to bring a case there.

Some arbitration clauses are difficult to follow in practice, such as those that have contradictory provisions or call for arbitration before an institution that does not exist or that require variations to institutional rules which are mandatory (such as ICC arbitration without Terms of Reference.) Whereas generally Articles 3 and 11 of the Arbitration Law, quoted above, imply that as long as it is clear that the parties have in fact agreed to arbitrate, and the dispute falls within the scope so agreed, theoretically the awkward details can be worked out and the clause will be valid. However, in practice Indonesian courts have often accepted jurisdiction where counsel can make any persuasive argument that Articles 3 and 11 should not apply. Therefore it is recommended that serious attention be paid to the drafting of the arbitration clause in order to ensure its efficacy.

*[3.3.6] Separability/autonomy of the arbitration agreement*

Although ‘severability’ or ‘separability’ is not mentioned in so many words, the Arbitration Law does provide that once the parties have agreed that their disputes shall be resolved by arbitration, even if the underlying contract is subsequently terminated, annulled or declared by the court to be null and void, the agreement to arbitrate still stands. Article 10 of the Arbitration Law provides:

*‘An arbitration agreement shall not become null or void under any of the following circumstances:*

- a. the death of one of the parties;*
- b. the bankruptcy of one of the parties;*
- c. novation;*
- d. the insolvency of one of the parties;*
- e. inheritance;*
- f. effectivity of requirements for the cancellation of the main contract;*
- g. if the implementation of the agreement is transferred to one or more third parties, with the consent of the parties who made the agreement to arbitrate; or*
- h. the expiration or voidance of the main contract.’*

This provision does not cover a situation where the underlying contract is deemed to be null and void *ab initio*, however. In such a case one would have to determine whether the parties did agree to arbitration, even if they did not legally agree to anything else. But it would seem that the arbitrators would have to be the ones to make such a determination, as long as the whole agreement has not already been declared null and void *ab initio* by a court in a final and binding decision.

*[3.3.7] Effect of the arbitration agreement*

As mentioned above, Articles 3 and 11 of the Arbitration Law make it clear that if the parties have agreed to arbitrate their disputes the courts do not have and may not take jurisdiction over such disputes.

Although the Supreme Court has held that the court must, on its own initiative, dismiss any case in which it does not have jurisdiction, in practice courts almost invariably will address any application made to it, and it is up to the party claiming its lack of jurisdiction to bring the matter up as an absolute exception on jurisdiction. Often the issue will arise when a party brings an action in the court on a dispute which should be subject only to arbitration, and the other party must invoke Articles 3 and 11 of the Arbitration Law in contesting the court's competence to hear any dispute under the subject agreement.

An exception to the court's jurisdiction must be brought at the outset of a court case, and the court must rule on it as a preliminary matter before examining the merits. If the court rejects the exception, such rejection may be appealed against to the high court and eventually, if necessary, to the Supreme Court.

#### **[4] ARBITRATORS AND THE ARBITRAL TRIBUNAL**

Relying upon the basic freedom of contract provisions of the Civil Code, as discussed above, parties who have agreed to refer their disputes to arbitration have considerable freedom as to choice of arbitrators, subject only to the qualifications required under the Arbitration Law.

##### **[4.1] Qualifications**

The new Arbitration Law sets out strict qualifications for persons who may be designated as arbitrators. Article 12 provides as follows:

*'(1) The parties who may be appointed or designated as arbitrators must meet the following requirements:*

- a. *Being authorised or competent to perform legal actions;*
- b. *Being at least 35 years of age;*
- c. *Having no family relationship, by blood or marriage to the third degree, with either of the disputing parties;*
- d. *Having no financial or other interest in the arbitration award; and*
- e. *Having at least 15 years experience and active mastery in the field.*

*'(2) Judges, prosecutors, clerks of courts, and other government or court officials may not be appointed or designated as arbitrators.'*

As this is a mandatory provision of the law, the BANI Rules contain the same requirements<sup>30</sup> plus one additional:

*'If according to the arbitration agreement the dispute is governed by Indonesian law, at least one arbitrator, preferably but not necessarily the Chair, shall be a law graduate or practitioner who knows Indonesian law well and resides in Indonesia.'*<sup>31</sup>

Aside from the above requirement of BANI Rule 9 (d) which applies for BANI-administered arbitrations only, there is no restriction on the nationality of the arbitrators.

The BANI Rules also require arbitrators in BANI-administered references to be chosen from the BANI panel, but BANI also will entertain application from a party to appoint a qualified arbitrator who is not listed on the panel where specific qualifications are required.<sup>32</sup>

#### **[4.2] Selection**

In line with the general freedom of contract provisions of the Civil Code, unless they have otherwise agreed, the parties may designate the arbitrators. One major respect in which the BANI rules derogate from the language of the Arbitration Law is that in situations in which the parties cannot agree upon, or have failed to designate, an arbitrator in accordance with the terms of their agreement to arbitrate, the Arbitration Law calls for such designation to be made by the Chief Judge of the

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<sup>30</sup> See BANI Rule 9 (3).

<sup>31</sup> BANI Rule 9 (5).

<sup>32</sup> Chapter IV, BANI Rules.

District Court, while the BANI Rules provide that such appointment shall be made by the Chairman of BANI. But BANI has also on occasion not given respect to the parties' choice of arbitrator, apparently deeming the BANI rules, which give that power to the BANI Chair to supersede and prevail over the Arbitration Law and the express language of the parties' agreement. BANI Rule 10 (6) provides:

*'Authority of Chairman of BANI:*

*Final decision or approval regarding the designation of all arbitrators shall be in the hands of the Chairman of BANI. In giving such approval, the Chairman may request additional information in connection with the independence, neutrality and/or criteria of the arbitrators being nominated. The Chairman may also consider the citizenship of the arbitrator nominated in connection with the citizenship of the parties in dispute by observing the standard requirements prevailing at BANI. The Chairman shall make an effort to ensure that the decision with regards the arbitrator designation is made or approved within a period of not longer than 7 (seven) days from the time the matter is submitted.'*

Appointment of arbitrators is one aspect of the Arbitration Law that is covered in considerable detail, in Articles 13 through 17. In summary, if the parties fail to agree on the choice of arbitrators or have not made provision therefor, the Chief Judge of the District Court may make the appointment. Also, if the parties fail mutually to agree upon the appointment of a sole arbitrator, the appointment may be made by the Chief Judge. When the parties have each appointed an arbitrator, the two party-appointed arbitrators are authorised to appoint the third arbitrator who shall be the chair. If they fail to do so, the Chief Judge may appoint the third arbitrator. The judge's decision is subject to no appeal. If after a party has appointed an arbitrator and requested the other party to do so, the other party fails to do so, the arbitrator chosen by the requesting party shall act as sole arbitrator.

An arbitrator must notify the parties in writing of the acceptance or rejection of the appointment. The appointment by the parties in writing and the acceptance in writing by the arbitrator forms a civil contract between them. The arbitrators are thus bound to render their award fairly, justly, and in accordance with the prevailing stipulations and the parties are bound to accept the award as final and binding.

As a general rule, most parties adopt the normal method of appointing arbitrators, that is that each party appoints one and the two so chosen appoint the chair. However, there is nothing to prevent the parties from agreeing upon a different method. For example they may prefer to seek mutually to appoint the chair themselves (presumably through their counsel) and only if they fail to do so within a certain specified period will the two party-appointed arbitrators make the appointment. Or the parties may decide to leave the appointment of the entire tribunal to a specified organisation, or even an individual, appointing authority. As long as the parties have mutually agreed upon and clearly spelled out the appointment mechanism, freedom of contract will prevail.

BANI requires any party that appoints a foreign arbitrator to cover such arbitrator's travel and accommodation costs, whereas if the chair is from outside of Indonesia, the parties share these costs.

Every arbitrator must indicate his or her acceptance of the mandate in writing. Once the mandate is accepted, the arbitrator may not withdraw without consent of the parties or, if the parties do not consent, the Chief Judge of the District Court may release the arbitrator from his or her duties.

#### **[4.3] Number of arbitrators**

Under the previous regime, the parties were free to designate any number of arbitrators, so long as it was an odd number. The new Arbitration Law continues this restriction, but only where the parties have not previously agreed upon a certain number of arbitrators. Article 8 (2) (f) of the Arbitration Law, in setting out the requirements for the notice of arbitration, requires such notification, among other things, to include:

*'The agreement entered into by the parties concerning the number of arbitrators or, if no such agreement has been entered into, the Claimant may propose the total number of arbitrators, provided such is an odd number.'*

The new BANI Rules go a step farther, limiting the number of arbitrators to one or three, but in extraordinary circumstances where there are multiple parties, five arbitrators may be empaneled.<sup>33</sup>

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<sup>33</sup>BANI Rule 10 (5).

#### [4.4] Challenging an arbitrator

The Arbitration Law requires a prospective arbitrator to advise if there is any possibility of conflict of interest. Article 18 (1) states:

*‘A prospective arbitrator asked by one of the parties to sit on the arbitration panel shall be obliged to advise the parties of any matter which could influence his independence or give rise to bias in the rendering of the award.’*

The Arbitration Law allows the parties to challenge, or request recusal of, an arbitrator if:

*‘. . . there is found sufficient cause and authentic evidence to give rise to doubt that such arbitrator will perform his/her duties independently or will be biased in rendering an award<sup>34</sup> or ‘. . . if it is proven that there is any familial, financial, or employment relationship with one of the parties or its respective legal representatives.’<sup>35</sup>*

Article 26 (2) of the Arbitration Law also provides that:

*‘An arbitrator may be dismissed from his/her mandate in the event that he/she is shown to be biased or demonstrates disgraceful conduct, which must be legally proven’*

If it is a sole arbitrator that is challenged, the challenge is made directly to the arbitrator. Where the dispute is to be heard by a panel of arbitrators, the challenge is presented to the whole panel. If the arbitrator to be challenged was appointed by the court, the challenge is submitted to the court.<sup>36</sup>

Any such challenge must be made within 14 days of the appointment or, if the basis for the challenge becomes known to the challenging party after that date, the challenge must be lodged within 14 days after such information becomes known.<sup>37</sup>

Articles 25 and 26 of the Arbitration Law set out further procedures, which do not differ substantially from that of most other jurisdictions and

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<sup>34</sup> Article 22 (1), Arbitration Law.

<sup>35</sup> Article 22 (2), Arbitration Law.

<sup>36</sup> Article 23, Arbitration Law.

<sup>37</sup> Article 24, Arbitration Law.

rules. The ultimate decision maker, however, is the Chief Justice of the District Court, unless the parties have designated a different Appointing Authority, or rules that provide for same.

#### **[4.5] Replacement of arbitrators**

Article 26 (1) of the Arbitration Law provides:

*‘An arbitrator’s authority shall not be nullified by the death of the arbitrator and the authority shall thereupon be continued by a successor arbitrator appointed in accordance with this Act’;*  
and Article 26 (3) provides;

*‘In the event that during hearing of the dispute an arbitrator dies, is incapacitated, or resigns, and so is unable to meet his/her obligations, a replacement arbitrator shall be appointed in the manner applicable to the appointment of the arbitrator concerned.’*

Thus an arbitrator is replaced in the same manner as that by which the arbitrator being replaced was appointed.

Where a sole arbitrator or the chairman of a Tribunal is replaced, hearings previously held must be repeated;<sup>38</sup> but where one of the other arbitrators is replaced, ‘... *the hearing of the dispute shall only be repeated among the arbitrators themselves*’.<sup>39</sup>

It appears that in the latter case the two original arbitrators would fully brief the new arbitrator on the case thus far so as to avoid having to repeat hearings.

The BANI Rules give a bit more clarity for such situations, and provide:

*‘Repetition of Proceedings:*

*If based on Articles 11, 12(1), or 12(3), a sole arbitrator is replaced, then proceedings, including the hearings conducted earlier must be repeated. If the Chairman of the Tribunal is replaced, each testimony hearing session earlier may be repeated if deemed necessary by the other arbitrators. If any other arbitrator is replaced, the other arbitrators shall brief the new arbitrator and no prior hearings shall be repeated except in*

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<sup>38</sup> Article 26 (4) Arbitration Law.

<sup>39</sup> Article 26 (5) Arbitration Law.

*extraordinary circumstances where, and to the extent that, the Tribunal, in its sole discretion, deems necessary in the interests of natural justice. The repetition of any hearings for above reasons may be taken into account and, if the Tribunal deems it appropriate, the deadline for completion of case examination in the proceeding referred to in Article 4 paragraph (7) may be extended.'*<sup>40</sup>

## **[5] ARBITRATION PROCEDURE**

The Arbitration Law allows parties mutually to designate in their agreement to arbitrate the rules which shall govern the procedure, provided such rules do not conflict with the provisions of the Arbitration Law. The Arbitration Law also recognises the parties' choice of any arbitral institution to administer the reference and provides that if such an institution is designated, the rules of such institution shall govern the procedure.<sup>41</sup> But the Arbitration Law also provides very basic rules of procedure<sup>42</sup> to be followed when no rules are designated.<sup>43</sup> Discussion under this Section 5 is based primarily upon these requirements of the Arbitration Law, with some reference to the BANI Rules.

### **[5.1] Preliminary meetings**

The Arbitration Law states that the case is to be decided on documents unless the parties or the arbitrators wish to have hearings.<sup>44</sup> Normally at least a preliminary meeting or hearing will be held to set the schedules and other parameters for the conduct of the arbitration, but this may also be done by correspondence or conference call. However, by far the majority of arbitrations do include hearings on the merits.

### **[5.2] Interim relief**

The Arbitration Law allows the arbitrators to issue both provisional and interlocutory awards, including security attachments, deposit of goods with third parties and sale of perishable goods.<sup>45</sup> No such power

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<sup>40</sup> BANI Rule 12 (4).

<sup>41</sup> Article 34, Arbitration Law.

<sup>42</sup> Articles 27 through 51. Arbitration Law.

<sup>43</sup> Article 31, Arbitration Law.

<sup>44</sup> Article 36, Arbitration Law.

<sup>45</sup> Article 32, Arbitration Law.

could be exercised by arbitrators under the prior regime. Court intervention would, however, probably need to be sought in the event that a party were to fail to comply with such an order or award of the tribunal. Only a court may order execution of an attachment, thus the requesting party could make an application to a court to have the order of the tribunal enforced by a court bailiff if not voluntarily complied with. But since, as a general rule, only final and binding awards and court judgments will be enforced by the courts, and since there are no sanctions provided in the Arbitration Law for failure to comply with such interlocutory arbitral awards, Article 32 of the Arbitration Law may prove difficult to implement in practice. But it has not as yet been tested.

### **[5.3] Fact-finding**

As mentioned earlier, Indonesia is a civil law jurisdiction, and for the most part, both arbitral references and court cases are based upon documents. There are no formal discovery procedures of the type known in common law jurisdictions. Parties are expected to list in their initial pleadings all documents upon which they base their argument or case, and those which are not submitted with those pleadings must be submitted at a subsequent hearing. This is explicit in the BANI Rules,<sup>46</sup> although not specified in the Arbitration Law. Courts do have the power to order additional documents to be presented in cases before them, but as a practical matter this is seldom effective, because there are no real sanctions, at least not in commercial cases. Arbitrators would have authority so to order under its general powers over the conduct of the hearings. And Rule 19 (6) of the BANI Rules allows the tribunal to impose sanctions against a party that fails to comply with its orders.

Article 46 (a) of the Arbitration Law provides only that the parties are afforded an opportunity to explain their respective positions in writing and to submit evidence deemed necessary to support such positions.

It is established practice that if one party claims that there are documents in the possession of the other party which are relevant, but the other party denies possession of same, the arbitrators are free to make their own determination on the matter and rule accordingly.

Articles 49 and 50 of the Arbitration Law set out procedures for summoning and utilisation of witnesses, both expert and factual. Otherwise, Article 37 (3) provides that examination of witnesses shall be

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<sup>46</sup>Rules 16 (3) and 17 (2).

carried out in accordance with the provisions of the old 19th Century Dutch-based Code of Civil Procedure (the “RV”).

Indonesia’s rules of evidence are codified in Book VI of the RV, together with Articles 162-177 of the HIR (*Herziene Inlandsch Reglement*, procedural law for Java and Madura) or Articles 282-297 of the RBg (*Rechtsreglement Buitengewesten*, applying to procedures in the other islands). These provisions were intended to govern evidence in both court hearings and arbitral references, and Article 37 (3) of the Arbitration Law makes it clear that they still relate to arbitrations, although normally an arbitral tribunal will have more flexibility in applying these than should the courts.

A brief summary of the relevant provisions of these early laws follows:

- Articles 1866 of the RV and Article 164 of the HIR define evidence to comprise written evidence, testimony of witnesses, inference, acknowledgements and oath.
- Articles 1865 of the RV and 163 of the HIR provide that a party arguing that he has a certain right or seeking to establish facts to strengthen such right, or deny the other party’s right, must present evidence of the existence of such right or fact.
- Article 1867 of the RV distinguishes between authentic written evidence and non-notarial written evidence. Authentic written evidence is evidence made before a notary public and should be considered as perfect, or undeniable, evidence in respect of matters contained therein.
- Article 1878 of the RV provides that non-notarial evidence which is contested shall be examined by the court. It is implicit that the functions assigned to the court for litigation cases are to be exercised by the tribunal in arbitrations.

[5.3.1] *Written submissions*

In *ad hoc* arbitrations under the rules provided in the Arbitration Law, the parties are instructed to submit their notice of arbitration and statement of claim directly to the arbitrators.<sup>47</sup> Since the Arbitration Law does not specify the procedure for notices of arbitration and exactly how and when arbitrators are to be designated, it is possible that no arbitral tribunal will

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<sup>47</sup> Article 38, Arbitration Law.

yet exist when the initial submissions are made, which may render these provisions of the Arbitration Law a bit difficult to implement.

Both the Arbitration Law and the BANI Rules set out minimal requirements for the Statement of Claim (or in BANI Rules' own term, Petition for Arbitration).<sup>48</sup>

As mentioned above, Article 36 of the Arbitration Law calls for the dispute to be heard and decided on the basis of written documents, but oral hearings may be conducted with the approval of the parties or if deemed necessary by the arbitrators. The BANI Rules leave the decision up to the tribunal.<sup>49</sup> Where the parties have chosen an arbitral institution to administer the reference, or have chosen specific rules to govern an *ad hoc* procedure, the requirements for written submissions will be governed by such applicable rules. Where the parties have not chosen any other procedural rules, the provisions of the Arbitration Law will prevail. The relevant provisions are as follows:

*'Article 38*

- (1) The Claimant shall submit its statement claim to the arbitrator or arbitration tribunal within the period of time as determined by the arbitrator or arbitration tribunal.*
- (2) The statement of claim shall contain at the least:*
  - a. The full name and residence or domicile of the parties;*
  - b. A short description of the dispute, accompanied by evidence; and*
  - c. Clear contents of the claim being asserted.*

*'Article 39*

*After receiving the statement of claim from the Claimant, the arbitrator or the chair of the arbitration tribunal shall forward a copy of such claim to the Respondent, accompanied by an order that the Respondent must file its response in writing within a period of not more than fourteen (14) days as from Respondent's receipt of the copy of Claimant's claim.*

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<sup>48</sup> See Article 38 (2) of the Arbitration Law, quoted below, and BANI Rule 16.

<sup>49</sup> BANI Rule 19 (1).

*'Article 40*

- (1) Immediately upon receipt of the response from the Respondent, the arbitrator or the chair of the arbitration tribunal shall provide a copy of thereof to the Claimant.*
- (2) At the same time, the arbitrator or chair of the arbitration tribunal shall order the parties or their representatives to appear at an arbitration hearing fixed for no more than fourteen (14) days from the issuance of the order.*

*'Article 41*

*In the event that the Respondent has not responded to Claimant's claim within the fourteen (14) day period contemplated in Article 39, the Respondent shall be summoned to a hearing pursuant to the provisions set out in Article 40 paragraph (2).*

*'Article 42*

- (1) In the response or no later than the first hearing the Respondent may submit a counterclaim and the Claimant shall be given an opportunity to respond thereto.*
- (2) Any counterclaim, as contemplated in paragraph (1), shall be heard and decided upon by the arbitrator or arbitration tribunal together with the main dispute.'*

*[5.3.2] Site visits and experts*

Article 37 (4) of the Arbitration Law states:

*'The arbitrator or arbitration tribunal may conduct examination of property in dispute, or of same other matter connected with the dispute, at the location of such property. If such is deemed necessary the parties shall be properly summoned so that they may also be present at such examination'.*

Although, generally, expert witnesses may be called by each of the parties, the Arbitration Law provides that the arbitral tribunal may call expert witnesses of its own, and the procedure is covered in Article 50 of the Arbitration Law, as follows:

*'Article 50*

- (1) The arbitrator or arbitration tribunal may request the assistance of one or more expert witnesses to provide a written report concerning any specific matter relating to the merits of the dispute.*
- (2) The parties shall be required to provide all details and information that may be deemed necessary by such expert witnesses.*
- (3) The arbitrator or arbitration tribunal shall provide copies of any report provided by such expert witnesses to the parties, in order to allow the parties to respond in writing.*
- (4) In the event that any matters opined upon by any such expert witness is insufficiently clear, upon request of either of the parties, such expert witness may be requested to give testimony in a hearing before the arbitrator(s) and the parties, or their legal representatives.'*

Of course, if the parties have chosen other specific rules to govern, such rules will prevail over the above-mentioned provisions. The BANI Rules are less specific, affording more flexibility to the tribunal. Rule 23(4) simply states:

*'If the Tribunal considers it necessary, and/or at the request of either party, expert witnesses or witnesses as to facts may be summoned. Such witnesses may be required by the Tribunal to present their testimony in a written statement first, on the basis of which the Tribunal shall determine, on its own or upon request of either party, whether oral testimony of any such witness shall be required.'*

**[5.4] Hearings***[5.4.1] Necessity of a hearing*

Although the Arbitration Law calls for the dispute to be heard and decided on the basis of written documents, both the Arbitration Law and the BANI Rules seem to imply that at least an initial procedural hearing will be called<sup>50</sup> and, as a practical matter, almost all arbitral proceedings

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<sup>50</sup> See Article 40 (2) of the Arbitration Law and BANI Rule 19 (1).

do involve some hearings, usually with witness testimony as well as written submissions and argument. But there is no legal requirement for a hearing and there would be no impediment to holding an entire arbitration based only upon written documentation if the parties were to so agree.

*[5.4.2] Hearing date*

In line with the previous legislation, a time-limit must be set for hearings. Absent agreement by the parties as to a different time frame, hearings must be completed within 180 days of the constitution of the full panel,<sup>51</sup> which is interpreted to mean the date of acceptance by the Chair of his or her mandate.

As a practical matter, BANI or arbitrators accustomed to act in BANI arbitrations, generally follow the court system of having one hearing every week or two. However, where foreign parties or counsel are involved, longer hearing periods are often used in the general international style.

If the respondent, having been called to a hearing, does not appear and provides no valid reason therefor, the tribunal is required to call a second hearing. Only if the respondent again, without reason, fails to appear at the second hearing, may the tribunal issue a default award.<sup>52</sup>

*[5.4.3] Location of the hearing*

Article 37 of the Arbitration Law provides:

- '(1) Unless the parties have themselves determined the venue of the arbitration, the same shall be determined by the arbitrator or arbitration tribunal.*
- (2) The arbitrator or arbitration tribunal may hear witness testimony or hold meetings, if deemed necessary, at a place or places outside the place where the arbitration is being held.'*

Most arbitrations are held in Jakarta, for the most part in hotels, unless they are BANI-administered, in which case they are normally held in one of the BANI premises.

There are no particular legal consequences attendant to the place of arbitration within Indonesia. Application for enforcement of any award

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<sup>51</sup> Article 48, Arbitration Law.

<sup>52</sup> Article 44 of the Arbitration Law and Rule 21 (2), BANI Rules.

rendered in Indonesia will be made to the court in the jurisdiction in which the losing party resides, regardless of where the arbitration was held. Thus choice of location will normally depend upon convenience of the parties and facilities available.

*[5.4.4] Required forms*

The BANI Rules, similar to UNCITRAL rules, provide that the tribunal may conduct the hearings in any manner it deems appropriate, subject only to the Rules themselves, applicable law and natural justice<sup>53</sup>. As to the latter the test under the BANI rules is that:

*‘ . . . the parties are treated with equality and that at any stage of the proceedings each party is given a fair and equal opportunity of presenting its case, ’*<sup>54</sup>

while the Arbitration Law requires only that:

*‘The parties in dispute shall have the same right and opportunity to put forward their respective opinions.’*<sup>55</sup>

But the Arbitration Law also gives wide discretion to the arbitrators as to the conduct and timing of the hearings and submissions.<sup>56</sup>

*[5.4.5] Records of the hearing*

Both the Arbitration Law and the BANI Rules provide for a record of proceedings. Article 51 of the Arbitration Law calls for minutes of the hearings, and of examination of witnesses, to be drawn up by a secretary and should cover: *‘... all activities in the examination and arbitration hearings’*.

The BANI rules provide for a transcript to be made by an independent court reporter if required by either party.<sup>57</sup> But even if there is no such independent transcript made, BANI provides a secretary to take minutes of the proceedings and rulings, and for such minutes to be signed by the Tribunal. Unfortunately it is BANI’s current policy to deny the parties

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<sup>53</sup> BANI Rules 13 (3) and 19 (2).

<sup>54</sup> BANI Rule 13 (3).

<sup>55</sup> Article 29 (1), Arbitration Law.

<sup>56</sup> See Article 46 (3) of the Arbitration Law.

<sup>57</sup> BANI Rule 19 (3).

access to the transcript, declaring it for use of the tribunal only. Thus parties to BANI arbitrations would be well advised, if possible mutually, to arrange for their own transcript services if they wish a transcript.

There is no simultaneous (real-time) live transcript service available as yet in Jakarta. Singapore is close-by, however, and has excellent providers of such services that can be utilised.

#### *[5.4.6] Fast track*

There is not, as yet, any fast-track or small claims arbitration, or even court, facilities in Indonesia. The 180 day time-limit can be shortened upon agreement of the parties, however, and BANI normally seeks to conclude hearings in 90 days where possible.

#### *[5.4.7] Concluding the arbitration process*

After the close of hearings, the tribunal is allowed only thirty days to render its award.<sup>58</sup> Like that for hearings, this time limit may be extended on agreement of the parties, and the same is also provided for in the BANI Rules.

## **[6] AWARDS**

### **[6.1] Settlement agreement**

In harmony with the national philosophy, *Pancasila*, the arbitration tribunal is required first to attempt to encourage the parties to reach an amicable settlement before commencing hearings.<sup>59</sup> If such a settlement can be reached, the same may be drawn up in writing by the tribunal as a consent award, which will be binding upon the parties and enforceable in the same manner as any final and binding award of the tribunal. Attempt to settle has for a long time been a prerequisite to commencing a suit in the court, and today it is codified in the Supreme Court's regulation on court-annexed mediation, mentioned earlier.<sup>60</sup>

The same requirement has also long been the BANI practice, having been a part of the original BANI Rules since BANI's inception in 1977. Now the Arbitration Law extends this to all Indonesian arbitrations.

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<sup>58</sup> Article 57, Arbitration Law.

<sup>59</sup> Article 45 (1), Arbitration Law.

<sup>60</sup> Supreme Court Regulation No. 2 of 2003.

The parties are both free, and encouraged, to reach a settlement at any time during the arbitration proceedings. If such settlement is successful, the arbitration tribunal should draw the same up as a consent award. If it is not rendered as an award, the settlement agreement will not have the same final and binding force as an arbitral award. The Law does not require that such an agreement be in the form of an award, nor are there any formal requirements for such deed. The settlement which is not an award can be set aside if a party to such settlement did not voluntarily agree thereto, was under threat or deceived, pursuant to Article 1321 of the Indonesian Civil Code.

## **[6.2] Types of award**

### *[6.2.1] Consent award*

As mentioned above, a consent award will be final and binding the same as any final award of the Tribunal.

Note also that Chapter V of the Arbitration Law sets out the parameters for arbitral awards, and also recognises ‘*binding opinions*’ of an institution. Before a dispute arises, parties to an agreement may request a binding opinion from BANI, or from any other arbitral institution, concerning a legal point or the interpretation of a provision in their agreement.<sup>61</sup> Such an opinion is binding and not subject to appeal of any nature.<sup>62</sup>

### *[6.2.2] Interim or interlocutory awards*

As mentioned in section 5.2, above, the Arbitration Law allows the arbitrators to issue both provisional and interlocutory awards, including security attachments, deposit of goods with third parties and sale of perishable goods.<sup>63</sup> No such power could be exercised by arbitrators previously. Court intervention would, however, probably need to be sought in the event that a party were to fail to comply with such an order or award of the tribunal. Only a court may order execution of an attachment, thus the requesting party could make an application to a court to have the order of the tribunal enforced by a court bailiff if not voluntarily complied with. But since, as a general rule, only final and binding awards and court judgments will be enforced by the courts, and

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<sup>61</sup> Article 52, Arbitration Law.

<sup>62</sup> Article 53, Arbitration Law.

<sup>63</sup> Article 32, Arbitration Law.

since there are no sanctions provided in the Law for failure to comply with these interlocutory arbitral awards, Article 32 of the Arbitration Law may prove difficult, if not impossible, to implement in practice. But it has not as yet been tested.

The BANI Rules do allow the arbitrators to impose sanctions on parties that fail to comply with their rulings or otherwise impede the arbitral process.<sup>64</sup> To our knowledge this facility has not as yet been utilised and thus cannot yet have been tested in the courts.

Awards solely on jurisdiction and other interim awards should be characterised, and clearly marked, as ‘final’ if they may require enforcement. To the knowledge of this writer, no award has been rejected for not being final, but the same could occur if such precautions are not taken.

#### *[6.2.3] Partial awards*

As only final and binding awards, like court judgments, can be enforced, it would not be wise to issue a partial award, unless it was made clear that the partial award is a final award. The Arbitration Law is silent as to partial awards.

#### *[6.2.4] Final awards*

After the close of hearings, the tribunal is allowed only thirty days to render its award. Like that for hearings, this time limit may be extended on agreement of the parties, but an alternative limitation should be designated or the extension may be deemed ineffective.

### **[6.3] Form of the award**

There is no particular form which an award must take, aside from the requirement of Article 54 (1) (a) of the Arbitration Law that the award must contain: ‘*a heading . . . containing the words ‘Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa’ (for the sake of Justice based on belief in One God)*’, and it must be signed by the arbitrators and indicate both the date and place it was rendered.<sup>65</sup>

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<sup>64</sup> BANI Rule 19 (6).

<sup>65</sup> Article 54, Arbitration Law.

*[6.3.1] Content of the award*

The balance of Article 54 of the Arbitration Law sets out the other minimum criteria which an award must contain. These are:

‘.....’

- b. the full name and addresses of the disputing parties;*
  - c. a brief description of the matter in dispute;*
  - d. the respective position of each of the parties;*
  - e. the full names and addresses of the arbitrators;*
  - f. the considerations and conclusions of the arbitrator or arbitration tribunal concerning the dispute as a whole;*
  - g. the opinion of each arbitrator in the event that there is any difference of opinion within the arbitration tribunal;*
  - h. the order of the award;*
  - i. the place and date of the award; and*
  - j. the signature(s) of the arbitrator or arbitration tribunal.*
- (2) The effectiveness of the award shall not be frustrated by the failure of one arbitrator (where there are three) to sign the award if such failure to sign is caused by illness or demise of such non-signing arbitrator.*
- (3) The reason for the failure of such arbitrator to sign, as contemplated in paragraph (2), must be set out in the award.*
- (4) The award shall state a time limitation within which the award must be implemented.’*

Note that Article 54 (1) (g) requires that the award include differing or dissenting opinions of the arbitrators, and 54 (3) requires that the award state the reason if one arbitrator fails to sign. But there is no provision made in the Law for issuance of an award where the arbitrators are unable to reach a majority decision at all. The BANI Rules do provide that in such case the points in question shall be decided by the chairman of the tribunal.<sup>66</sup>

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<sup>66</sup>BANI Rule 27.

No mention is made specifically of dissenting opinion, but there is no impediment to the inclusion of such a dissenting opinion and to our knowledge this has occasionally occurred.

#### **[6.4] Issuance and revision of awards**

Once the award has been issued, the parties are afforded fourteen days in which to submit a request to the tribunal to: ‘... *correct any administrative errors and/or to make additions or deletions to the award if a matter claimed has not been dealt with in such award*’

The tribunal is required to register a signed original, or authentic copy, of the award with the court within 30 days of its rendering.<sup>67</sup> This time limit does not apply to registration of foreign-rendered awards. Because of the 14-day period for correction of errors, this can result in a situation where an award is registered and subsequently amended. If a party is given less than 14 days to satisfy the award, a situation could occur (and in at least one instance has occurred) where the successful party may commence action to enforce an award which was registered prior to an application for correction. If such a situation should occur frequently, the necessity of an amendment to the Law may become apparent.

In order to register an award the court will require an original or authenticated copy to be submitted in the Indonesian language.<sup>68</sup> Although not specified in the law, for purposes of registration and eventual enforcement in Indonesia, that Indonesian version will be considered as the original. Therefore it is imperative that all awards that may require enforcement in Indonesia be rendered in Indonesian, as well as in whatever language the arbitration is held, most normally English, BANI will deem the Indonesian version as the original even if in fact the award has been drafted in another language and the Indonesian version is a translation.<sup>69</sup> It is important to ensure that any translation into Indonesian is accurate, because that is the version which will be operative in case the award must be enforced in Indonesia.

Note that failure to register will render the award unenforceable.<sup>70</sup>

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<sup>67</sup> Article 59 (1), Arbitration Law.

<sup>68</sup> Article 67, Arbitration Law.

<sup>69</sup> See BANI Rule 14 (4).

<sup>70</sup> Article 59 (4), Arbitration Law.

*[6.4.1] Scrutiny of the award*

There is no provision in the Arbitration Law or in the BANI Rules covering scrutiny of an award, nor is there any generally available mechanism for actual scrutiny of awards other than those issued in ICC (International Chamber of Commerce) administered arbitrations.

*[6.4.2] Correction of awards*

After the award has been issued, the parties are allotted 14 days in which to request the arbitrators to correct administrative errors or make additions or deletions to the award in the event a matter has not been dealt with.<sup>71</sup>

*[6.4.3] Additional awards*

The parties are then afforded fourteen days in which to submit a request to the tribunal (or to BANI in case of a BANI arbitration) to: ‘...to make additions ... to the award if a matter claimed has not been dealt with in such award’<sup>72</sup> To the knowledge of this writer, this facility has not as yet been tested in the courts.

**[6.5] Setting aside of awards**

Application may be made to the applicable District Court to annul either domestic or international awards, but on very limited grounds, primarily involving withholding of decisive documentation, forgery or fraud. Article 70 of the Arbitration Law provides;

*‘An application to annul an arbitration award may be made if any of the following conditions are alleged to exist: (a) letters or documents submitted in the hearings are acknowledged to be false or forged or are declared to be forgeries after the award has been rendered; (b) after the award has been rendered documents are found which are decisive in nature and which were deliberately concealed by the opposing party; or (c) the award was rendered as a result of fraud committed by one of the parties to the dispute.’*

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<sup>71</sup> Article 58, Arbitration Law.

<sup>72</sup> Article 58, Arbitration Law.

Any such application must be submitted within 30 days of registration of the award,<sup>73</sup> and a decision must be made upon such application within 30 days of submission thereof. Appeal may be made to the Supreme Court against any such decision, and the Law requires the Supreme Court to decide upon such appeal within 30 days of application.<sup>74</sup>

In early 2014, the Constitutional Court received an application contesting the Elucidation of Article 70 of the Arbitration Law on the ground that it caused legal uncertainty.

Article 70 governs that annulment of an arbitration award may be made if the award contains elements of forgery, concealment of material documents or fraud. The elucidation of Article 70 stated that an application for annulment must be supported by a court decision proving that there has been such a forgery, concealment of material documents, or fraud. Article 71 provides that an application for annulment must be submitted within 30 days as of the date when the award was registered. The Applicants claimed that it would be impossible to obtain a court decision proving such ground for annulment within the 30-day time limit and thus Article 70 would be inoperable. On 11 November 2014, the Supreme Court rendered its judgment revoking the Elucidation of Article 70 on the ground that it had caused legal uncertainty and injustice, thereby contravening the Indonesian Constitution. A party may now apply to annul an award on the ground that the award contains elements of forgery, concealment of material documents or fraud, without having to have a court decision to support it.

#### *[6.5.1] Domestic awards*

The court to which one would apply to set aside a domestic award would be the court in which the award is registered, that is the court with jurisdiction over the losing party, or its assets.

No specific provision is made in the Arbitration Law to allow the parties to waive their right to annulment of the award. The question has not, to our knowledge, been tested in the courts. The general freedom of contract provisions of the Civil Code (Articles 1320 - 1338) would seem to allow parties to waive such right, unless a court were to find in a case that the operation of such waiver resulted in a violation of public policy or order.

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<sup>73</sup> Article 71, Arbitration Law.

<sup>74</sup> Article 72, Arbitration Law.

*[6.5.2] Foreign-related awards*

No distinction is made between awards, if rendered in Indonesia, involving only local interests and those with foreign interests or elements. Any arbitration held in Indonesia is domestic, regardless of nationality of the parties, governing law or location of the project or assets involved.

Regarding the annulment of an international award, that is an award rendered outside of Indonesia, Article V(1)(e) of the New York Convention makes it clear that the court that has jurisdiction to annul an award is either the court of the country in which, or under the law of which, the arbitration is held. Thus, if the *lex arbitri* is Indonesian Law (i.e., presently Law No. 30 of 1999), even if the seat was elsewhere, the Indonesian courts would have jurisdiction to hear an annulment application and to annul if appropriate. The court with jurisdiction to set aside a foreign-rendered award in such situation is the District Court of Central Jakarta, and the parameters of Article 70 of the Arbitration Law, quoted above, would apply.

*[6.5.3] Time limits*

An application to set aside an award must be submitted within thirty days of registration of the award, and a decision must be made upon such application within thirty days of submission thereof. Appeal against any such decision may be made directly to the Supreme Court, without the necessity to apply first to the High Court, as required in the appeal process for normal court cases; and the Law requires the Supreme Court to decide upon such appeal within thirty days of application.

*[6.5.4] Effect of setting aside*

Although the law is silent on the point, presumably the setting aside or annulment of an award will render such award invalid and ineffective.

*[6.5.5] Re-arbitration*

There is no provision in the Arbitration Law requiring that a matter be re-arbitrated.

It would then be up to the aggrieved party to commence a new arbitral reference if it so desired. Or, if the reason for setting aside the award is that the court determines that the parties did not agree to arbitrate in the first place, or that the subject matter is not arbitrable, the

aggrieved party would have the option to bring the action in a court of appropriate jurisdiction.

## **[7] JUDICIAL ASSISTANCE AND INTERVENTION**

Articles 3 and 11 of the Arbitration Law make it clear that where the parties have agreed to arbitrate their disputes the courts do not have and may not take jurisdiction over such disputes. Although the Supreme Court has held that a court must, on its own initiative, dismiss any case over which it does not have jurisdiction, in practice, courts almost invariably will address any application made to them, and it is up to the party claiming its lack of jurisdiction to bring the matter up as an absolute exception on jurisdiction based upon these Articles 3 and 11, as well as the general freedom of contract provisions of the Indonesian Civil Code and the applicable agreement to arbitrate. In the past there were numerous occasions in which the courts would ignore both the provisions of the Arbitration Law and the Supreme Court's holdings and advisories on the matter when unethical counsel would persuade them that a contractual dispute is a tort case, and therefore not arbitrable, or join a third party, who has not agreed to arbitration, as defendant. However this tendency does appear to be diminishing, particularly since the Supreme Court has made it clear it will not tolerate such abuses. In one recent case, a party respondent to an arbitration applied to the court to stay the arbitration on the ground that it was precipitously brought. The court refused to hear such an application where the other party contested its jurisdiction on the basis of an agreement to arbitrate and an arbitration already commenced.<sup>75</sup>

## **[8] RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS**

The procedure for enforcement of an arbitral award in Indonesia differs somewhat depending upon whether the reference was held, and the award rendered, within or outside of the archipelago.

### **[8.1] Enforcement pursuant to domestic law**

Neither Indonesian law and practice nor BANI rules make any distinction between 'domestic' and 'international' arbitrations, in the sense of any diversity in the nationality of the parties, the only distinction

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<sup>75</sup> *PT. Bahari Cakrawala Sebuku v. PT. Leighton Contractors Indonesia*; Decision of the District Court of South Jakarta No. 212/Pdt.G/PN.Jak-Sel, 30 August, 2004.

being the place in which the arbitration is held. Article 1 (9) of the Arbitration Law, consistent with the previous legislative regime, defines international arbitral awards as: ‘ . . . awards handed down by an arbitration institution or individual arbitrator(s) outside the jurisdiction of the Republic of Indonesia, or an award by an arbitration institution or individual arbitrators(s) which under the provisions of Indonesian law are deemed to be International arbitration awards’ As there has been no legislation, nor Supreme Court ruling, to the contrary, an award rendered in an arbitration with venue within Indonesia will be domestic without exception. This was confirmed by the Supreme Court, under the old legislation, in dismissing an application to enforce, as an international award, an award rendered in an arbitration held in Indonesia between a foreign and a domestic domiciled party.<sup>76</sup> There was one aberrant case in which a domestically rendered award in an ICC case was deemed to be international for purposes of avoiding the time limit for registration,<sup>77</sup> however it is unlikely to be followed.

Awards rendered in Indonesia are executed through the court of first instance (District Court) in the district in which the losing party is domiciled. As mentioned above, domestic awards, that is awards rendered within Indonesia, must be registered with the Clerk of the District Court, in the district in which the losing party is domiciled or maintains assets, within 30 days of rendering.<sup>78</sup> Failure to register will render the award unenforceable.

The enforcement procedure for domestic awards allows the appropriate District Court to issue an order of execution directly if the losing party does not, after being duly summoned and so requested by the court, satisfy the award. Although there is no appeal process, the losing party does have the opportunity to contest execution, both at the hearing and also after issuance of any execution order by filing a separate contest. Although the District Court may not review the reasoning in the award itself,<sup>79</sup> it may only execute the award if both the nature of the dispute and the agreement to arbitrate meet the requirements set out in the Arbitration Law<sup>80</sup> and if the award is not in conflict with public

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<sup>76</sup> *Ascom Electro A.G. v. P.T. Manggala Mandiri Sentosa*; W7.Dc.Ht.02/Pdt.Eks/Abt.Int/ 1993.3746IX.1993.03, 22 September, 1993.

<sup>77</sup> *PT Lirik Petroleum v. PT Pertamina (Persero)*, ICC Case, Final Award dated 27 February 2009

<sup>78</sup> Article 59, Arbitration Law.

<sup>79</sup> Article 62 (4), Arbitration Law.

<sup>80</sup> Articles 4 and 5.

morality and order.<sup>81</sup> There is no recourse against rejection by the court of execution.<sup>82</sup> To date, there have been very few domestic awards which the courts have declined to enforce.

Once an order of execution is issued, the same may be executed against the assets and property of the losing party in accordance with the provisions of the RV, in the same manner as execution of judgments in civil cases which are final and binding. But note that only those assets which can be specifically identified can be attached or seized and sold. There is no provision for general orders of attachment or seizure in Indonesia.

## **[8.2] Enforcement pursuant to international agreements**

Indonesia is a party to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the ‘New York Convention’)<sup>83</sup> and has made both the commercial and the reciprocity reservations. Thus an award rendered in a dispute of a commercial nature in any of the (currently) 148 other signatory states will be enforceable in Indonesia under the provisions of the Arbitration Law.

Only awards rendered in a country which, together with Indonesia, is a party to a bilateral or multilateral treaty or convention on the recognition and enforcement of international arbitration awards may be enforced in Indonesia,<sup>84</sup> and a certificate from the diplomatic representative of the Republic of Indonesia in the country in which the International award was rendered, stating that such country and the Republic of Indonesia are both bound by a bilateral or multilateral treaty, must be submitted with the application for Exequatur.<sup>85</sup> Indonesia is not a party to any bilateral treaties on enforcement of awards (nor for that matter of court judgments), and thus only arbitral awards rendered in states that are signatories to the New York Convention will be enforced in Indonesia.

Foreign-rendered awards must first be registered to be eligible to be enforced, but there is no time limit for such registration.

Application for enforcement of international awards are submitted to the District Court of Central Jakarta, the court vested by the Arbitration

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<sup>81</sup> Article 62 (2), Arbitration Law.

<sup>82</sup> Article 62 (3), Arbitration Law.

<sup>83</sup> Ratified by Presidential Decree No 34 of 1981.

<sup>84</sup> Article 66, Arbitration Law.

<sup>85</sup> Article 67 (2) (c), Arbitration Law.

Law with jurisdiction to issue orders of Exequatur in cases of international arbitrations.<sup>86</sup> Where the Government of the Republic of Indonesia is a party only the Supreme Court has jurisdiction to issue Exequatur.<sup>87</sup>

Under the previous legislation, all applications for Exequatur had to be forwarded by the District Court to the Supreme Court for issuance. This involved considerable delay in time, as such applications were docketed together with the normal case-load of the Supreme Court and no express service was available. By giving Exequatur power to the Central Jakarta District Court the Arbitration Law has expedited this process.

Rejection of *Exequatur* by the Central Jakarta District Court can be appealed to the Supreme Court, which must decide upon the appeal within 90 days of application therefor.<sup>88</sup> Issuance of *Exequatur*, however, is not subject to appeal.<sup>89</sup> Nor may a decision of the Supreme Court either issuing or rejecting *Exequatur* where the Government of Indonesia is a party be appealed.<sup>90</sup>

As with domestic arbitrations, *Exequatur* orders may be enforced by attachment and/or seizure and sale of the debtor's assets and property in accordance with the normal provisions of the RV.<sup>91</sup> Where such assets are located in a district other than Central Jakarta, the Central Jakarta court will forward the execution order to the Chief Judge of the District Court having jurisdiction over such assets, to which court one must apply for execution to enforce such order.<sup>92</sup>

### **[8.3] Enforcement of awards abroad**

As mentioned above, Indonesia is a signatory to the New York Convention and therefore awards rendered in Indonesia should be enforceable in any of the other signatory states in accordance with the procedures for such enforcement set out in the applicable laws of any such applicable state, as required by the New York Convention itself, which constitutes law in any signatory state.

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<sup>86</sup> Article 65, Arbitration Law.

<sup>87</sup> Article 66 (e), Arbitration Law.

<sup>88</sup> Article 68, Arbitration Law.

<sup>89</sup> See Article 68 (1) & (2), Arbitration Law.

<sup>90</sup> Article 68 (4), Arbitration Law.

<sup>91</sup> Article 69 (3), Arbitration Law.

<sup>92</sup> Article 69 (2), Arbitration Law.

## **[9] PRACTICAL INFORMATION**

### **[9.1] Visa requirements**

Basically, any foreign national who intends to visit Indonesia is required to possess a valid passport, or a legal travel document, valid for at least six months after entry, and a valid entry visa. Indonesian consulates in other countries can issue visas, including business visas which may be valid for up to three months and/or allow multiple entries.

For short term or tourist visas, a 'Visa on Arrival', or 'VoA' facility is available at certain International airports (such as Jakarta and Bali) and some seaports. Nationals of the following countries will be eligible to obtain such VoA: Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Egypt, Finland, France, Germany, Holland, Hungary, India, Ireland, Italy, Japan, Kuwait, Luxemburg, Maldives, New Zealand, Norway, Oman, People's Republic of China, Poland, Portugal, Qatar, Russia, Saudi Arabia, South Africa, South Korea, Spain, Switzerland, Sweden, Taiwan, United Arab Emirates, United Kingdom and the United States of America. VoA visas are issued for 7 or 30 days and cannot be extended nor converted to a different type of visa. It has been proposed to issue such visas for a longer period but as of date of writing this has not come into effect. A new regulation has now been issued to exempt the requirement for visa for the above-mentioned countries for tourism purposes.

No visa is required for citizens of: Brunei Darussalam, Chile, Hong Kong, Macau, Malaysia, Morocco, Peru, the Philippines, Singapore, Thailand and Vietnam to enter for a period of 30 days or less.

It would be most wise for anyone intending to act as arbitrator or counsel, or even to try to negotiate a settlement, to obtain a business visa before entering the country, as visas on arrival are intended only for tourists and violators could face sanctions. Normally a sponsor letter will be required to support an application for a business visa, but it would be best to speak with the Indonesian consulate closest to you to determine what is required, and the time involved, as not all consulates follow the same procedures.

Anyone intending to spend more than a short time working may require a work permit and it is thus recommended that either such person or his or her Indonesian sponsor consult an immigration/manpower agent or consultant before entry to assist in ensuring proper documentation.

**[9.2] Foreign counsel**

There is no impediment to foreign counsel, or any foreign person, representing a party in an arbitration in Indonesia. However, the visa and work permit requirements mentioned above should be observed.

The BANI rules require that where a dispute is governed by Indonesian law, foreign counsel or other foreign representatives may appear only if accompanied by reputable local counsel. Although the Arbitration Law imposes no such requirement for non-BANI arbitrations, it would be foolish indeed for a party not to involve local counsel where Indonesian law governs the matter.

**[9.3] Taxation**

A local party engaging foreign counsel or expert witnesses will be required to withhold tax against payment of the legal or witness fees. The rate will depend upon the tax domicile of the recipient and whether Indonesia is party to a double-taxation treaty with the state of such domicile.

An award, as such, is not subject to tax, nor to any withholding thereof. However, funds received in payment of an award become ordinary income to the recipient, if a resident taxpayer, and must be reported as such; whereas costs and losses can be expensed in the normal way.

Where the recipient is a foreign party that is not resident in Indonesia, and is not deemed to have a 'permanent establishment' for tax purposes through its activities or project here, there is likely to be a final withholding of tax against payment of any amounts of award that represents income from activities in Indonesia. This liability and the rate will, again, depend upon the tax domicile of the recipient and whether that domiciliary state is a party to a tax treaty with Indonesia.

**[10] APPENDICES (on CD)**

**[10.1] Law No. 30 of 1999 concerning Arbitration and  
Alternative Dispute Resolution**

**[10.2] Elucidation on Law No. 30/1999 concerning Arbitration  
and Dispute Settlement Alternative**