

INDONESIA

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I. INTRODUCTION: ARBITRATION IN INDONESIA – HISTORY AND INFRASTRUCTURE

A. *History and Current Legislation on Arbitration*

1. Historical evolution of law relating to arbitration

After a long colonisation by the Dutch, Indonesia's legal system is based upon the Dutch civil law, which was adopted by the new Indonesian nation at the time of its independence in 1945. The Indonesian Constitution provided for each existing Dutch law not in conflict with Indonesia's independent status to continue, as guidance, to prevail until and unless a new Indonesian law was to be passed to supersede it. A number of laws have since been revised, and other new laws are being drafted all the time to fit in with ever-changing global economic trends and needs. 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. However the basic Dutch Civil, Criminal and Commercial codes remain in force as they have not yet been revised.

Indonesia is not, traditionally, a litigious culture. Her underlying philosophy, Pancasila, calls for deliberation to reach a consensus and discourages contention in all things. In the Javanese culture, the dominant one of approximately 300 ethnical cultures that make up this archipelago,¹ it is considered shameful to have to resort to litigation, in effect leaving it to someone else to resolve one's problems. Accordingly, commercial litigation is not as common as it is in such jurisdictions as India, Singapore and the United States, for example. But 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

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¹ http://en.wikipedia.org/wiki/Demographics_of_Indonesia

become more and more sophisticated and complex, we are finding a marked increase in contractual documentation calling for arbitration rather than litigation in Indonesia. In 2003, the Supreme Court has initiated a system of court-annexed mediation which it is hoped will significantly reduce the court caseloads. The Supreme Court mediation regulation was further revised in 2008.

The initial instruments of law which carried the idea of settling disputes through assessment of an arbitrator in Indonesia were the Dutch's *Herziene Inlandsch Reglement* ("HIR") and the *Reglement Buitengewesten* ("RBg"). Article 377 of the HIR and Article 705 of the RBg stipulated the following:

If an Indonesian and an Eastern Foreigner wish to have their dispute settled by an arbitrator, they are bound to the procedural laws applicable to the Europeans.

The clause is deemed as a keystone to the concept of arbitration in Indonesia's legal system. It introduces a method of settlement disputes without having to go to court, such "judicial power" being granted to an arbitrator. The provisions, however, were merely introductory. It was not complemented with procedural rules to safeguard the implementation of arbitration. Hence, it refers to provisions of the *Reglement op de Burgerlijke Recht Vordering* ("RV").

In the era of Dutch colonialism, there was a social classification, splitting the society into 3 categories, the *Bumiputera* (native Indonesians), the Eastern Foreigners (Asian foreigners residing in Indonesia), and the Europeans. Different rules of law were applicable to each of those classes. In terms of Civil Law, the Eastern Foreigners and the Europeans were bound to the *Burgerlijke Wetboek* ("BW" which was then applied in the Indonesian legal system as the Indonesian Civil Code) and the *Wetboek van Koophandel* ("WvK", which was then applied in the Indonesian legal system as the Indonesian Commercial Code). The RV was the procedural law supplementing those material laws.

Regulations on how to conduct arbitration were enshrined in the RV in its Articles 615-651.

Until August of 1999, Indonesia had no specific law governing arbitration, and thus for over 150 years arbitrations were regulated under the Dutch Civil Procedures of the RV, 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.²

Prior to 1981, when Indonesia ratified the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), enforcement of any arbitral award was handled in the same manner as enforcement of a final and binding court judgment. However, since Article 463 of the RV provides that, except for general average awards, judgments of foreign courts cannot be enforced in Indonesia, it had previously been assumed that the same applied to foreign-rendered arbitration awards and thus these could not be enforced in Indonesia.

Even after ratification of the New York Convention, a further nine years passed before implementing regulations were promulgated, through Supreme Court Regulation No. 1 of 1990 (“Regulation No. 1 of 1990”), and in the meantime the courts remained reluctant to enforce foreign-rendered awards, even though such a position was in violation of Article III of the New York Convention, which provides that every contracting state must recognise and enforce awards rendered in other contracting states without imposing substantially more onerous conditions than are imposed upon recognition or enforcement of domestic awards.

The confusion was understandable, however. Since registration and application for enforcement of domestic-rendered awards was to be made in the District Court (*Pengadilan Negeri*) in the district in which the award was rendered, the members of the Supreme Court could not agree as to which court one would apply for enforcement of a foreign-rendered award, there being no appropriate District Court in which to register, nor which would have had jurisdiction to grant enforcement of, an award rendered outside of the jurisdiction of any domestic court. Some judges therefore believed that application should be made directly to the Supreme Court; others that the awards should be “self-executing”; and still others that a single District Court should be designated to take jurisdiction over New York Convention enforcement applications.

Finally, the Supreme Court issued Regulation No. 1 of 1990 setting out the necessary implementing regulations for enforcement of arbitral awards rendered in a country which, together with Indonesia, is party to an international convention regarding implementation of foreign arbitral awards. The District Court of Central Jakarta (*Pengadilan Negeri Jakarta Pusat*) was designated as

² Article 1338(1), Indonesian Civil Code.

the registrar and the venue to which application for enforcement thereof was to be made. The Chairman of that court was then allotted 14 days in which to transmit the request file to the Supreme Court, which was the sole court with jurisdiction to issue *exequatur*, the enforcement order, in cases of foreign-rendered awards.³

Once the order of *exequatur* was granted, the same was to be sent back down to the Chairman of the District Court of Central Jakarta for implementation. If execution was to be effected in a different district (i.e. that of the domicile, or location of assets, of the losing party), the Central Jakarta court was to delegate the order to the appropriate District Court for implementation. Execution was effected on property and possessions of the losing party in accordance with the normal provisions of the RV relating to execution of court judgments.⁴

Regulation No.1 of 1990, however, did not set any time limit within which the Supreme Court was required to rule on these applications and, for the most part, they were simply docketed into the Supreme Court's normal case-load. The initial nine applications, those filed between 1991 and mid-1993, were acted upon with reasonable promptness—some in less than six months. No such orders were issued after mid-1994, however, either of *exequatur* or rejection thereof, and thus it is conceivable that some of the remaining seven applications filed prior to August, 1999 may still be pending.

2. Current Law

After years in the drafting, on 12 August, 1999 Indonesia finally promulgated its new comprehensive Law Concerning Arbitration and Alternative Dispute Resolution, Law No. 30 of 1999 (the Arbitration Law),⁵ 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. One of these is the incorporation of provisions encouraging alternative dispute resolution (ADR).⁶ Another provision gives certain interlocutory powers to the tribunal. In all it is made very clear that

³ Article 5, Regulation No.1 of 1990.

⁴ Article 6, Regulation No.1 of 1990.

⁵ See Annex I hereto.

⁶ Article 6, Arbitration Law.

where the parties have agreed to arbitrate their disputes no court has, nor may take, jurisdiction over such disputes and court intervention is only permitted for enforcement of an eventual award or to appoint or challenge an arbitrator where, and only where, the parties have not agreed upon a different appointing authority. There is no appeal from arbitral awards, including interim awards on jurisdiction.

Both the Arbitration Law and the implementing regulation for enforcement under the New York Convention, 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 characterised 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, or any *ad hoc* rules, they may wish. 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. These differences include, aside from the fact that all domestically held arbitrations are domestic, as mentioned above, among others: 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 grounds for annulment of an award are also more limited than those contained in the Model Law. (See section H below).

3. Law reform projects

There have been, from time to time, various aid agency funded projects towards law reform, few of which had any lasting impact. One notable exception was the USAID funded ELIPS (Economic Law and Improved Procurement Systems) project initiated in 1991 and

extending until 1997.

The ELIPS Project was designated to improve Indonesia's economic law and government procurement system. Of its several project components, ELIPS was influential in the drafting of a number of major economic law instruments, namely the Company Law (Law No.1 of 1995) and the revisions to Intellectual Property Laws on Trademarks (Law No. 19 of 1992, then revised with Law No. 14 of 1997) Copyright (Law No. 12 of 1997) and Patents (Law No.13 of 1997). Its team also drafted an arbitration law, based primarily on the UNCITRAL Model Law; however this was not the draft upon which Indonesia's eventual Arbitration Law, promulgated in 1999, was based. It may be said that the ELIPS effort proved an encouragement to pass a new law covering arbitration, however.

4. Confidentiality and publication of awards

Article 27 of the Arbitration Law states only that: "*All hearings of arbitration disputes shall be closed to the public.*"⁷ It is normal practice that arbitration proceedings are kept confidential, but there is no law so requiring over and above that the hearings themselves are closed, as above, nor any sanctions for violation of such confidentiality. The duty to maintain confidentiality has been abused in a number of recent cases where foreign claimants seek to make a media circus of the entire reference, although it is not clear what advantage that avails them, other than offending Indonesia.

Both the Arbitration Law and the Rules of Indonesian National Arbitration Board ("BANI") provide for a record of proceedings. Article 51 of the 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*".⁸ BANI provides a secretary to record and take minutes of the proceedings and rulings in its administered references, however it is BANI's policy to withhold such minutes from the parties, providing only a summary to the Tribunal at the subsequent hearing for their signature. Parties arbitrating at BANI would be advised to arrange private transcript service if they do wish to have a transcript.

There is no mechanism for publication of arbitral awards in Indonesia, nor would it be appropriate for any to be published, unless specifically so desired by all parties involved, as these are

⁷ Article 27, Arbitration Law.

⁸ Article 51, Arbitration Law.

generally considered to be confidential.

Theoretically, once an award is registered with the court for enforcement purposes, it would be public record. However, without a power of attorney from one of the parties, the court will not provide a copy nor any information over and above the registration data.

B. Arbitration Infrastructure and Practice in Indonesia

1. Major arbitration institutions, number of cases and other statistics

The Arbitration Law makes it clear that the parties may opt to hold their arbitration utilising any rules or before any administering institution they may mutually agree upon. Some adequate procedural rules are provided which will govern if parties do not designate others, and these would be supplemented where necessary by the arbitral tribunal.⁹ 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.¹⁰ Thus where parties have simply agreed to arbitrate in Indonesia, without designating either an administering institution or rules to govern, the tribunal will be required to follow the procedural rules set out in Chapter IV (Articles 27 through 51) of the Arbitration Law.

Locally, the most commonly used arbitral body is Badan Arbitrase Nasional Indonesia ("BANI"), which maintains a panel of local and international arbitrators and utilises its own rules of procedure, which are available in both Indonesian and English.¹¹ 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 recently 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

⁹ Article 31, Arbitration Law.

¹⁰ Article 34, Arbitration Law.

¹¹ The Rules of Arbitral Procedure of the Indonesia National Board of Arbitration ("BANI Rules") may be found at <http://www.baniarbitration.org/procedures.php>

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 only less than half of the designated arbitrators' fee is distributed to the arbitrators themselves.

BANI does not train or certify arbitrators. Arbitration training is, however, held periodically by the Chartered Institute of Arbitrators Indonesia Chapter in conjunction with KarimSyah Law Firm, and scholarships are available to outstanding law students, members of the judiciary and Ministry of Law and Human Rights or Attorney General officials.

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 19 registrants.¹² BAPMI has its own rules, and additional rules for the conduct of arbitrators. Qualifications for arbitrators generally follow those in the Arbitration Law except that, at least to date, BAPMI arbitrators must be Indonesian citizens, whereas there is no such requirement under the Arbitration Law nor BANI's rules.

There is also the National Sharia Arbitration Body ("BASYARNAS"), an arbitration body dedicated to resolving disputes on transactions which apply an economic Sharia law structure. Indonesia has the largest Islamic population in the world, and by far the majority of Indonesia's inhabitants adhere to the Islamic faith. BASYARNAS was formerly known as the Indonesian Muamalat Arbitration Body (BAMUI). BASYARNAS applies the principle of *islah*, or forgiveness, and its decisions are confidential, as well as final and binding.

Badan Arbitrase Perdagangan Berjangka Komoditi Indonesia Trade and Commodities Arbitration Board (BAKTI) was established on 7 November, 2008 to resolve the disputes in the area of futures

¹² The list of BAPMI panels is available at http://www.bapmi.org/en/arbitrators_list.php

exchange. At the moment, BAKTI has 22 arbitrators on its panel.¹³

Other industry-specific groups are in the process of being established all the time, and there are also some that administer mediation or other forms of ADR, for example; The National Mediation Center (“PMN”) and The Indonesian Insurance Mediation Body (“BMAI”).

PMN was set up in 2003 by a group of former mediators who had previously assisted in private sector debt restructuring through the now-dissolved Jakarta Initiative Task Force, a quasi-governmental institution established in 1998 under the auspices of the Financial Sector Policy Committee under sponsorship of the IMF and the World Bank. PMN has provided training for practicing lawyers and sitting judges who mediate for the court-annexed mediation process mentioned above. PMN’s panel consists only of Indonesian mediators, many of whom are listed on one or more of the various District Court rosters for court-annexed mediation.

The Indonesian Insurance Mediation Body (“BMAI”) was established in Jakarta on 12 May, 2006 and started operating on 25 September, 2006. BMAI aims to resolve disputes between an insured and its insurer and to promote the trust and interest on insurance in general.

Indonesia being a Civil Law jurisdiction, where prior cases do not have precedential value, very few cases are reported. This lack of reported information, coupled with the fact that both registration and enforcement of domestic awards is effected in the District Court in the domicile of the losing party, and since there are 347 judicial districts¹⁴ spread throughout the archipelago, it is almost impossible to obtain full data on enforcement of domestic awards, except with respect to cases sufficiently notorious to raise a stir in legal or business circles or warrant comment in the press. It is generally understood, however, that most domestic awards have been enforced without delay or difficulty as a matter of course.

The Clerk of the Central Jakarta District Court does keep records of the registration of international awards, indicating when application is made to enforce any of these, and when the execution order is issued. Access to such records is difficult but possible and they show that between 2000 and 2015 there were 100 foreign-rendered awards registered with the Central Jakarta District Court.

¹³ The list of BAKTI panels is available at <http://bakti-arb.org/arbitr.html>

¹⁴ <http://www.badilum.info/index.php/article/24/78>

There are no comprehensive records of enforcement or execution procedures but from polling practitioners it would appear that, since the promulgation of the new Arbitration Law, only a couple of applications for enforcement have encountered any serious difficulty, and these were primarily administrative rather than substantive.

BANI cases have shown a steady increase, from only 95 cases between 1977 and 1997, to 229 cases between 1998 and 2007, and 285 cases from 2008 to 2013.¹⁵

2. Development of arbitration compared with litigation

As mentioned above, Indonesia is not a litigious culture. But arbitration is gaining more popularity compared to litigation, for a number of reasons, other than just a growing familiarity in the process. These include (i) flexibility to choose arbitrators, (ii) higher degree of confidentiality, (iii) universal enforceability, (iv) more controllable (although rarely lower) costs, (v) uncertainty and unpredictability of court judgments, and (vi) vast amount of time taken to reach a final, binding and enforceable judgment through the courts.

II. CURRENT LAW AND PRACTICE

A. *Arbitration Agreement*

1. Types and validity of agreement

As in virtually any jurisdiction, the availability of the arbitral process for resolution of disputes is based upon mutual consent of the parties. Courts, as instruments of the government, are vested with inherent jurisdiction to resolve disputes arising in the territory over which that government has sovereignty. But in commercial matters, because Indonesia's Civil Code recognises that a commercial contract has the force of law 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 in writing will an arbitral tribunal have jurisdiction to resolve the dispute. Article 1(3) of the

¹⁵ No data has as yet been released for subsequent years.

Arbitration Law defines an agreement to arbitrate as follows:

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.

An arbitration agreement, or clause in the underlying agreement, entered into prior to the time a dispute arises, need meet only the general requirements of a contract as contained in the Civil Code in order to constitute a valid agreement to arbitrate, there being no specific requirements set out in the Arbitration Law itself.

Although the general requirements for a valid contract do not necessarily require that a contract or contractual provision be rendered in writing,¹⁶ the Arbitration Law specifically requires that the agreement to arbitrate be “in writing” and signed by all parties to the dispute.¹⁷

The Arbitration Law recognises electronic communications as “writings” providing 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.¹⁸ 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 if contested. 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 Article 1320 *et seq.* of the Civil Code, as mentioned above.

Submission agreement

In the event the agreement to arbitrate is entered into subsequent to the execution of the underlying 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

¹⁶ Article 1320, Indonesian Civil Code.

¹⁷ Article 1(3), Arbitration Law.

¹⁸ Article 4(3), Arbitration Law.

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.

2. Enforcing arbitration agreements

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. Article 11 states:

- (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.

Although the Supreme Court has held that the 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 it, and it is up to the party claiming lack of jurisdiction to bring the matter up as an absolute exception to

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. Occasionally courts will still ignore both the provisions of the Arbitration Law and the Supreme Court's holding; however this does appear to be changing. 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.

An absolute exception to 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.

It should be noted that, despite the arbitration agreement being a valid and binding contract, if in writing, courts will not actually order parties to arbitrate. Indonesian law does not provide for this type of specific performance. So all the court can, and should, do is refuse to hear a case as the jurisdiction lies with arbitration.

3. Effects on third parties

Essentially, the Arbitration Law does not govern the effect of conclusion of an arbitration agreement on third parties. Such matters are governed by the contractual provisions of the Indonesian Civil Code which provides all basic guidelines of concluding contracts or agreements, and all relevant aspects to it.

The Indonesian Civil Code initially determines that a party can bind only itself to an agreement and not others, unless given an express power of attorney to do so. Nonetheless, it stipulates that at some instance, third parties should be willing to respect implementation or performance of an agreement. This is not an 'obligation' binding upon the third parties, it merely requires a recognition and guarantee that it would be respected by the third parties. By this conception, third parties are expected not to bar the implementation of a relevant agreement. Such conduct by third parties would be deemed as tort.

There are conditions however, according to the Indonesian Civil

Code when a third party could benefit from certain rights in an agreement. Under Article 1317 of the Indonesian Civil Code, an individual may enter into an agreement for the interest of a third party, and the individual who has concluded such agreement cannot revoke the agreement once the third party has declared his intention to exercise his right thereunder.

4. Termination and breach

Nor does the Arbitration Law govern about termination of the arbitration agreement. This also would fall within the provisions of the Civil Code.

According to Article 1381 of the Civil Code, an agreement may be terminated by several means, namely:

- payment;
- offer of immediate payment, followed by consignment or custody;
- renewal of the debt;
- comparison or compensation;
- consolidation of debts;
- exemption from a debt;
- the destruction of the goods that were owed;
- the invalidity or the nullification;
- the implementation of a dissolving condition; and
- prescription, which shall be the subject of a separate title.¹⁹

Article 1266 of the Civil Code acknowledges that any agreement may be terminated for breach, but only where the court confirms such breach and the right thereby to terminate. This article supersedes termination provisions of any contract, but it may be waived by the parties to the agreement.²⁰

B. Doctrine of Separability

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

¹⁹ Article 1381, Indonesian Civil Code.

²⁰ Article 1266, Indonesian Civil Code.

declared by the court to be null and void, the agreement to arbitrate still stands. Article 10 of the Arbitration Law states:

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.²¹

C. Jurisdiction

The Arbitration Law, as the early provisions of the RV before it, regulates that only disputes of a commercial nature, and those that are within the authority of the parties themselves to resolve, may be arbitrated. This is logical because, as the jurisdiction of the arbitrators is conferred by the parties, the parties may only confer upon the tribunal such powers as they themselves possess.

Although there is no explicit provision providing for *kompetenz-kompetenz*, it should be implicit from Articles 3 and 11 of the Arbitration Law, quoted above, that only the arbitral tribunal has the jurisdiction to determine its own jurisdiction, as well as whether a matter is capable of being arbitrated or not. This is a matter of jurisdiction.

A jurisdictional objection may be, and sometimes is, brought before the courts, but it is more common for a party simply to bring an action in the court and leave it to the other party to claim that the court does not have jurisdiction because of the arbitration clause. It is still the unfortunate fact that some courts of first instance (District Courts) will accept jurisdiction despite the existence of an arbitration clause, particularly where counsel can provide it with cleverly reasoned justification for so doing. However, this seems to be changing slowly and, in any case, such decisions are usually

²¹ Article 10, Arbitration Law.

reversed on appeal. Where an arbitration has commenced pursuant to a valid agreement to arbitrate and the respondent nonetheless commences an action in the court, as long as the tribunal is satisfied that it does in fact have jurisdiction, there is no impediment to its proceeding with the arbitration despite the parallel application to the court. There is of course the risk that the eventual award may be difficult to enforce if the court were to render a contradictory judgment. However, an award of the tribunal confirming its jurisdiction will provide a strong prima facie evidence for the appeal and, in some cases, if rendered before the matter is considered by the court, may persuade the court to decline jurisdiction, as it indeed should do.

Technically, it is a violation of the Arbitration Law to initiate court proceedings to resolve a dispute where the parties have agreed in writing to arbitrate any such dispute.²² By law, the judges must declare themselves to have no jurisdiction over the dispute. However, the court will entertain any case submitted to it, so it is up to the party seeking, or who has commenced, arbitration to submit its challenge to the court's jurisdiction based upon the agreement to arbitrate.

Any such challenge to jurisdiction should be submitted by the defendant before any reply to a plaintiff's statement of claim is submitted. It should be noted that submitting any such jurisdictional objections to the court does not constitute a waiver of a party's right to arbitrate.

D. 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.²³ Arbitration is not available in cases of disputes for which no amicable settlement would be permissible, or where state intervention is required.

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

²² Article 11 (2) of the Arbitration Law states that district courts shall refuse and will not interfere if a matter is being referred to arbitration through an arbitration agreement.

²³ Article 5(1), Arbitration Law.

dissolution of marital community property and the legal status of persons. It is assumed that, if contested in court, these restrictions will still be deemed applicable under the new Arbitration Law. Likewise, clearly as 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 effected by an arbitral tribunal would include transfer of title to land or shares in a 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.

E. Arbitral Tribunal

1. Status and qualifications of arbitrators

The 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 any 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.²⁴

There is no restriction on the nationality of the arbitrators.

Arbitrators in BANI-administered references must be chosen from the BANI panel, and at least one member of a tribunal must be qualified in Indonesian law if Indonesian law governs the relationship; 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.

The language of the Arbitration Law differs somewhat from that of the Model Law with respect to declaration of prospective arbitrators as to independence and impartiality. Article 18(1) provides:

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.²⁵

2. Appointment of arbitrators

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 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

²⁴ Article 12, Arbitration Law.

²⁵ Article 18(1), Arbitration Law.

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. (See Articles 13-17, Annex I).

In summary, if the parties fail to agree on the choice of arbitrators or have not made provision therefore, 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 a party has appointed an arbitrator and requested the other party to do so within the appropriate time limit, and the other party fails to do so, the arbitrator chosen by the requesting party shall act as sole arbitrator.

Of course the role of the Chief Judge, as appointing authority, will be superseded by the parties' choice of any other appointing authority, or that designated in any rules the parties have agreed to follow. In practice it is extremely rare for the Chief Judge to act as appointing authority as the parties invariably do designate a different institution.

An arbitrator must notify the parties in writing of the acceptance or rejection of the appointment.²⁶ The appointment by the parties in writing and the acceptance in writing by the arbitrator forms a civil contract among them.²⁷ 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

²⁶ Article 16(2), Arbitration Law.

²⁷ Article 17(1), Arbitration Law.

binding.²⁸ This contractual relationship also means that 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.

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.

3. Challenge and removal

The Arbitration Law, in Article 22, 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 not perform his/her duties independently or will be biased in rendering an award” or “... if it is proven that there is any familial, financial, or employment relationship with one of the parties or its respective legal representatives.²⁹

If it is a sole arbitrator that is challenged, the challenge is made first 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.

Any challenge must be made within fourteen 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 fourteen days after such information becomes known.

Articles 25 and 26 of the Arbitration Law set out further procedures, which do not differ substantially from that of most other jurisdictions and rules. 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.³⁰

The ultimate decision maker is the Chief Justice of the District

²⁸ Article 17(2), Arbitration Law.

²⁹ Article 22, Arbitration Law.

³⁰ Article 26(2), Arbitration Law.

Court. However, if specific rules for the conduct of the arbitration have been designated by the parties, the authority designated in such rules, if any, will prevail and supersede the provisions of the law calling for the court to act as appointing/challenging authority. When BANI is administering the arbitration, the ultimate decision is made by the Chairman of BANI and the court does not get involved.³¹

4. Arbitrator liability and immunity

An arbitrator cannot be held liable for any action or conduct performed during the arbitration proceedings or when exercising his or her function as arbitrator unless it can be proven that such arbitrator was acting in bad faith.³²

As was required under the prior legislative regime, the arbitration law imposes a time limit for completion of hearings of 180 days from the composition of the full tribunal, and the arbitrations have only 30 days from the completion of hearings in which to render their award. Article 20 of the Arbitration Law provides that if the award is not rendered within this time the arbitrators may be liable to pay compensation to the parties for any losses caused by the delay.³³ Presumably a party wishing to invoke this provision would have to take action in the court. Note that these time limits may be extended, or shortened, by agreement of the parties. But if a waiver is not accompanied by a different time limit it may be deemed ineffective.

The writers are not aware of any situation in which liability has been imposed upon arbitrators under this provision.

F. Conducting the Arbitration

1. Law governing procedure

a) Determination of law and rules governing procedures

Article 31 of the Arbitration Law provides:

- 1) The parties are free to determine, in an explicit written agreement, the arbitration procedures to be applied in

³¹ Article 10(6), BANI Arbitration Rules.

³² Article 21, Arbitration Law.

³³ Article 20, Arbitration Law.

hearing the dispute, provided this does not conflict with the provisions of this Act.

- (2) In the event that the parties do not themselves determine the procedures to be applied, and the arbitrator or arbitration tribunal has been constituted in accordance with Articles 12, 13, and 14, all disputes which have been so referred to the arbitrator or arbitration tribunal shall be heard and decided upon in accordance with the provisions in this Act.
- (3) In the event, the parties have chosen an arbitration procedure as contemplated in paragraph (1) the time frame and venue of the arbitration must be agreed upon, and if these have not been so determined by the parties, they shall be decided upon by the arbitrator or arbitration tribunal.³⁴

Thus clearly it is up to the parties to agree on all matters. If they do not agree upon other rules of procedure, those contained in the Arbitration Law itself will be applied. The law governing the procedure (*lex arbitri*) will be the Arbitration Law, unless the parties specifically designate a different law.

b) Methods for selection of seat absent party choice

Likewise it is up to the parties to designate the seat. If they fail to do so, the Tribunal will make that determination.

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 institutionally administered, in which case they may be held in the institution's premises.

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

³⁴ Article 31, Arbitration Law.

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, or the arbitrators if the matter is left to them, and the facilities available.

c) Mandatory rules of procedure

Article 31(1) of the Arbitration Law, as mentioned above, gives the parties the right mutually to designate in their agreement to arbitrate the rules which shall govern the procedure to conduct the proceedings, 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.³⁵ 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.³⁶

Thus where parties have simply agreed to arbitrate in Indonesia, without designating either an administering institution or rules to govern, the tribunal will be required to follow the procedural rules set out in Chapter IV (Articles 27 through 51) of the Arbitration Law.

But as all of the procedural rules set out in the Arbitration Law can be superseded if different rules are chosen, it can be said that there are no rules of procedure that are mandatory. Even the time limits, otherwise mandatory, can be waived. Only those provisions relating to such matters as qualification of arbitrators, arbitrability, the form and content of the award and registration requirements— not strictly procedural—are mandatory.

It should be kept in mind that there are certain provisions which are mandatory unless waived and could seriously affect the conduct of the arbitration and the ability of parties properly to present their case if they do not waive them in their agreement to arbitrate. One is the time limits, mentioned above. Another is that Article 28 requires that the arbitration be held in the Indonesian language unless the parties have specifically agreed upon a different language and the tribunal consents.

Article 36 of the Arbitration Law calls for the dispute to be heard

³⁵ Article 31(2), Arbitration Law.

³⁶ Article 34, Arbitration Law.

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.³⁷ Almost all cases do involve at least one hearing.

Both the Arbitration Law and the BANI Rules provide for a record of proceedings. Article 51 of the 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".³⁸

The BANI rules provide for a transcript to be made by an independent court reporter if required by either party. But even if there is no such independent transcript made, BANI provides a secretary to make a recording of and produce summary minutes of the proceedings and rulings, and for such minutes to be signed by the Tribunal.³⁹ However under BANI's current policy these minutes are not provided to the parties, but only to the arbitrators on the next hearing date. Thus parties wishing to have a proper transcript, or any transcript at all, would be wise to arrange it separately.

2. Conduct of arbitration

Although not specified in so many words, it is clear from the provisions on procedure that the arbitrators have wide authority to structure the procedural matters as they deem appropriate.

Although in theory, consistent with general Civil Law practice, the law favors an arbitration to be based solely upon documents submitted, there are almost always some hearings. 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. As a practical matter, almost all arbitral proceedings do involve some hearings, usually with witness testimony as well as written submissions and argument.

Invariably written submissions are exchanged before any but a possible procedural, hearing is held. Arbitration Law sets out minimal requirements for the Statement of Claim.⁴⁰ Article 38(2) requires:

³⁷ Article 36, Arbitration Law.

³⁸ Article 51, Arbitration Law.

³⁹ Article 19(3), BANI Arbitration Rules.

⁴⁰ Article 38, Arbitration Law; Article 16, BANI Arbitration Rules.

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.⁴¹

The BANI Rules have similar requirements for the Statement of Defense as well.⁴² Both require that any counterclaim or claim of set-off be submitted together with the Statement of Defense, although the arbitrators may permit the same to be filed at a later date, but not later than the first hearing.

3. Taking of evidence

i. General

Article 46 (3) of the Arbitration Law provides:

The arbitrator or arbitration tribunal shall be empowered to require the parties to provide such supplementary written submissions of explanations, documentary or other evidence as may be deemed necessary, within such time limitation as shall be determined by the arbitrator or arbitration tribunal.⁴³

It could be concluded that by having the power to order the parties to provide evidences it deems necessary, the arbitral tribunal or arbitrators could be said to possess the freedom to determine the relevance, materiality, and weight of the evidences submitted by the parties, although this is not made explicit in the law.

However, it should be noted that the arbitrators should comply with the rules of evidence under HIR (*Herziene Inlandsch Reglement*, procedural law for Java and Madura) in assessing the evidence. For example, under article 172 of HIR, the panel of arbitrators should observe certain elements to measure the value from witness statements.

⁴¹ Article 38(2), Arbitration Law.

⁴² Article 17(3)(a), BANI Arbitration Rules.

⁴³ Article 46(3), Arbitration Law.

Article 37(3) of the Arbitration Law provides that examination of witnesses shall be carried out in accordance with the provisions of the code of civil procedure which is generally constituted by a combination of three pre-Independence Dutch laws: the RV, the BW and the HIR or the RBg.⁴⁴ Historically, 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 and thus the arbitrators are bound to such rules of evidence, although normally an arbitral tribunal will have more flexibility in applying these than do the courts. Deviation from such rules will not constitute grounds for setting aside an award.

ii. Witnesses

Before giving their testimonies, witnesses are obliged to be sworn.⁴⁵ Implicitly, the Arbitration Law suggests that the swearing in of a witness has to be conducted before the arbitrators since it is they who call the witnesses to be heard of their testimonies.

The Arbitration Law does provide the power for the arbitrator or an arbitral tribunal to order witnesses to give their testimonies before them,⁴⁶ the same powers given the court in litigation cases. Article 140 HIR provides a compelling measure to the witnesses in the event that the witness concerned does not comply with the summons order. But there are no sanctions for failure to comply, in arbitration or even in civil court cases.

Moreover, the Arbitration Law does not provide any mechanism of *subpoena* or an order from the court to summon witnesses who are unwilling to testify in the arbitration to give testimonies before the court. Under the previous regime, Article 630 of the RV provided a mechanism for the court, on request of a party, to appoint an examining magistrate before whom witnesses who were unwilling to attend an arbitral hearing could be heard elsewhere, in the same manner as in court cases. This is one of the provisions repealed under the Arbitration Law, without providing a substitute, thereby leaving no effective means to *subpoena* recalcitrant witnesses.

The Tribunal can conduct the hearing and examination of witnesses as it deems appropriate. Normally, in practice, this

⁴⁴ Article 37(3), Arbitration Law.

⁴⁵ Article 49(3), Arbitration Law; Article 23(6), BANI Arbitration Rules.

⁴⁶ Article 49(3), Arbitration Law.

becomes a fairly informal process in which both the arbitrators and the opposing counsel may ask questions of the witnesses, sometimes alternately. The stricter provisions of the code of civil procedure are usually not closely followed.

It should, however, be noted that Article 1905 of the RV and Article 169 of the HIR provide that the testimony of a single witness shall be not be trusted, unless accompanied by other supporting evidence, such as a second witness. Family, relatives, those having relation with a disputant through marriage, including divorced husbands or wives are generally not qualified/permitted to act as witnesses, except in certain exceptional cases. These provisions are mandatory in court cases, but may be relaxed in arbitration if the tribunal so wishes.

iii. Documentary evidence

For the most part, both arbitral references and court cases are based upon documents. But there are no formal discovery procedures of the type known in common law jurisdictions. Parties are expected to produce whatever evidence is necessary to prove their case, and to list in their initial pleadings all documents upon which they base their argument or case, with those not submitted with those pleadings to be submitted at a subsequent hearing. This is explicit in the BANI Rules,⁴⁷ although not specified in the Arbitration Law. Courts do have the power to order additional documents to be presented, 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 their general powers over the conduct of the hearings. It is established in 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 or refuses to produce same, the arbitrators are free to draw their own inference or conclusion on the matter and rule accordingly.

4. Interim measures of protection

The Arbitration Law gives the tribunal the authority to issue both provisional and interlocutory awards, including security attachments, deposit of goods with third parties and sale of

⁴⁷ Article 16(3), BANI Arbitration Rules.

perishable goods. Article 32 of the Arbitration Law provides:

- (1) At the request of one of the parties, the arbitrator or arbitration tribunal may make a provisional award or other interlocutory decision to regulate the manner of running the examination of the dispute, including decreeing a security attachment, ordering the deposit of goods with third parties, or the sale of perishable goods.
- (2) The period of implementation of the provisional award or other interlocutory decision contemplated in paragraph (1) shall not be counted into the period contemplated in Article 48.⁴⁸

Arbitrators, like courts in litigation cases, may order goods to be attached to secure properties for any possible award in the future. The tribunal, however, has no power of execution and only a court may execute any such order. 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 Law for failure to comply with these interlocutory arbitral awards, Article 32 of the Arbitration Law may prove difficult to implement against a recalcitrant party in practice. But it has not as yet been tested in court. In effect, compliance by a party will depend upon good faith and reticence to prejudice the tribunal against it by disobeying their orders.

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. To our knowledge this facility has not been exercised as yet, and it is unlikely to be enforceable by the courts if it were.

5. Interaction between national courts and arbitration tribunals

One aim of the Indonesian Arbitration Law was to stop the courts from interfering with proposed and ongoing arbitrations. The law now clearly states that the court has no authority to adjudicate disputes between parties to an arbitration agreement. Application to a court may be made only if the appointment of an arbitrator is challenged and the parties have not designated rules which give this

⁴⁸ Article 32, Arbitration Law.

power to a different institution.

National courts may become involved at one of three stages of the arbitration process: (i) at the outset of the dispute, to enforce the agreement to arbitrate or to appoint or recuse an arbitrator; (ii) during the arbitration proceedings, through requests to enforce interim measures (although not yet tested); and (iii) after the close of arbitration to either enforce or annul the final award.

Historically, Indonesian courts have engendered little confidence among foreign investors that the dispute resolution systems they and their Indonesian partners devise in their contracts will be given full effect when a conflict ultimately arises. Unfortunately unscrupulous counsel have occasionally found various ways to persuade courts to evade the conscripts of the Arbitration law and the arbitral process, and to adjudicate cases subject to arbitration agreements, enjoin ongoing proceedings, or reopen the merits of final awards.

The court will address any application made to it, provided the same is in the context of a court action. 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 case under the subject agreement.

Occasionally a party may apply to a court to stay an arbitration. In some, but not all, recent such cases the courts have 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. In the absence of designation of an appointing authority by the parties to an agreement to arbitrate the court may address questions of appointment and/or recusal of arbitrators.

Otherwise, the courts have no jurisdiction to deal with any matters subject to arbitration, other than enforcement or other relief that may be sought after issuance of the final award. An exception might be to enforce interim measures of relief granted by a tribunal, but this has not yet been tested, and it is doubtful courts will be willing to enforce anything but a final award.

6. Multiparty, multi-action and multi-contract arbitration

The Arbitration Law does not set any specific provisions regarding multi-party arbitration nor consolidation of multi-actions

or multi-contract agreements. In practice, if one party to a multi-party agreement wishes to bring action against one other party, but not all, the non-litigant party(ies) must usually be joined as “co-defendants”, to which no liability will attach. Otherwise the defendant could successfully seek dismissal of the case on the ground that there is lack of parties to the dispute. Presumably this requirement would also apply to an arbitration between two parties to a multi-party agreement. The parties not involved in the dispute would have to be joined as “co-respondents”, or even “co-claimants”, but they would not be required to make submissions of their own unless they wished to join actively in the reference.

There is also no provision in the Arbitration Law for appointment of more than three arbitrators to a Tribunal. The requirement for number of arbitrators is only that it be an odd number. Therefore if there were a multiple party dispute where more than two parties were contending, and the parties wished to constitute a tribunal of, say, five arbitrators, there would be no legal impediment to so doing, although in most such cases, if the parties cannot group themselves into two camps, it is more common to appoint a sole arbitrator or have the appointing authority appoint the whole tribunal.

7. Law and rules of law applicable to the merits

Where parties have not agreed on the governing law, it will be up to the tribunal to determine which law to apply, normally based upon submissions of the parties. Such determination should be made based upon the normal criteria: points of connection, including the nationalities of the parties, the place of the performance of the contract, any references to provisions of law in the contract, flag of a vessel in a maritime case, and similar.

As a general rule, Indonesian courts will apply Indonesian law where no other has been designated and, unless there is a strong indication that some other law should govern, arbitrators also are more likely to apply Indonesian law where there is a significant Indonesian connection. Note that because all arbitrations held in Indonesia are considered domestic arbitrations, the same criteria will apply to any arbitration held here. For the most part, if the dispute relates to a project or business in Indonesia, Indonesian law will normally apply where the parties have not designated any other.

8. Costs

The costs of the arbitration should be awarded to the successful party in the final award. This is provided under Article 77 of the Arbitration Law, which provides:

- (1) The arbitration fees shall be charged to the losing party.
- (2) In the event that a claim is only partially granted, the arbitration fees shall be charged to the parties equally.⁴⁹

This does not include parties' counsel fees which, unless otherwise agreed by the parties, are borne by the respective parties themselves. Parties' legal costs are never awarded in court actions and the same practice will normally apply to arbitration, absent parties' agreement to the contrary.

Article 76 of the Arbitration Law sets out expenses that are regarded as costs of the arbitration to be awarded, which are:

- (2) Costs as mentioned under paragraph 1 cover:
 - a. Arbitrators' fees;
 - b. Travel costs and other costs expended by arbitrators;
 - c. Costs of witness and/ or required expert witnesses for dispute examination; and
 - d. Administration costs.⁵⁰

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.⁵¹

Other costs that may be required in conjunction with arbitration, aside from counsel fees, are notary fees and costs of translation and possibly interpreters and transcript costs.

As mentioned above, unless the parties have agreed upon a different language, the arbitration will be held in Indonesian, which will then require all documents to be in the Indonesian language. Where originals are in another language, these would then have to be translated by a government-licensed sworn translator. A recent, 2009, general regulation requires the Indonesian language to be used in all nature of meetings and writings. Although this regulation has not as yet been implemented, and its scope has not been clarified, BANI normally takes the position that regardless of what

⁴⁹ Article 77, Arbitration Law.

⁵⁰ Article 76, Arbitration Law.

⁵¹ Article 9(3), BANI Arbitration Rules.

the parties have agreed, all BANI arbitrations should be conducted in Indonesian. Most practitioners believe this policy is contrary to both the Arbitration Law and the freedom of contract provisions in the Civil Code⁵², but anyone contemplating providing for BANI arbitration should take this into consideration.

As there is no guidance in the Arbitration Law, the tribunal may handle the payment in any manner that they deem appropriate, including requiring a deposit or that a substantial portion of the fees be paid in advance. If the parties have agreed on specific rules or administering institution, the procedures set out therein will be followed. BANI's fee structure is based upon a percentage of the quantum of the claim, somewhat similar to that of the ICC, and requires that the parties deposit the whole of the initially anticipated fees in advance. Note that under BANI's current policy, less than half of that amount is actually paid to the arbitrators.

The Indonesian Arbitration Law empowers the tribunal to apportion the costs of the parties proportionally in accordance with the arbitral award, specifically where parties have won on some claims and lost on others. See translation of Article 77(2), above. If specific rules have been designated, then those rules shall apply.

There is no provision under the Arbitration Law granting any power to the court to review any part of a tribunal's decision. Nor is there any mechanism for "taxing" costs. It is thus understood that the arbitral tribunal has the ultimate say on the costs.

G. Arbitration Award

1. Types of award

Binding Opinion

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. Such an opinion is binding and not subject to appeal of any nature. This provision is an extension of this service which has been offered by BANI for some time, but it is rarely utilised.

⁵² Article 1338(1) of the Indonesian Civil Code.

Interim or interlocutory awards

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.

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 other 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 Law for failure to comply with these interlocutory arbitral awards, Article 32 of the Arbitration Law may prove difficult to implement in practice. But it has not as yet been tested.

Consent Awards

The Arbitration Law does not regulate consent awards as such. Article 6 does provide guidelines for seeking to settle a dispute before hearings commence in earnest, either by the parties themselves or with a mediator. If such efforts are successful the parties should set out their settlement in a written agreement, which will be registered in the District Court within 30 days, just as an arbitral award would be. Presumably such agreement will function as a consent award and be enforceable as such. To our knowledge this has not as yet been tested, as consent awards, like mediated settlements, are invariably complied with voluntarily.

2. Form requirements

Content of the award

The Arbitration Law sets out minimum criteria for the award. Article 54 provides as follows:

- (1) An arbitration award must contain:
 - a. a heading to the award containing the words ‘DemiKeadilan Berdasarkan Ketuhanan Yang Maha Esa’

- (for the sake of Justice based on belief in the One Almighty God);
- 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.⁵³

Correction of awards

After the award has been issued, the parties are afforded 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.⁵⁴

3. Remedies

Remedies available in arbitration, as in court cases, in Indonesia are provided by the Indonesian Civil Code. According to the Indonesian Civil Code, relief permissible to be granted includes “*costs, damages, and interests*”. The term ‘interest’ is understood to include loss of foreseeable expected future income that would have been obtained had the dispute not occurred.

Indonesian law does not recognise punitive or exemplary damages. Interest is not mandatory under Indonesian law and thus

⁵³ Article 54, Arbitration Law.

⁵⁴ Article 58, Arbitration Law.

is not assumed, but is awardable if the same has been provided for in the underlying contract, or if mandated by the governing law if such law is not Indonesian law. If interest is payable but no interest rate has been agreed upon or so mandated, the statutory rate of 6% per annum, not compounded, will be applied.⁵⁵ If no interest has been agreed upon by the parties, the tribunal may award interest, at the statutory rate, for the duration between the time the award is ordered to be satisfied until actually paid.

4. Decision making

The Arbitration Law does not specifically define how the arbitration tribunal should reach their decision. However, if anything, Article 56 of the Law mentions that a decision should be rendered based upon the relevant provisions of law, or based on justice and fairness.

5. Settlement

Article 45 of the Arbitration Law requires the tribunal, at the first hearing, to encourage the parties to settle amicably and, if such settlement is attained, to draw up what is effectively a consent award. Although this is mandated for the initial hearing only, it is assumed that the parties may reach such a settlement at any time and a consent award could be drawn up then.

It should be kept in mind, however, that today no government body or state-owned enterprise will be comfortable to settle any dispute by an amicable settlement that requires them to make a payment, as they will fear investigation by the Corruption Eradication Commission, and thus even if inclined to settle they will be required to arbitrate, or litigate, so that any such payment be mandated by some third party adjudication.

6. Effects of the award

Article 59 of the Arbitration Law requires that an arbitral award shall be registered by the arbitrators or their duly authorised representatives, with the District Court, or else the award shall not

⁵⁵ Article 1767 of Indonesian Civil Code jo. State Gazette (*Staatsblaad*) No. 22 of 1848.

be enforceable. Normally the tribunal will include in the award a power of attorney to the parties, or either of them, to effect registration on behalf of the tribunal. But in some foreign arbitrations where neither counsel nor the arbitrators make themselves aware of this requirement, difficulty can arise unless the arbitrators are willing to provide a separate power of attorney later, which some arbitrators have refused to do, claiming *functus officio*, thereby rendering their awards unenforceable. Recently the courts have been requiring such powers of attorney to be rendered in separate documents, even where contained in the award itself.

For domestic arbitrations, registration must be effected within 30 days of the date rendered, by submission of a signed original, or authentic copy, of the award to the court. 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.

There is no time limit for registration of international (foreign-rendered) awards.

Registration requires an original or authenticated copy to be submitted in the Indonesian language, and 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 be rendered in Indonesian, as well as in another language, most normally English, if required by the parties or the tribunal. 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. 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.

7. Correction, supplementation and amendment

Article 58 of the Arbitration Law provides a mechanism for correction of the arbitral award:

Within not more than fourteen (14) days after receipt of the

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award, the parties may submit a request to the arbitrator or arbitration 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.

No specific provision is made for interpretation of the award in the Arbitration Law or in the BANI Rules. However, if the arbitration is held under the UNCITRAL rules, the provisions of those rules would apply.

The Indonesian Civil Code contains a section relating to interpretation of contracts in general and, if a provision of an award were not clear to such extent that it made execution difficult, it is probable that, upon application by a party, the court would rely upon those provisions for interpretation.

H. Challenge and Other Actions against the Award

1. Setting aside

Domestic 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. Regarding the annulment of an international award, 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 have jurisdiction to hear the annulment application and to annul if necessary. 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.

A request to annul, or set aside, an arbitral award must be submitted in writing within 30 days of the date of registration of said award with the registrar of the applicable District Court (in the case of foreign-rendered awards this is the District Court of Central Jakarta). The average duration for such challenge proceedings is approximately 6 to 8 months.

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 *et seq.*) 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.

Time limits

Any such application 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 may be made to the Supreme Court, and the Law requires the Supreme Court to decide upon such appeal within thirty days of application.

2. Appeal on the merits

There is no appeal against an arbitral award on the merits.

III. RECOGNITION AND ENFORCEMENT OF AWARDS

A. Domestic Awards

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 no appeal is available, the losing party does have the opportunity to contest execution by filing a separate contest. Although the District Court may not review the reasoning in the award itself,⁵⁶ 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

⁵⁶ Article 62 (4), Arbitration Law.

Arbitration Law⁵⁷ (the dispute must be commercial in nature and within the authority of the parties to settle, and the arbitration clause must be contained in a signed writing) and if the award is not in conflict with public morality and order.⁵⁸

B. Foreign Awards

1. Enforcement Pursuant to Domestic Law

The procedure for enforcement of an arbitral award in Indonesia differs somewhat depending upon whether the arbitration was held, and the award rendered, within or outside of the archipelago. The Arbitration Law does not make any distinction between “domestic” and “international” arbitrations, in the sense of any diversity in the nationality of the parties, the only distinction being the place in which the arbitration is held. Article 1(9) of the Arbitration Law, consistent with the previous legislative regime, defines International Arbitration 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”.⁵⁹ As there has been no legislation, nor Supreme Court ruling, to the contrary, an award rendered in an arbitration with its seat 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.

There has been one aberrant situation where the successful party to an arbitration held in Jakarta registered its award later than the 30-day limit and thus sought to register it as an international award on the basis that it was ICC administered. The court was persuaded to accept and register such award as an international one despite the fact that the parties were fully Indonesian-owned Indonesian entities, the project was located in Indonesia and the reference was held in Indonesia under Indonesian governing law, substantive as well as *lex arbitri*. Even under the Model Law test this

⁵⁷ Articles 4 and 5, Arbitration Law.

⁵⁸ Article 62 (2), Arbitration Law.

⁵⁹ Article 1(9), Arbitration Law.

would have been considered a domestic arbitration without question. And thus the award was enforced, although under the law it was no longer enforceable due to the passage of the time limit. Unfortunately this case may well cause confusion about the territoriality of the Arbitration Law, although, as a civil law jurisdiction, decisions need not constitute precedent.

Awards rendered in Indonesia are executed through the court of first instance (District Court) in the district in which the losing party is domiciled, whereas foreign-rendered awards, if enforceable under a relevant convention, are enforced by application to the District Court of Central Jakarta, *Pengadilan Negeri Jakarta Pusat*, first for an order of *Exequatur*, and subsequently an order of attachment, which latter order can then be implemented in the District Court in the domicile of the party against which enforcement is sought. If the Government of the Republic of Indonesia is a party to the arbitral reference, the enforcement order may only be issued by the Supreme Court. In such cases, application is still made through the Central Jakarta District Court, which forwards the same to the Supreme Court for action. 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. Giving *Exequatur* power over foreign rendered awards to the Central Jakarta District Court has expedited this process.

Although there is no comprehensive data on domestic enforcement, it appears that, to date, there have been very few domestic awards which the courts have declined to enforce. Parties seem more likely to seek to have awards set aside rather than wait for an enforcement action to be commenced. Furthermore a decision to annul an award may be appealed. Once the 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.

2. Various regulatory regimes

Indonesia, through Presidential Decree Number 34 Year 1981, has ratified the New York Convention and, through Law No. 5 of 1968, has ratified the Convention on the Settlement of Investment

Disputes between States and Nationals of Other States.

3. 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) 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 155 or so other signatory states will be enforceable in Indonesia under the provisions of the Arbitration Law. 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.

Application for enforcement of international awards are submitted to the District Court of Central Jakarta, the court vested by the Arbitration Law with jurisdiction to issue orders of *Exequatur* in cases of international arbitrations. Where the Government of the Republic of Indonesia is a party only the Supreme Court has jurisdiction to issue *Exequatur*. The requirements for such application mirror those of the previous legislation, which in this case were the implementing regulations to the adoption of the New York Convention, as set out in Supreme Court Regulation No. 1 of 1990. 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, 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*. It should be noted that Article 67 (c) of the Arbitration Law requires a certification from the Indonesian consulate in the country in which the award is rendered to such effect.

IV. APPENDICES AND RELEVANT INSTRUMENTS

A. National Legislation

See Law No. 30 of 1999, the Arbitration Law, attached

B. Major Arbitration Institutions

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See Section I B 1, above.

C. Cases

Under the Arbitration Law, arbitral awards are not published, nor are most court judgments.

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