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International Arbitration

Indonesia
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Law and Practice

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1. General

1.1 Prevalence of Arbitration

International arbitration is increasingly chosen as a method to resolve disputes in Indonesia, but the total number of disputes for which arbitration is chosen still lags behind the number submitted to the general courts in Indonesia. One of the reasons is a measure of unfamiliarity with arbitration as a dispute resolution mechanism. Another is the local infrastructure for conducting arbitral procedures, which is still in an early stage of development.

However, arbitration is becoming more broadly accepted and the total number of commercial arbitrations registered with the Indonesian National Board of Arbitration (*Badan Arbitrase Nasional Indonesia* or BANI) is rising: in 2019, the most recent year for which data is available, there were 85 arbitrations.

When arbitration is chosen, it is generally believed that the positive drivers are the appointment of arbitrators by the parties, the confidentiality of the proceedings, and the final and binding nature of the award. Other reasons cited include the flexibility of the procedure, the professionalism and expertise of the arbitral tribunals, and the comparative unattractiveness of cross-border dispute resolution through the courts. In its elucidation, the Arbitration Law identifies a number of other general principles which distinguish arbitration from the administration of justice through state courts and which it seeks to secure with this law. These include the following: the speedy nature of arbitration due to an absence of procedural and administrative restrictions, the ability to select arbitrators with specific expertise with regard to the matter that is in dispute, and the possibility of selecting a legal regime best suited to the parties for the purposes of the issue in dispute. Foreign contract parties will often choose arbitration, as judgments of foreign courts are not enforceable in Indonesia but foreign arbitral awards are, if certain conditions are met.

1.2 Trends

A positive trend affecting arbitration in Indonesia is the modernisation of arbitral procedures, with the increasing use of electronic filing and other information technology. A further positive trend is the increasing number of Indonesian professionals available to act as arbitrators. Moreover, increased investment in Southeast Asia has led to growth in the demand for dispute resolution services in the region, and Indonesia has had its share in that growth.

The COVID-19 pandemic has (at least temporarily) severely impacted the use and conduct of international arbitration proceedings in Indonesia. Although reliable figures are unavailable, most arbitration procedures will very likely have been affected by the implementation of "large-scale social restrictions" (PSBB) within Jakarta that commenced in early April 2020, when personal mobility was severely restricted, most workplaces were temporarily closed and all workplace and office activities were replaced by a work-from-home policy. These measures are, for the moment, being gradually relaxed. Separately, BANI Decree No 20.015/V/SK-BANI/HU dated 28 May 2020 and BAPMI Decree No Per-01/BAPMI/03/2020 dated 30 March 2020 promote the use of online proceedings.

1.3 Key Industries

Commercial arbitration is increasingly used in the sectors of infrastructure development, construction, technology and communications, mining and natural resources, and joint ventures. Some state-owned companies prefer the use of BANI Rules over foreign institutional arbitration.

Of the industries mentioned, coal mining and precious metals mining have probably seen a decrease in the number of newly registered arbitral claims, caused by the general downturn in investment in this area. Technology and communications are areas in which arbitration is regarded as attractive because of the likelihood of confidentiality being protected.

1.4 Arbitral Institutions

There are now many well-known arbitration institutions in Indonesia, including:

- the Indonesian National Board of Arbitration (*Badan Arbitrase Nasional Indonesia* or BANI);
- the Indonesian Capital Market Arbitration Board (*Badan Arbitrase Pasar Modal Indonesia* or BAPMI);
- the National Shari'a Arbitration Board (*Badan Arbitrase Syariah Nasional* or Basyarnas); and
- the Arbitration Board of Indonesian Sports (*Badan Arbitrase Olahraga Indonesia* or BAORI).

In terms of volume and caseload of international matters, BANI is a leader in the field. Many cross-border contracts now choose international arbitration providing for application of arbitration rules drawn up by international arbitration institutions such as the International Chamber of Commerce, the Singapore International Arbitration Centre, the Hong Kong International Arbitration Centre and the London International Court of Arbitration.

In many cases, the institution will not decide the dispute; rather, its role is to assist with the conduct of the procedure generally. This often includes the appointment of the tribunal, including selecting arbitrators where a party fails to do so, or where the parties are unable to agree. Often their function will encompass the administration of the proceedings, including:

- reviewing the draft of the award;
- hearing challenges to arbitrators;
- taking deposits on account of the arbitration costs;
- fixing the arbitrators' fees;
- reminding parties and tribunals of deadlines; and
- arranging hearing facilities.

All these functions, and many more, are set out in the arbitration rules unique to each institution.

2. Governing Legislation

2.1 Governing Law

Law No 30 of 1999 on Arbitration and Alternative Dispute Resolution (Arbitration Law) is the statute that governs arbitration and other forms of alternative dispute resolution, such as mediation and expert determination. The Arbitration Law has replaced the provisions on arbitration contained in the Civil Procedure Code, which was inherited from the pre-independence period.

The Arbitration Law is not based on the UNCITRAL Model Law on International Commercial Arbitration (Model Law), and deviates from the Model Law on several points, ie:

- Indonesian is the default language;
- the arbitral tribunal is to complete its "examination of disputes" within 180 days of its constitution; and
- grounds for annulment of Indonesian awards are limited to fraud, forgery or concealment of material documents.

Some of these points will be discussed in further detail in this report. Generally, the role of the courts is relatively limited as compared to the role granted to the courts in the Model Law.

In addition, prior to the enactment of the Arbitration Law, Supreme Court Regulation No 1 of 1990 on the Procedures for the Implementation and Execution of Foreign Arbitration Awards (Supreme Court Reg No 1/1990) had been used as reference for the enforcement and execution of foreign arbitral awards.

2.2 Changes to National Law

Minister of Finance Regulation No 80/PMK 01/2015 on the Execution of Judicial Decisions (2015 Regulation) has provided parties in disputes against the state of Indonesia with increased assurance of obtaining payment of awards. No statutory amendments with a significant impact on Indonesian arbitration practices have been introduced more recently. As of the date of this report, no further major reforms are underway or expected.

3. The Arbitration Agreement

3.1 Enforceability

The Arbitration Law requires an arbitration agreement to be made in writing and signed by the parties. It may be in the form of:

- an arbitration clause contained in a written agreement made before the dispute arises; or
- an agreement especially entered into by the parties after the dispute arises.

If an arbitration agreement is made before the dispute arises, the Arbitration Law requires that it should state that all disputes that arise or may arise from a legal relationship between the parties must be settled by means of arbitration. If an arbitration agreement is made after the dispute arises, it must include at least:

- the subject matter of the dispute;
- the names and addresses of the parties;
- the names and residential addresses of the members of the arbitral tribunal;
- the place where the arbitral tribunal will render the award;
- the name of the secretary to the arbitral tribunal;
- the time period within which the arbitration is to be completed; and
- a statement from the members of the arbitral tribunal accepting their appointment, and a statement from the disputing parties that they will bear all costs of the arbitration.

The Arbitration Law does not require the seat of the arbitration, the legal concept tying the arbitration to a legal jurisdiction, to be mentioned in the arbitration agreement. However, if the place where the arbitral tribunal will render the award is Jakarta, it is safe to assume that the Arbitration Law will govern the arbitration, and that the Indonesian courts will have control in relation to the arbitration and the powers that are elsewhere granted to the courts of the seat of arbitration.

An arbitration agreement can be contained in an exchange of correspondence that provides a record of its content, and any dispatch by telex, telegram, facsimile, email or other means of telecommunication must be accompanied by an acknowledgment of receipt. The Arbitration Law does not deal with optional arbitration clauses that give one (or more) parties the ability to make a choice after a dispute has arisen whether to arbitrate or litigate that dispute.

3.2 Arbitrability

Matters that may not be referred to arbitration are those in which, according to Indonesian law, no amicable settlement is possible: eg, criminal matters, bankruptcy, adoption, etc. The

general approach to determine whether or not a dispute is arbitrable is found in Article 5 (1) of the Arbitration Law, which states that a dispute can be settled by means of arbitration if the dispute is of a commercial nature and "falls within the full legal authority of the disputing parties". The latter requirement appears to give arbitrators the authority to examine whether particular parties, eg, government-owned entities, have the requisite power to submit disputes to arbitration. As regards to the meaning of "commercial nature", the elucidation to Article 66 of the Arbitration Law states that these include commerce, banking, finance, investment, industry, and intellectual property.

Arbitration is not limited to dispute settlement. Under the Arbitration Law parties may petition arbitrators to help settle an equivocal contract provision, or provide for the amendment of a contract due to changing conditions. The Arbitration Law allows parties to ask for a binding opinion from the arbitrators, which opinion is not open to appeal.

3.3 National Courts' Approach

The national courts nowadays generally enforce arbitration agreements. Articles 3 and 11 of the Arbitration Law conclusively eliminate the national courts' competence to hear any dispute that has been referred to arbitration, and rule that the courts must reject, and may not be involved in, disputes that should have been settled by means of arbitration. This notion was confirmed in the Supreme Court decision of the case between PT Pertamina Hulu Energi Raja Tempirai (PHE Tempirai) v PT Golden Spike Energy (Golden Spike) in 2015, in which the Supreme Court overturned a decision of the High Court that had upheld a lower court decision. The lower court had ruled that it had jurisdiction to examine a breach of contract lawsuit despite the existence of an arbitration agreement. Therefore, the lower court did not have jurisdiction to examine the case.

3.4 Validity

The Arbitration Law recognises the separability principle: an arbitral clause can be considered valid even if the rest of the contract in which it is contained is wholly or partly invalid. The arbitration clause is therefore separate from the agreement in which it is set out. If there is no express law chosen for the arbitration agreement, the law with which that agreement has its closest connection is either the law of the underlying contract or the law of the seat of the arbitration.

4. The Arbitral Tribunal

4.1 Limits on Selection

The Arbitration Law contains no limitation on the parties' autonomy to select arbitrators but lists requirements for a valid appointment as an arbitrator. An arbitrator must:

- be legally capable to perform legal actions;
- be at least 35 years old;
- not have any family relationship by blood or marriage up to the second degree with any of the disputing parties;
- not have any financial or other interest in the award; and
- have a minimum of 15 years of experience and active proficiency in the field concerned.

The Arbitration Law also prohibits judges, prosecutors, court clerks and other court officials from being appointed as arbitrators. There is no restriction with regard to nationality.

There is no clear rule in the Arbitration Law which requires that there should be an uneven number of arbitrators. The Arbitration Law says that if parties each appoint an arbitrator, such arbitrators have the authority (ie, not the obligation) to appoint a third arbitrator. If they fail to do so, then one of the parties can (but need not) apply for the appointment of a third arbitrator by the court.

4.2 Default Procedures

Under the Arbitration Law, the parties have the freedom to choose the national or international arbitration institution to which they wish to submit their disputes. The rules of that institution will apply unless otherwise decided (Article 34 of the Arbitration Law). The parties may agree on a particular set of rules on arbitrator selection, provided that the rules are not contradictory to the Arbitration Law, or to the appointment rules of the national or international arbitration institution they have selected. In the event that the chosen method for selecting arbitrators fails or the parties do not choose a selection method, the chairman of the district court will have authority to appoint the members of the arbitral tribunal.

Specifically for ad hoc arbitration, the Arbitration Law provides that in the event that the parties fail to appoint the members of the arbitral tribunal, they may seek the assistance of the chairman of the district court to appoint the members of the arbitral tribunal.

However, if the parties agree to specific institutional arbitration rules or set out their own rules, these will apply as the default procedure, provided they do not contradict the Arbitration Law.

The Arbitration Law provides that the tasks of the arbitrators end:

- after an award has been issued;
- the deadlines determined in the arbitration agreement have been exceeded; or
- the parties have agreed to withdraw their dispute from arbitration.

The law specifies that the death of one of the parties does not in itself affect the arbitration procedure, though the term of office of arbitrators will automatically be extended by 60 days in such an event.

4.3 Court Intervention

During the appointment process, the court can intervene in the selection of arbitrators:

- if one of the events described in Article 13 of the Arbitration Law, discussed in **4.2 Default Procedures** occurs; and
- if a recusal filed by one party is objected to by the other party or parties, or if the member of the arbitral tribunal concerned fails to step down.

Thereafter, the court can only address the issue of the jurisdiction and competence of an arbitral tribunal within the framework of enforcement of the award through a writ of execution (exequatur).

4.4 Challenge and Removal of Arbitrators

Section III of the Arbitration Law stipulates the provisions governing the challenge or removal of arbitrators. It contains the requirements for a challenge or removal of members of an arbitral tribunal by the parties or by the chairman of the district court.

A challenge request to recuse members of an arbitral tribunal can be filed:

- if there is sufficient cause or authentic evidence that raises doubt as to whether the arbitrator will perform the task independently, neutrally and impartially when rendering an award; or
- if it is proven that the arbitrator has a family, work or financial relationship with one or more of the parties or their legal counsel.

4.5 Arbitrator Requirements

Under the Arbitration Law, each member of the arbitral tribunal must be independent, neutral and impartial, as outlined in **4.1. Limits on Selection**, but there are no specific references to the requirement for independence, impartiality and/or disclosure of a potential conflict. BANI has adopted a similar requirement, yet it also does not have specific references.

If the appointment of arbitrators is complete, then an arbitrator cannot be released from his or her duties other than with the agreement of the disputing parties. If the parties agree, then the arbitrator is released. If they disagree, the issue of the release can be submitted to the district court chairman for final decision.

5. Jurisdiction

5.1 Matters Excluded from Arbitration

Subject matters that may not be referred to arbitration under the governing law of Indonesia include those that are not commercial in nature and disputes that cannot be settled amicably, such as criminal offences – see also **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

An arbitral tribunal is itself authorised to rule on a party's challenge to the tribunal's jurisdiction (the competence-competence principle). The principle is generally accepted even though the Arbitration Law does not specifically confirm it. The applicability of this principle can be inferred from Articles 3 and 11 of the Arbitration Law. Article 3 requires the courts to refer disputes arising out of a contract (that has an arbitration clause) to arbitration instead of assuming jurisdiction, and Article 11 states that parties to a written arbitration agreement are no longer entitled to initiate litigation proceedings at the courts.

Several Indonesian arbitration institutions incorporate this principle specifically in their arbitration rules, such as Article 19 of the BANI Rules 2019 and Article 22(2) of the BAPMI Rules.

5.3 Circumstances for Court Intervention

The Arbitration Law does not allow the courts to address the issue of jurisdiction of an arbitral tribunal. The Arbitration Law does set out the limited involvement of the courts, such as the appointment, discharge and recusal of an arbitrator; registration and issuance of exequatur for an arbitral award; and the annulment of an arbitral award. However, as this is limited, the courts tend to be reluctant to intervene in questions relating to the jurisdiction of arbitral tribunals.

There have been cases in which the courts have assumed jurisdiction where the claim was argued to represent not a breach of contract subject to an arbitration clause, but a tort – see **5.6 Breach of Arbitration Agreement**.

5.4 Timing of Challenge

The Arbitration Law does not provide any mechanism to challenge the jurisdiction of an arbitral tribunal before the courts. Therefore, unless there is ambiguity in the arbitration clause that may trigger the courts' jurisdiction, a challenge to the jurisdiction of an arbitral tribunal may only be heard by the arbitral tribunal.

5.5 Standard of Judicial Review for Jurisdiction/ Admissibility

Admissibility and/or jurisdiction issues will first be addressed by the arbitral tribunal at the beginning of the arbitration proceeding before examination of the substance of the dispute.

They may also be subject to court review during the enforcement stage. In either case, the standard should be de novo: the Indonesian courts would not apply restraint in their review, particularly not where it concerns due process and equality issues such as the right to be heard. But an Indonesian court has not yet confirmed this view – see also **3.2 Arbitrability**.

5.6 Breach of Arbitration Agreement

Current trends show a strong tendency for Indonesian courts to reject jurisdiction in breach of an arbitration agreement: where there is a clear and unambiguous arbitration clause, and that clause is valid and enforceable and the dispute concerns an alleged breach of contract, the courts must refer the parties to arbitration.

In practice, there have been cases where the parties have initiated court litigation based on tort in order to avoid application of the arbitration clause. The argument typically used was that the arbitration jurisdiction was limited to matters involving breach of contract, and hence could not extend to a tort-based claim. However, Article 134 of the Revised Civil Procedural Law (HIR) opens up the possibility for parties wishing to invoke an arbitration clause to challenge the court if it assumes jurisdiction over a matter covered by an arbitration agreement. Indonesian law requires that the arbitration agreement and the lack of jurisdiction must be raised in the first written pleading.

5.7 Third Parties

Third parties that are not a party to the arbitration agreement may join in the arbitration proceedings in the following circumstances:

- if the third party has an interest in joining in the arbitration;
- if the participation is agreed by the disputing parties; and
- if the arbitral tribunal approves the third party's joining in the arbitration.

The Arbitration Law does not limit this condition to domestic parties. Thus, it is applicable to both foreign and domestic third parties.

In principle, a third party, ie, any person or entity that has not signed an arbitration agreement, is not bound to become involved in the arbitration. An exception would be where the rights under an agreement would have been assigned to a third party. If that agreement contained an arbitration clause, that third party would, as an assignee, be bound to the arbitration clause.

6. Preliminary and Interim Relief

6.1 Types of Relief

The Arbitration Law recognises that the availability of interim relief pending a final award is an important feature of arbitration, including orders to prohibit actions that could cause imminent harm or to preserve assets to satisfy an award. Pursuant to Article 32 of the Arbitration Law, an arbitral tribunal is permitted to award preliminary or interim relief. Types of relief that can be awarded include:

- a security attachment;
- a deposit of goods with third parties; and
- the sale of perishable goods.

Similar relief is often provided for in varying levels of detail in the rules of arbitration institutions.

6.2 Role of Courts

Preliminary and Interim Relief

The courts do not play a role in ordering preliminary or interim relief in arbitration proceedings. Arbitral tribunals do not have the authority to grant or lift attachments in the same manner and with the same binding force as the Indonesian courts have.

Although an arbitral tribunal is granted the power to render relief within the parameters of an arbitral procedure, in practice, complications arise when the claimant party attempts to enforce the relief granted by the arbitral tribunal. Indonesian law does not regulate court implementation of preliminary or interim relief awarded in arbitration proceedings. It generally adopts the position that only a final and binding decision awarded in arbitration proceedings can be enforced.

Emergency Arbitrators

The Arbitration Law does not contain any reference to the use of emergency arbitrators. However, if the parties have agreed on specific rules for the arbitration – either institutional or ad hoc – that allow the use of emergency arbitrators, the court should recognise the validity of an arbitral award rendered by an emergency arbitrator.

In light of Articles 3 and 11 of the Arbitration Law, both of which stipulate that the national courts must refrain from examining disputes which the parties have agreed to refer to arbitration, the national court should not be able to intervene once an emergency arbitrator has been appointed in accordance with the applicable institutional or ad hoc arbitration rules.

6.3 Security for Costs

The Arbitration Law does not expressly allow the arbitral tribunal to order security for costs. However, institutional arbitration rules sometimes contain security for costs provisions.

7. Procedure

7.1 Governing Rules

The parties to a dispute that has been submitted to arbitration have the following options:

- to draw up their own procedural rules or adopt the UNCITRAL rules or other rules for ad hoc arbitration;
- to use the rules of a national or international arbitration institution; or
- to use the default rules contained in the Arbitration Law, which will in any event apply if neither of the preceding options have been chosen.

7.2 Procedural Steps

Pursuant to the Arbitration Law, the following default procedural steps are prescribed.

- When a dispute arises, the respondent must be notified in writing via mail, telex, facsimile or email. The notification must include:
  (a) the name and address of the disputing parties;
  (b) evidence of the agreed arbitration clause;
  (c) the disputed issues;
  (d) the basis for a claim and the claim amount;
  (e) the agreed dispute settlement procedure; and
  (f) the agreed or chosen number of arbitrators.
- Written submission must be presented to the arbitral tribunal for the purpose of examining the dispute. Oral submissions may be made if agreed by the parties and considered necessary by the arbitrators.
- At least one hearing must be held. If deemed necessary by either party or the arbitral tribunal, the parties must appear at further hearings.
- The arbitrators must make an effort to settle the dispute amicably prior to examination of the dispute. If such conciliation is in fact reached, then this must be set out in a deed which is final and binding upon both parties and instructs them to abide by its provisions. The arbitration hearings commence if a settlement cannot be reached.
- The examination of witnesses and experts follows the Indonesian Civil Procedural Law. The arbitrators can decide to summon witnesses either at their own initiative or at the request of the parties. The cost of witnesses must be borne by the claimant. The arbitrators may also hear expert witnesses. The testimony of the expert witnesses must be in writing.
- In contrast to the UNCITRAL Model Law, the arbitration proceedings must be completed within 180 days after the panel of arbitrators has been established. As regards time limits, the Arbitration Law states that arbitration procedures may not extend beyond 180 days. This term can be extended by the arbitrators at the substantiated request of one of the parties, as a result of interim measures, or if the proper resolution of the dispute so requires, as determined by the arbitral tribunal. It is possible and common to waive this provision in an arbitration clause.
- The award must follow the requirements set out in Article 54 (1) of the Arbitration Law (for further explanation, see **10. The Award**) and must be pronounced within 30 days of the examination being completed.

7.3 Powers and Duties of Arbitrators

The arbitrators, acting as an arbitral tribunal, have the following authority:

- to determine the tribunal's own jurisdiction;
- to determine the rights and obligations of the disputing parties;
- to render an interlocutory decision at the request of one of the disputing parties;
- to conduct site visits if considered necessary;
- to determine the seat of arbitration unless already agreed by the parties; and
- to hear witnesses or experts.

The arbitrators have the following duties:

- to adjudicate the claims based on:
  (a) applicable law; or
  (b) the principles of fairness and appropriateness (ex aequo et bono), unless the parties have agreed to reject these principles;
- to complete the examination of the case within 180 days of the establishment of the panel of arbitrators, unless agreed by the parties to be extended; and
- to decide on the arbitration costs (arbitrators' fees, transportation costs and other relevant costs, costs to summon witnesses or experts that may be necessary for the examination of the dispute, and administration costs).

7.4 Legal Representatives

No particular qualification is required for a legal representative appearing before arbitration proceedings in Indonesia. In fact, there is no obligation to be admitted to any Bar association in order to act as counsel in such proceedings. Moreover, there is no obligation for the parties to be represented at all. Foreign

legal representatives require no specific qualification to act as their client's representative.

If a legal representative is an Indonesian legal counsel/advocate, the requirements under the Advocates Law (Law No 18 of 2003) will apply. For capital market arbitration in BAPMI, the legal representatives that can appear must be members of the Association of Capital Market Legal Consultants (*Himpunan Konsultan Hukum Pasar Modal* or HKHPM).

8. Evidence

8.1 Collection and Submission of Evidence

As Indonesia is a civil law country, under Indonesian procedural law, a party must present its own evidence to substantiate its claim; hence the common law concept of discovery is generally not recognised. Under the Arbitration Law, arbitrators do have the power to request parties to provide additional information in writing, documents or other evidence necessary. However, arbitrators have no executorial authority to compel the parties to provide the requested documents.

8.2 Rules of Evidence

The Arbitration Law adopts a combination of rules of evidence provided under the provisions of the Arbitration Law and the Indonesian Civil Code. The approach taken to implement such combination is the principle lex specialis derogit lex generalis; thus, if the provisions in the Arbitration Law stipulate a specific subject matter, this would override the law governing general matters, ie, the Indonesian Civil Code. The Arbitration Law also adopts the civil procedural law or HIR.

A party may submit any of the following evidence recognised under the Indonesian Civil Code and HIR:

- documents/written evidence;
- witness statements;
- presumptions/indications (*vermoedens*);
- confessions or admissions; and
- oaths.

In order to ensure that the evidence is admissible, there are specific requirements for each type of evidence. The IBA Rules on the Taking of Evidence in International Arbitration are often referred to as guidance in cross-border arbitrations seated in Indonesia.

8.3 Powers of Compulsion

With the absolute competence of arbitration and pursuant to the limitation on court involvement in arbitration, there are no powers of compulsion or court assistance for arbitrators to order the production of a document or require the attendance of witnesses. The arbitral tribunal should rely on the powers vested in it pursuant to the arbitration agreement, the Arbitration Law and the institutional arbitration rules where applicable.

9. Confidentiality

9.1 Extent of Confidentiality

The examination of a dispute by arbitrators takes place in a closed proceeding, and registration details, documents, submissions and hearings can only be disclosed to third parties with the consent of the disputing parties or if legally required by law. Indonesian law is silent on whether information in arbitration proceedings may be disclosed in subsequent arbitration proceedings. The Arbitration Law does not expressly state that the award is confidential.

Most of the rules adopted by arbitration institutions have their own provisions on confidentiality. The BANI Rules, for instance, specify that all matters relating to the arbitration must be kept in strict confidence amongst the parties, the arbitrators and BANI itself.

10. The Award

10.1 Legal Requirements

Article 54 paragraph (1) of the Arbitration Law requires that an arbitral award must, at minimum, contain the following:

- the statement "*Berdasarkan Keadilan yang Berdasarkan Ketuhanan Yang Maha Esa*" (For the Sake of Justice based on the Almighty God), written at the top of the award;
- the full names and addresses of the parties;
- a brief description of the dispute;
- the positions of the respective parties;
- the full names and addresses of the arbitrators;
- the considerations and conclusions of the tribunal concerning the dispute;
- the opinion of each of the respective arbitrators if there is a difference of opinion within the tribunal;
- the dictum of the award;
- the place and date of the award; and
- the signatures of the members of the tribunal. The failure of an arbitrator to sign an award, because of illness or death, if noted in the award itself, will not affect the enforceability of the award (Article 54(2) of the Arbitration Law).

The Arbitration Law does not expressly deal with the matter of a member of the arbitral tribunal issuing a dissenting opinion.

In addition, the Arbitration Law provides that the award must specify the time within which the award must be implemented. The award must be delivered orally within 30 days of the arbitration being closed.

A request for registration of a domestic award must be made within 30 days after the date of the award on penalty of unenforceability of the award. There is no limitation on the registration period for a foreign arbitral award – see also **12.2 Enforcement Procedure**.

10.2 Types of Remedies

The arbitral tribunal's final award is usually an order for the payment of a sum of money or an order to engage in or refrain from a certain conduct. However, Indonesian law does not contain any statutory limitations on the type of remedies an arbitral tribunal can award. As such, arbitrators can:

- render declaratory relief;
- order a party to pay damages;
- issue injunctions; and
- award costs.

The award may provide that interest is payable on the amount awarded, at a rate and for a duration determined by the arbitral tribunal, which has broad discretion.

10.3 Recovering Interest and Legal Costs

Unless agreed otherwise by the parties in the arbitration clause, legal costs incurred by the parties are borne by the parties but may be ordered to be totally or partially paid by the losing party. The costs of the arbitration are usually determined by the arbitral tribunal. Costs include:

- the arbitrators' fees;
- travel and lodging and other expenses incurred by the arbitrators;
- witness or expert witness expenses; and
- administration, hearing and other costs payable to an arbitration institution, if any.

11. Review of an Award

11.1 Grounds for Appeal

An arbitral award is final and binding on the parties and cannot be appealed. The only available recourse is to file a request for annulment (setting aside) of the award. This avenue is only applicable to domestic awards.

Grounds for Annulment

The Arbitration Law allows parties to apply for an annulment – whole or partial – of an arbitral award on one or more of the following grounds:

- letters or documents that were submitted in the hearings are acknowledged to be false or counterfeit, or are declared to be forgeries, after the award is rendered;
- after the award is rendered, documents that are decisive in nature and were deliberately concealed by the opposing party are discovered; or
- the award is rendered as a result of fraud committed by a party.

The original Elucidation required the grounds to be proven in a final and binding court decision. This was problematic, as it could take several years to obtain a final and binding decision, while the Arbitration Law only provides a 30-day deadline from registration of the award. As a result, arbitral awards were rarely annulled in practice. However, the Elucidation was revoked in 2014 and the grounds for an annulment can now be invoked based simply on evidence deemed satisfactory by the court.

The grounds for annulment of an award under Article 70 of the Arbitration Law are more restrictive than those of the UNCITRAL Model Law. The request for annulment must be submitted to the chairman of the district court where the losing party resides. The court must issue its decision within 30 days. If the request for annulment is granted, it must specify the consequences of the annulment.

No Grounds for Annulment

Annulment of an arbitral award is not possible on the grounds of the arbitral tribunal having exceeded the mandate established by the arbitration agreement, the arbitral tribunal having been improperly composed, the arbitrators having lacked the proper expertise, the award including matters that were not requested, or the award being in excess of what was claimed, all of which are recognised grounds in several other jurisdictions.

Foreign arbitral awards are not subject to annulment. In practice, losing parties have sought to challenge a request for enforcement in Indonesia before the Central Jakarta District Court (CJDC). The grounds used were those of refusal of enforcement of an arbitral award as provided under Article 66 of the Arbitration Law – mainly for breach of public policy. This practice is not something regulated under the Arbitration Law – see **12.2 Enforcement Procedure**.

Correction of an Award

Correction of an award by the arbitral tribunal is not provided for in the Arbitration Law. The rules of procedure chosen by

the parties or determined as applicable by the arbitrators in the absence of such agreement, will govern any correction or interpretation of an arbitral award.

11.2 Excluding/Expanding the Scope of Appeal

Exclusion and expansion of the scope of appeal, or annulment in the context of the Arbitration Law, are not regulated under Indonesian law. Arbitration agreements sometimes provide for a waiver of the right to challenge an arbitration award, but the validity of such waiver has not been ruled on by the Indonesian courts.

11.3 Standard of Judicial Review

In the context of an annulment, the review will analyse the facts against the ground(s) brought forward in the application. Indonesian law does not clearly define the standard of review that would be relevant in determining whether an award must be annulled, but it is safe to assume that the standard is de novo. For elaboration on annulment, see **11.1 Grounds for Appeal**.

12. Enforcement of an Award

12.1 New York Convention

Indonesia has ratified the New York Convention (United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards – New York, 10 June 1958) with the contracting state reciprocity reservation and the commercial nature of the dispute reservation.

Indonesia has also ratified the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), and it has complied with several awards issued pursuant to that treaty.

12.2 Enforcement Procedure

International and Domestic Arbitration

An international arbitration award is defined by the Arbitration Law as an award handed down by an arbitration institution or individual arbitrator outside the jurisdiction of the Republic of Indonesia, or an award by an arbitration institution or individual arbitrator which, under the provisions of the laws of the Republic of Indonesia, is deemed as an international arbitral award. According to the Indonesian Supreme Court, arbitration under ICC Rules of an award issued in Jakarta is international arbitration (Supreme Court Case No 904K/PdtSus/2009).

The enforcement procedure for international arbitration is different to that for domestic arbitration only in that there is no time limit to file for application and the CJDC is the only court authorised to deal with enforcement applications. However, if the dispute involves Indonesia as a state, the application must be filed with the Supreme Court, even though the adjudication will be assigned to the CJDC.

Conditions for Enforcement

In order to seek enforcement in Indonesia, the enforcing party must observe Article 66 of the Arbitration Law, which requires fulfilment of the following:

- the award was rendered by an arbitrator or arbitral tribunal in a state that has a bilateral or multilateral convention on the recognition and enforcement of arbitral awards with Indonesia (the reciprocity principle);
- the subject matter of the dispute falls within the scope of commercial law (the commerciality principle);
- the execution of the awards would not violate public policy; and
- an exequatur (writ of execution) has been obtained from the chair of the CJDC.

There are three relevant steps to enforcing a foreign arbitral award in Indonesia:

- registration;
- obtaining an exequatur; and
- execution (*eksekusi*).

Registration

Registration of a foreign arbitral award is effected by the arbitral tribunal or its attorney at the CJDC. The application must be accompanied by the following documents:

- the original or a certified true copy of the award and a sworn Indonesian translation;
- the original or a certified true copy of the arbitration clause or agreement and a sworn Indonesian translation; and
- a confirmation from the Indonesian embassy in the country where the award was issued that that country is bound by the New York Convention or another international agreement on recognition and enforcement of arbitration, to ensure that the reciprocity requirement is fulfilled.

All documents produced or signed outside Indonesia must first be consularised by the Indonesian Embassy where they were produced or signed, by virtue of Articles 68 and 70 of the Regulation of Ministry of Foreign Affairs No 09/A/KP/XII/2006/01 on General Guidelines on the Procedure for International Relations and Co-operation.

A power of attorney from the arbitral tribunal is required if the award is registered by an attorney. The Arbitration Law assumes that arbitrators themselves register the award. Obviously, this will be difficult to achieve in practice, also because, as discussed

in **4.2 Default Procedures**, the function of the arbitrators ends after an award has been issued. For this reason, parties often request in their claim that the arbitrators grant a power of attorney at the time of issuance of the award, allowing an attorney to register the award. The power of attorney must be consularised by the Indonesian Consulate or Embassy having jurisdiction over the place of signing by the arbitrators or arbitration institution (for an institutional arbitration). The examination in this phase is limited to whether it has fulfilled all administrative requirements. The CJDC will then issue a deed of registration once the documents are found to be complete.

The Exequatur

An exequatur application follows once the award is successfully registered. Unlike registration, which is effected on behalf of the arbitral tribunal, the exequatur is requested by the party seeking to enforce the award. The examination will determine whether the award fulfils the reciprocity, commerciality and public policy requirements.

The Arbitration Law does not provide a mechanism on how the respondent party may intervene in the enforcement request. The nature of the request is unilateral.

Once an exequatur has been issued, the foreign arbitral award can be enforced in Indonesia. The decision to grant an exequatur cannot be appealed. However, if the application for an exequatur is rejected, that can be appealed before the Supreme Court. The appeal must be adjudicated within 90 days of the date of filing.

Attachment of Assets

The execution phase may involve the assistance of the district court that has jurisdiction over the losing party or its assets. The CJDC is the authorised district court mandated to grant the attachment orders requested under a foreign arbitration award by the Arbitration Law. However, in the implementation of a foreign arbitral award, if the assets to be executed upon are located in a court jurisdiction other than the CJDC, the latter will delegate its authority to the local court jurisdiction where those assets are located (Article 69 of the Arbitration Law).

If an attachment of assets is required for enforcement, a request for attachment must first be submitted to the court with jurisdiction over the location of the assets. For this purpose, the request for attachment must be specific with regard to the assets, their nature and location.

The relevant court will later issue an *aanmaning* (warning letter) to the defendant (the losing party) to ask for enforcement of the award. In the event that the losing party still insists in not complying with the award, the court will further render an order to enforce the attachment (*executorial beslag*). Execution will then be carried out with the assistance of the court bailiff. The liquidation of assets can finally be achieved through an auction. This process will be performed in accordance with Indonesian Civil Procedural Law.

If there is a challenge to the process of executorial attachment, the challenge will be entertained as in a civil case and will be subject to the normal appeal process in the High Court and cassation and civil review process in the Supreme Court. There is no definite time limit within which a final and binding decision on a challenge can finally be obtained.

12.3 Approach of the Courts

The general approach toward the recognition and enforcement of a foreign arbitral award is that it can be recognised and enforced only upon obtaining an exequatur from the chief of the CJDC. In line with Article 66 of the Arbitration Law, the exequatur can be granted if:

- the award is issued by an arbitrator or arbitral tribunal in a country with which Indonesia has a treaty, whether bilateral or multilateral, regarding the recognition and enforcement of international arbitral awards (reciprocity requirement);
- the subject matter of the dispute is commercial in nature; and
- it does not violate Indonesian rules of public policy.

Article 4(2) of Regulation 1/1990 defines public policy as "the basic principles of the entire Indonesian legal system and social system". This extensive definition of public policy has given rise to a variety of judicial views and rigidity in interpreting statutes when examining applications for the enforcement of international arbitral awards. In the past, this, in turn, has led to refusal to enforce international arbitration awards.

Prior to the enactment of the Arbitration Law, in the case ED & F Mann (Sugar) Limited v Yani Haryanto in 1990, the Supreme Court refused the enforcement of a London arbitral award in favour of Mann on the ground that the award had violated public policy because the underlying contract had violated Indonesian law pertaining to a prohibition on sugar imports. In this decision, it appears that the Supreme Court held that violation of a positive law or a provision under Indonesian law would constitute a violation of public policy.

After the enactment of the Arbitration Law, in the case Sumi Asih v Vinmar and AAA in 2012, the CJDC interpreted that a violation of public policy would impede the enforcement of an international arbitral award if it affected:

- the economic interests of the public in general;
- the livelihood of the public; and

- state security.

The Supreme Court upheld the decision of the CJDC. The Supreme Court thus views that a violation of public policy is not limited to positive law or provisions under Indonesian law, but includes implications for the wider public interest.

13. Miscellaneous

13.1 Class-Action or Group Arbitration

Law No 8 of 1999 on consumer protection provides for the possibility of class-action arbitration or group arbitration, particularly for issues relating to consumer protection administered by the Consumer Dispute Settlement Agency (BPSK). The specific requirements for a class action are that the group of people must be the consumers affected and that they share the same interests in the claim. However, both consumers and producer must consent that their dispute will be settled by arbitration and must sign an arbitration agreement.

The requirements for a class-action claim are further elaborated in Supreme Court Regulation No 1 of 2002 on Class-Action Claims. The claim must share the same factual background, the same substantial legal basis and there must be a similar type of claim between the representatives of the class and the class themselves.

13.2 Ethical Codes

If counsel to one of the parties is an Indonesian advocate, the Indonesian Code of Ethics for Advocates will apply. The Indonesian Code of Ethics for Advocates is issued by the Indonesian Bar Association (PERADI).

In addition, in cross-border arbitrations the IBA Guidelines on Conflicts of Interest in International Arbitration and IBA Guidelines on Party Representation in International Arbitration provide guidance to counsel, arbitrators and arbitration institutions.

For arbitrators, there are no professional standards that apply nationwide. Each domestic arbitration body, such as BANI and BAPMI, has its own code of ethics applicable to its respective arbitrators.

The ethics codes of BANI and BAPMI share the following requirements for arbitrators, however:

- to be impartial and independent;
- to keep all information obtained through arbitration proceedings confidential;
- to refrain from seeking publicity from arbitration cases adjudged;
- to adjudge cases based on the law and principles of equity and fairness; and
- a prohibition on accepting gifts or promises from the disputing parties.

13.3 Third-Party Funding

Indonesian law is silent on the issue of third-party funding for litigation or arbitration proceedings. Practitioners have discussed the benefits of third-party funding, observing that it could provide for greater access to justice, create a level playing field and eliminate all or part of the costs of arbitration for corporations. However, third-party funding is currently neither permitted nor prohibited in Indonesia. In practice, arbitration with third-party funding is still uncommon in Indonesia.

13.4 Consolidation

The Arbitration Law is silent on how to consolidate separate arbitration proceedings. However, Article 9 of the BANI Rules stipulates that the chairperson of BANI may, at the request of a party, consolidate two or more arbitrations into a single arbitration under the rules, where:

- the parties have agreed to consolidation and the arbitration dispute arises from the same legal relationships; or
- the request for arbitration is made under a number of agreements involving the same parties and the choice of arbitration institution is BANI; or
- the requests for arbitration are made under a number of agreements to which one of the parties is common and the choice of arbitration institution is BANI.

13.5 Third Parties

Pursuant to the Arbitration Law, an arbitration agreement will only bind parties that have consented to be bound by it. Accordingly, third parties cannot be bound by an arbitration agreement unless they have given their consent to this.

Particularly in the case of an arbitration award, it will bind a third party if this party submits an intervention in the arbitration process, and such intervention is agreed to by all disputing parties and the arbitrators (see **5.7 Third Parties**). BANI has reportedly administered only one case in which the disputing parties and arbitrators agreed that the arbitral procedure could be participated in by third parties.

ABNR Counsellors at Law was founded in 1967 and is Indonesia's longest-established law firm. It pioneered the development of international commercial law in the country following the reopening of the economy to foreign investment after a period of isolationism in the early 1960s. With over 100 partners and lawyers (including two foreign counsel), ABNR is the largest independent, full-service law firm in Indonesia and one of the country's top-three law firms by number of fee earners, giving it the scale needed to simultaneously handle large and complex transnational deals across a range of practice areas. It also has global reach as the exclusive Lex Mundi (LM) member firm for Indonesia since 1991. LM is the world's leading network of independent law firms, with members in more than 100 countries. ABNR's position as the LM member firm for Indonesia was reaffirmed for a further six-year period in 2018.

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