

Arbitration in Indonesia

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1. INTRODUCTION

Indonesia is the world's largest archipelago, consisting of over 15,000 islands, of which about 6,000 are inhabited, the largest being Sumatra, Java, Kalimantan (Borneo), Sulawesi (Celebes) and Irian Jaya (western Papua/New Guinea). The archipelago is spread across an area as wide as the United States, with a total surface area equal to four times the territory of France. The population has surpassed 200 million by the end of the 20th Century, and is expected to exceed that of the United States not long into the 21st.

In the two decades leading up to the onset of Asia's economic and currency crisis of the late 1990's, Indonesia had become one of the most rapidly developing countries in the world. Rich in natural resources, including manpower, oil, gold and coal, the archipelago also enjoys a climate particularly conducive to staple and cash crops such as palm oil, rice, sugar, tobacco, coffee, timber and many others. In the 1970's and 1980's, revenues from the booming oil industry were sufficient to carry the costs of government and growing infrastructure. However, with the sharp decrease in oil revenues, Indonesia began to look to other sectors and beyond its own borders for funding in order to maintain its rate of development and allow import of new technology and improvement of management skills. New tax laws were enacted, effective in 1984¹ and have been revised and amended several times, with the latest Amendments (to date of this publication) coming into effect in January, 2001², with the intention of increasing the tax base and giving some certainty to what was previously a rather arbitrary system of

¹ Laws Nos. 6, 7 and 8 of 1983.

² Laws Nos. 16, 17, & 18 of 2000, promulgated on 2 August, 2000.

tax collection. At the same time, the government commenced an ongoing program aimed at encouraging increased foreign investment in the private sector, and has since continued in its efforts to improve the investment and trade climate and encourage economic growth generally. Today there are relatively few restrictions on foreign investment, with foreign interests permitted to own up to 100% of local companies engaged in most activities, at least for the first 15 years, and up to 95% in almost all activities indefinitely.

Foreign participation in so many Indonesian businesses, coupled with recognition of inefficiencies in the judicial process, has increased the awareness and interest in alternative methods of dispute resolution, particularly those relating to cross-border commercial relationships, yielding an elevated recognition of the need for arbitration.

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

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

But the notoriety is generally misplaced. Arbitral awards rendered in Indonesia have been here enforced as a matter of course, with few difficulties, for as long as any practitioner can remember. The few foreign-rendered awards for which enforcement have been sought, however, have not enjoyed quite the same ease of enforcement. Until late 1999 orders of *Exequatur* had to be issued by the Supreme Court, a process which could take two or more years in the normal course of things. But now, under Indonesia's new Arbitration Law, this function has been delegated to a court of first instance, which should put enforcement of foreign-rendered awards on the same footing as that of awards rendered locally.

Indonesia is not, on the whole, a litigious culture. Commercial litigation is relatively rare, compared to such jurisdictions as India and the United States, for example, and even Singapore. Aside from the cultural rationale, there are more practical reasons for hesitancy to litigate, which are based generally upon the uncertainty and unpredictability of court judgements and the inordinate amount of time it can take to reach a final and binding decision through the judicial system. As business transactions become more and more sophisticated and complex, we are finding a marked increase in contractual documentation calling for arbitration rather than litigation in Indonesia.

A Short History of Indonesia's Legal System:

From the earliest days of Dutch colonisation, inhabitants of the Indonesian archipelago were divided for legal purposes into various 'population groups', based primarily on ethnic origin. Each group had its own legal system: separate regulations administered by separate government officials and enforced in separate courts of law. The origin of this division is not clear, but it was codified by the Dutch colonial government in Article 163 of the Constitution for the Netherlands Indies, *Indische Staatsregeling*. The three principal groups were:

1. Europeans and others equated with them, such as Americans, Australians, South Africans and Japanese, and also "equalised" *pribumi* (indigenous Indonesians);

2. Chinese and other foreign orientals (except for Japanese); and
3. Indigenous Indonesians (*pribumi*).

Initially, most parts of the Dutch Civil Code and the entire Commercial Code were applicable only to the first group, while in each region or area the *pribumi* had their own unwritten *adat* (customary) law, each with its own concepts and priorities. In 1917, a regulation entitled *Vrijwillige onderwerping aan het Europeesch Privaatrecht*³ gave the indigenous groups an opportunity voluntarily to place themselves under colonial civil law. This regulation facilitated the transaction of business between Europeans and the *pribumi*. Subsequent regulations made the Civil and Commercial Codes applicable first to the ethnic Chinese and later to non-Chinese foreign orientals⁴.

Dutch policy was aimed at maintenance, insofar as possible, of the *status quo* through preservation of native *adat* law, which was largely not codified. Under this dualistic system, court procedures for non-Indonesian populations were governed by the *Burgelijke Reglement of de Rechtsvordering* (generally known as the “RV”)⁵ while procedural laws for indigenous (*pribumi*) Indonesians were further divided geographically: the *Herziene Indonesisch Reglement* (“HIR”) governing procedures on the islands of Java (the most populous in the archipelago, on which is situated the capital, Jakarta, then known as Batavia) and nearby Madura; and the *Rechtsreglement Buitengewesten* (“RBg”) applying to procedures in the other islands.

When Indonesia proclaimed its Independence, on 17 August 1945, one of the basic problems for the new independent government was how much of the law applied under the colonial system should be maintained. It was obvious that some aspects of the old legal system were at odds with the principles of a newly independent state. One such unacceptable principle was the maintenance of different laws for the different population groups, and thus unification of law in as many fields as possible became a priority. The new Indonesian Constitution therefore brought all Indonesians under the

³ State Gazette, *Staatsblad* 1917 No. 12.

⁴ *Staatsblad* 1917, No. 129 and *Staatsblad* 1924, No. 556, respectively.

⁵ State Gazette No. 52 of 1847, junct. No. 63 of 1849. Until today the RV constitutes Indonesia’s underlying Code of Civil Procedure.

same laws, although even today there are some regions in which certain *adat* laws still prevail. The Constitution provided that old Dutch laws not in conflict with the new Constitution would remain valid, if not fully binding at least as guidelines, unless and until they were superseded by new laws of the Republic.

2. LEGISLATION - New Arbitration Law

Although arbitration has been recognised, and applied, as a formal means of dispute resolution in Indonesia since the mid-19th Century, until late 1999 there was no specific law governing arbitration, and for over 150 years all arbitrations were regulated under a handful of provisions of the RV⁶, 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 Code⁷. After years in the drafting, on 12 August, 1999 Indonesia finally promulgated its new comprehensive Law on Arbitration and Alternative Dispute Resolution, Law No. 30 of 1999 (the “**Arbitration Law**”⁸), superseding those articles of the RV covering arbitration.

Although many of the provisions of the old RV are reflected in the Arbitration Law, there are also a number of innovations, some which are found in the laws of few, if any, other jurisdictions. One of these is the incorporation of provisions encouraging alternative dispute resolution (“**ADR**”) rather than, or at least prior to, commencement of arbitral hearings⁹. If amicable/mediated settlement can be achieved such is to be set out in writing, becomes binding upon the parties, and can be implemented as though an arbitral award.

Another unusual provision allows the parties to apply to an arbitral institution for a binding opinion as to a point of law or the interpretation of a provision in their underlying

⁶ Articles 615 through 651 of Title I of the Third Book thereof. These have been repealed and replaced by the new Arbitration Law.

⁷ Articles 1320 and 1338, *inter alia*.

⁸ Unofficial translation attached as Appendix I hereto.

⁹ Article 6 and 45.

agreement, even where no dispute has arisen¹⁰. This facility has long been offered by Indonesia's primary arbitral institution, *Badan Arbitrase Nasional Indonesia* ("BANI")¹¹, but the Arbitration Law extends the availability of such service to any arbitrahstitution, domestic or foreign. In practice, unless a foreign arbitral institution already provides a similar service, it is questionable whether this provision can be operative beyond Indonesian borders.

Both Arbitration and ADR are restricted to commercial disputes and only to the extent that the rights concerned fall within the full legal authority of the parties to determine.¹²

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 goods¹³. No such power could be exercised by arbitrators previously. No sanctions are set out in the Arbitration Law for failure to comply with any such order however, and it remains to be seen how effective this provision shall prove in practice. The new rules of procedure of BANI, however, do allow the arbitrators to impose sanctions on parties that fail to comply with their rulings or otherwise impede the arbitral process.

The Arbitration Law allows parties mutually to designate in their agreement to arbitrate the rules which shall govern the procedure, provided such rules do not conflict with the provisions of the Arbitration Law¹⁴. If no rules are designated, the procedural provisions of the Arbitration Law itself must be followed.¹⁵ This is indeed an innovation and eliminates situations sometimes previously encountered in which either arbitrators were constrained to create their own rules where parties had not designated, and could not subsequently agree upon, the procedural rules to be applied, or worse still, where an unwilling respondant might claim lack of jurisdiction on the grounds that the arbitration clause is insufficiently clear as to constitute a valid agreement to arbitrate¹⁶.

10 Articles 52 and 53, and Article 1 (8).

11 See preface to BANI Rules of Arbitral Procedure, attached as Appendix II hereto.

12 Article 5.

13 Article 32.

14 Articles 31 and 34.

15 Article 31.

The transitional provisions of the Arbitration Law¹⁷ state that arbitral references commenced, but for which no hearings had as yet been held, prior to enactment are subject to the Arbitration Law. If hearings had already commenced as at such date, the old legislation of the RV would apply to the conduct of the reference itself. However, any award rendered which is final and binding but had not as yet been fully executed as of 12 August, 1999, must be implemented in accordance with the Arbitration Law.

3. ARBITRATION AGREEMENT

As in virtually any jurisdiction, the availability of the arbitral process for resolution of disputes is based upon consent of the parties. Courts, as instruments of the government, are vested with the jurisdiction to resolve disputes arising in the territory over which that government has sovereignty. But in commercial matters, because the Civil Code recognises that a commercial contract has the force of law¹⁸ between the parties who have formed and agreed to such contract, the parties have the freedom to agree that disputes under their contract be resolved through arbitration, thereby opting out of the court's jurisdiction for such purpose. But only where the parties both, or all, agree will an arbitral tribunal have jurisdiction to resolve the dispute.

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

“Article 3

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

.....
.....

16 See discussion on elements of a valid contract under “Arbitration Agreement”, below.

17 Articles 78 through 80.

18 See elements of valid contract, below.

“Article 11

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

“(2) The District Court shall refuse and not interfere in settlement of any dispute which has been determined by arbitration except in particular cases determined in this Act.”¹⁹

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

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

The Contract

Let us now consider what constitutes a valid contractual agreement under Indonesian law. Contracts are covered in Book III (Obligations) of the Indonesian Civil Code²⁰. The relevant provisions are summarised below²¹:

“To those who have concluded contracts, the contracts shall apply as acts.”²²

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

¹⁹ Translations from the Arbitration Law are prepared by Karim Sani Law Firm. This translation has been proposed by BANI to the Ministry of Justice to be made “official”, but at time of writing it is still “unofficial”.

²⁰ S. 1847/No. 23, originally the Dutch Civil Code and adopted by Indonesia upon its Independence in 1945.

²¹ The official text is in Dutch and has been translated into a second “official” text in Indonesian. There is no official translation into English and thus all translations into English included herein are unofficial and prepared by Karim Sani Law Firm, unless otherwise noted.

²² Art. 1338 paragraph 1 Civil Code.

- a. The parties must each have the legal capacity to conclude a contract. All persons are deemed to have such legal capacity except (i) minors (under 21 years old, unless married²³) or (ii) persons under official custody²⁴.
- b. There must be a meeting of minds, by free consent, without any coercion, error or deceit.
- c. The subject matter must be clearly defined. If necessary the quality and quantity thereof should be firmly stated. The obligations of each of the parties must be clear.
- d. The contract must be for a permissible legal purpose; i.e. no obligation or performance may be contrary to the law, public order or public morality.

If either element “a” or “b”, above is missing, the contract is voidable and annulment of the contract can be demanded from a judge. In cases of ambiguity about the subject matter or illegal cause, the contract is null and void. In the latter cases the judge shall, *ex officio*, declare the contract null and void. The action for annulment should be brought within five years.

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

A contract which fulfills the requirements mentioned above becomes legally binding²⁵ and cannot be terminated unilaterally. Some agreements cannot be terminated even with the consent of both parties, e.g. ante-nuptial settlements²⁶.

Every contract must be performed in good faith²⁷. This requirement has been interpreted to imply that a contract must be fair and equitable, although the same is not

²³ Art. 330 Civil Code.

²⁴ Art. 433 Civil Code.

²⁵ Art. 1338 Civil Code

²⁶ Arts. 149 and 1338 Civil Code.

²⁷ Art. 1338 Civil Code.

specifically stated in the law.

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

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

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

“(1) In the event the parties choose resolution of the dispute by arbitration after a dispute has arisen, their designation of arbitration as the means of resolution of such dispute must be given in a written agreement signed by the parties.

“(2) In the event the parties are unable to sign the written agreement as contemplated in paragraph (1), such written agreement must be drawn by 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.”

Writing

Although the general requirements for a valid contract, as discussed above, do not necessarily require that a contract or contractual provision be rendered in writing, the Arbitration Law specifically requires that the agreement to arbitrate be in writing and signed by all parties to the dispute²⁸. Both the Arbitration Law, and the new Rules of BANI, recognise electronic communications as “writings”. The Arbitration Law provides that if the agreement to arbitrate is contained in an exchange of correspondence (including telefax or e-mail), a record of receipt of such correspondence is also required to evidence such agreement.²⁹ Similarly, the definition of “Writing” in the new BANI Rules provides:

“Writing”, whether capitalised or in lower case, shall include not only documents written or printed on paper but also electronically created and/or transmitted documentation; such writings to include not only agreements but also exchange of correspondence, minutes of meetings, telex, telefax, e-mail and other such communications; and no agreement, document, correspondence, notice or other instrument which is required to be in writing shall be denied legal effect solely for the reason that it is contained in an electronically created or transmitted message.”³⁰

28 Article 4.

29 Article 4 (3).

30 Rule No. 3 (xii). See new BANI rules, Appendix II hereto.

Through this language the BANI rules incorporate the intent of the Model Law on Electronic Commerce of 1996 (supplemented in 1998) which has been established by the United Nations Commission on International Trade Law (“UNCITRAL”), although such Model Law itself has not been adopted in Indonesia.

Incorporation by Reference

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

Continuing Validity

Once the parties have agreed that their disputes shall be resolved by arbitration, even if the underlying contract is subsequently terminated, annulled or declared by the court to be null and void, the agreement to arbitrate still stands. Article 10 of the Arbitration Law provides:

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

- a. the death of one of the parties;*
- b. the bankruptcy of one of the parties;*
- c. novation;*
- d. the insolvency of one of the parties;*
- e. inheritance;*
- f. effectivity of requirements for the cancellation of the main*

- contract;*
- g. if the implementation of the agreement is transferred to one or more third parties, with the consent of the parties who made the agreement to arbitrate; or*
 - h. the expiration or voidance of the main contract.”*

The new BANI rules go a bit further, stating:

“Arbitration Clause Independent

The Tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of this Rule an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the Tribunal that the underlying contract is null and void shall not necessarily imply the invalidity of the arbitration clause.”³¹

Although not specified in the new Arbitration Law beyond what is stated in Article 11, quoted above, the new Rules of BANI do recognise the principle of *competenz-competenz*, so that in a BANI arbitration arbitrators clearly have jurisdiction to determine their own jurisdiction, and thus the effectivity of the agreement to arbitrate shall be determined by the arbitrators and not by the court. Rule No. 18 (a) provides:

“Competenz Competenz

The Tribunal shall have the power to rule on any objection that it does not have jurisdiction, including any objection with respect to the existence or validity of the agreement to arbitrate.”

4. ARBITRATORS AND THE ARBITRAL TRIBUNAL

³¹ BANI Rule 18 (b).

Relying upon the basic freedom of contract provisions of the Civil Code, as discussed above, parties who have agreed to refer their disputes to arbitration have considerable freedom as to choice of arbitrators, as well as choice of administration and rules.

Number

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

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

The new BANI Rules go a step farther, limiting the number of arbitrators to one or three, but in extraordinary circumstances where there are multiple parties, five arbitrators may be empaneled. Rule 10 (e) provides:

“Multiple Parties In the event that there are more than two parties to the dispute, all parties acting as Claimant(s) shall be considered as a single party for purposes of designation of an arbitrator, and all parties claimed against shall be considered as a single party Respondant for purposes of designation of an arbitrator. In the event that such multiple parties cannot agree upon the designation of an arbitrator within the allotted time frame, their selection of an arbitrator shall be deemed to have been left to the Chairman of BANI, who shall make the selection on their collective behalf. In extraordinary circumstances of multiple party disputes, if requested by a majority of the parties to the dispute, the Chairman may authorise a panel of five (5) arbitrators to be constituted. Additional parties may be joined in an arbitral reference only as provided in Article 30 of the Law.”

Qualifications

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

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

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

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

As this is a mandatory provision of the law, the BANI Rules contain the same requirements³² plus one additional:

“If Indonesian Law Where the dispute subject to the arbitral reference is governed by Indonesian law, at least one arbitrator, preferably but not necessarily the chairman of the Tribunal, must be a qualified legal scholar or practitioner familiar with the relevant laws of, and resident in, Indonesia.”³³

Aside from the above requirement of Rule 9 (d), there is no restriction on the nationality

³² See BANI Rule 9 (c).

³³ BANI Rule 9 (d).

of the arbitrators. The BANI Rules require arbitrators in BANI-administered references to be chosen from the BANI panel, but also will entertain application from a party to appoint a qualified arbitrator who is not listed on the panel where specific qualifications are required. Although the BANI panel contains reputable qualified arbitrators from all over the world, BANI will also consider application for qualified foreign arbitrators not yet listed on its panel. This is set out in some detail in Rule 9 (b), as follows:

“Outside Arbitrator. In the event that a party, or two party-appointed arbitrators, deem that specific expertise is required justly to adjudicate an arbitral reference submitted to BANI, an application may be made to the Chairman for appointment of a qualified arbitrator not listed on the BANI roster of arbitrators. Any such application shall clearly state the reasons why such outside arbitrator is required and a full curriculum vitae of the qualifications of any such arbitrator proposed. If the Chairman deems that there is no arbitrator already on the BANI panel with the necessary qualifications and that the arbitrator requested does have such qualifications and is otherwise qualified, impartial, and suitable, the Chairman may, in his sole discretion, approve the appointment of such an arbitrator. In giving such approval the Chairman may invite the new arbitrator to become included on the BANI panel of arbitrators. If the Chairman does not approve the appointment of such outside arbitrator, the Chairman shall recommend, or appoint, in his/her stead an alternative arbitrator chosen from the BANI panel or a reputable qualified expert in the field required not on the panel. The Board will also consider the appointment of a foreign arbitrator who is certified by a recognised arbitration certification institute or recommended by the chairman of the arbitration institution in such arbitrator’s jurisdiction of practice, provided such foreign arbitrator meets the required qualifications and agrees to abide by these Rules, including the fee schedule.”

Appointment

Generally, again in line with the general freedom of contract provisions of the Civil Code,

unless they have agreed otherwise, the parties are given the opportunity to designate who shall act as 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.³⁴ BANI takes the view that Article 11 of the Arbitration Law should preclude court jurisdiction over the choice of arbitrators, and that once BANI is vested with jurisdiction the designation of arbitrators must be under BANI's administration and control. Of course where the parties have not designated BANI as the body to administer the arbitration and have either failed to designate any rules or administration, or have designated *ad hoc* rules, such as those of UNCITRAL, unless a different appointing agency has been designated, only the court can have such authority.

The BANI Rules require approval of the Chairman of BANI for all appointments, even that by two party-appointed arbitrators of the third. Rule 10 (f) provides:

“Authority of Chairman The ultimate decision/approval of all arbitrators shall reside with the Chairman of BANI. In rendering such decision the Chairman may request additional information relating to the independence, impartiality and/or qualifications of the proposed arbitrator from the person(s) proposing such arbitrator. The Chairman may also take into account the nationality of the proposed arbitrator in relation to the nationalities of the parties to the dispute. The Chairman shall endeavour to make all decisions relating to appointment and/or approval of arbitrators within 7 (seven) days of the matter being presented to him/her. “

The above may seem arbitrary, compared to other jurisdictions, however the requirement must be taken in context. Indonesia's reputation for lack of transparency

³⁴ See Articles 13 - 15 of the Arbitration Law, attached as Appendix I hereto, and Rule 10 of the BANI Rules, attached as Appendix II hereto.

and professionalism in some of the courts cannot be viewed without consideration of the conduct of a certain segment of the legal profession which works hand in hand with those courts, yielding the situation which forms the basis of such reputation. The reputation may be over emphasized, but the problem does exist, and does have an adverse effect upon sanctity of contract and foreign investment into the country. BANI prides itself on its professionalism and transparency and is dedicated to making every effort to avoid misconduct of any kind in its arbitral proceedings. The only way to ensure that no one with a different agenda may sit in judgement of commercial disputes before BANI is for BANI to monitor the appointment of every arbitrator. In practice, then, this vigilance poses a considerable advantage to the designation of this arbitral institution over an *ad hoc* proceeding where there is no control on who shall be appointed, on delays and impediments engendered by parties, nor on rationality of the arbitral award.

Both the Arbitration Law³⁵ and the BANI Rules³⁶ require each arbitrator to indicate his or her acceptance of the mandate in writing. Once the mandate is accepted, the arbitrator may not withdraw without consent of the parties or. If the parties do not consent, the Chief Judge of the District Court may release the arbitrator from his or her duties.³⁷ Rule 10 (d) of the BANI Rules requires each arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence in such arbitrator's written acceptance of his/her mandate. Interestingly, the Arbitration Law itself does not require written acceptance, but Article 18 thereof does require any party appointed arbitrator to : “ . . . *advise the parties of any matter which could influence his/her independence or give rise to bias in the rendering of the award.*”

Recusal

The Arbitration Law allows the parties to 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*”³⁸ or “ . . . *if it is proven that there is any familial, financial, or employment*

35 Article 16.

36 Rule 10 (d).

37 Article 19, Arbitration Law.

38 Article 22 (1).

*relationship with one of the parties or its respective legal representatives.*³⁹ If it is a sole arbitrator that is challenged, the challenge is made directly to the arbitrator. Where the dispute is to be heard by a panel of arbitrators, the challenge is presented to the whole panel. If the arbitrator to be challenged was appointed by the court, the challenge is submitted to the court⁴⁰.

Any such challenge must be made within 14 days of the appointment, or, if the basis for the challenge becomes known to the challenging party after that date, the challenge must be lodged within 14 days after such information becomes known.⁴¹

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. The ultimate decision maker, however, is the Chief Justice of the District Court. Where BANI is administering the arbitration, however, the ultimate decision is made by the Chairman of BANI and the court does not get involved.⁴²

Article 26 of the Arbitration Law provides that where a sole arbitrator or the chairman of a Tribunal is replaced, hearings previously held must be repeated; but where one of the other arbitrators is replaced, ' . . .the hearing of the dispute shall only be repeated among the arbitrators themselves.'⁴³ The BANI Rules are a bit more workable in such situations, and provide:

“Repetition of Hearings If under Rule 11, 12 (a) or 12 (c) a sole arbitrator is replaced, any hearings held previously shall be repeated. If the chairman of the Tribunal is replaced, any hearings of witness testimony held previously may be repeated if deemed advisable by the other arbitrators. If any other arbitrator is replaced, the other arbitrators shall brief the new arbitrator and no prior hearings shall be repeated

39 Article 22 (2)

40 Article 23.

41 Article 24, Arbitration Law.

42 BANI Rules 11 and 12.

43 Article 26 (5).

*except in extraordinary circumstances where, and to the extent that, the Tribunal, in its sole discretion, deems necessary in the interests of natural justice.*⁴⁴

5. ARBITRATION PROCEDURE

As mentioned above, the Arbitration Law allows parties mutually to designate in their agreement to arbitrate the rules which shall govern the procedure, provided such rules do not conflict with the provisions of the Arbitration Law. If no rules are designated, the procedural provisions of the Arbitration Law itself must be followed.⁴⁵ The Arbitration Law also recognises the parties' choice of any arbitral institution to administer the reference and provides that if such an institution is designated, the rules of such institution shall govern the procedure.⁴⁶ Thus where parties have simply agreed to arbitrate in Indonesia, without designating either an administering institution or rules to govern, one is restricted to the procedural rules set out in Chapter IV (Articles 27 through 51) of the Arbitration Law. Let us, then, examine these and contrast them with the Rules of BANI.

Language

Article 28 of the Arbitration Law calls for the proceedings to be held in the Indonesian language, but permit the parties to choose another language, subject to consent of the arbitral tribunal.

The BANI Rules also call for proceedings to be held in Indonesian if the parties have not agreed otherwise, but also allow the tribunal itself to determine a different language if they deem it warranted by circumstances, such as nationality of one or more party or of the arbitrators themselves⁴⁷. The BANI rules also give the

44 BANI Rule 12 (d).

45 Article 31.

46 Article 34.

47 Rule 14 (a).

tribunal full discretion to allow documentation in its original language, with or without translation, or to require Indonesian documents to be translated into another language⁴⁸.

As an award must be registered with the court to be enforceable (as mentioned below), and as the court will only register the award if there is an Indonesian version, all awards will have to be either rendered in, or translated into, Indonesian.

Confidentiality

The Arbitration Law does not sufficiently address the confidentiality of an arbitral reference. Article 27 states only that all hearings shall be closed to the public. The BANI rules require a much higher standard of confidentiality and provide also that, unless otherwise agreed by all parties, or required by law, all submissions, hearings, witness statements, awards, and other matters relating to the arbitral reference shall be kept in confidence among the parties and the arbitrators⁴⁹.

Although hearings are closed to the public, Article 30 of the Arbitration Law allows joinder of third parties with related interests, if agreed to by the the parties and the arbitrators. The requirement that all awards be registered with the court⁵⁰ does also tend to dilute the effectivity of the confidentiality of the award.

Venue

Unless the parties have designated the venue of the arbitration, the same shall be determined by the tribunal.⁵¹ Witness and/or property may be examined at another location, provided the parties are called to attend,⁵² and, of course, the

48 Rule 14 (b).

49 BANI Rule 13 (b).

50 Article 59, Arbitration Law.

51 Article 37 (1)

52 Articles 47 (2) and (3), Arbitration Law.

tribunal may meet for deliberations at any location or time they wish. Hearings for BANI arbitrations are normally held in one of the BANI premises, although inspections and deliberations may be held elsewhere⁵³. BANI maintains a number of premises in Jakarta and one in Surabaya. BANI has also entered into cooperative arrangements with the Hong Kong International Arbitration Centre (“HKIAC”) and the Singapore International Arbitration Centre (“SIAC”) to allow BANI arbitrations to be held in either of those premises, and vice versa, but to date this facility has not as yet been utilised.

Time Limitations

In line with the previous legislation, a time limit must be set for hearings. If the parties have not agreed otherwise, the limit will be 180 days from constitution of the full panel⁵⁴. This limit may be extended upon consent of all parties or in certain extraordinary circumstances, such as where necessitated by an interlocutory order of the tribunal.⁵⁵ The arbitrators will then have only 30 days in which to render the award.⁵⁶ Thereafter the parties have 14 days in which to request the arbitrators to correct administrative errors or to make additions or deletions to the award in the event a matter has not been dealt with.⁵⁷

Submissions

All submissions for BANI arbitrations are made to BANI, in sufficient number of copies for BANI to retain one and deliver one to each of the arbitrators and each other party. Once BANI receives the request for arbitration, the same is examined by BANI to determine whether in fact BANI has jurisdiction over the dispute and, if it does so determine, it will register the reference and send a copy of the request on to the respondent, allowing it 14 days⁵⁸ to submit its initial response and designate an

⁵³ BANI Rule 13 (d).

⁵⁴ Article 48 (1), Arbitration Law.

⁵⁵ Articles 33 and 48 (2), Arbitration Law.

⁵⁶ Article 57, Arbitration Law.

⁵⁷ Article 58, Arbitration Law.

arbitrator⁵⁹. Once a tribunal has been empanelled, as described above, the arbitrators will have full authority to rule as to timing and nature of submissions.

In *ad hoc* arbitrations under the rules provided in the Arbitration Law, the parties are instructed to submit their notice of arbitration and statement of claim directly to the arbitrators⁶⁰. Since the law does not specify the procedure for notices of arbitration and exactly how and when arbitrators are to be designated, it is possible that no arbitral tribunal will yet exist when the initial submissions are made, which may these provisions of the new Law may prove a bit difficult to implement.

Both the Arbitration Law and the BANI Rules set out minimal requirements for the Statement of Claim.⁶¹ The BANI Rules are more specific and also require supporting documentation to be annexed at that time, or if additional documentation is anticipated, these should be referred to at that time. BANI's aim is to streamline the arbitral process insofar as is feasible, while respecting the parties' right to be heard. BANI's requirements for the Statement of Defense are similar to that for the Statement of Claim.⁶² Both the new Law and BANI Rules⁶³ require that any counter-claim 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, not later than the first hearing. As BANI requires arbitration fees to be paid in advance, in the past respondents have sought to frustrate the process by submitting counter-claims far in excess of the quantum of the initial claim, making it difficult or impossible for the claimant to cover the fee for the counter claim. The new BANI rules have eliminated that occurrence. Rule 17 (d) provides, in part:

“ . . . Failure of the parties, or either of them, to pay the fees and costs assessed with respect to any counter-claim or set-off will not prevent nor

58 Extendible, at the discretion of the Chairman of BANI, for an additional 14 days on application of the respondent.

59 See BANI Rules 7 and 8.

60 Article 38, Arbitration Law.

61 See Article 38 (2) of the Arbitration Law and BANI Rule 16.

62 See BANI Rule 17.

63 Article 42, Arbitration Law and BANI Rule 17.

delay continuation of the arbitral reference with respect to the main claim, which, provided the fees and costs have been paid with respect to such main claim, shall proceed as though no counter-claim or set-off had been asserted unless and until the fees and costs with respect to such counter-claim or set-off have been paid in full.”

Hearings

Article 36 of the Arbitration Law calls for hearings on the dispute to be done by written documents, but verbal hearings may be conducted with the approval of the parties or if deemed necessary by the arbitrators. The BANI rules leave the decision up to the tribunal⁶⁴. Both the Law and the BANI Rules seem to imply that at least an initial procedural hearing will be called and, as a practical matter, almost all arbitral references do involve some hearings, usually with witness testimony as well as written submissions and argument.

If the respondent, having been called to a hearing, does not appear and provides no valid reason therefor, the tribunal is required to call a second hearing. Only if the respondent again, without reason, fails to appear at the second hearing, may the tribunal issue a default award.⁶⁵

The BANI rules, similar to UNCITRAL rules, provide that the tribunal may conduct the hearings in any manner it deems appropriate, subject only to the Rules themselves, applicable law and natural justice⁶⁶. As to the latter the test under the BANI rules is that : “ . . . the parties are treated with equality and that at any stage of the proceedings each party is given a fair and equal opportunity of presenting its case,⁶⁷ while the Arbitration Law requires only that: “*The parties in dispute shall have the same right and opportunity to put forward their respective opinions.*”⁶⁸

64 Rule 19 (a).

65 Article 44 of the Arbitration Law and Rule 21 (b), BANI Rules.

66 Rules 13 (c) and 19 (b).

67 BANI Rule 13 (c).

68 Article 29 (1).

But the Arbitration Law also gives wide discretion to the arbitrators as to the conduct and timing of the hearings and submissions⁶⁹.

Both the Arbitration Law and the BANI Rules authorise the tribunal to make interlocutory rulings⁷⁰. But the BANI Rules go a step further and afford to the tribunal: “. . . authority to impose sanctions on a party which fails or refuses to comply with any ruling made by the Tribunal or otherwise engages in conduct which impedes the smooth adjudication of the dispute by the Tribunal.”⁷¹ Clearly this rule has been promulgated in an attempt to protect BANI arbitrations from the kind of improper conduct which is often experienced in court litigation procedures.

Amicable Settlement

In line with the state ideology of Pancasila, which calls for deliberation to reach a consensus and discourages confrontation of any kind, an arbitral tribunal is required first to attempt to cause the parties to reach an amicable settlement before commencing hearings⁷². If such a settlement can be reached, the same is to be drawn up in writing by the tribunal, which writing becomes a consent award binding upon the parties and enforceable in the same manner as would be an award of the tribunal. Attempt to settle is a prerequisite to commencing a suit in the court. The same requirement has long been the BANI practice, having been a part of the original BANI rules since BANI's inception in 1977. Now the requirement extends to all Indonesian arbitrations.

Evidence

Indonesia being a civil law jurisdiction, the rules of evidence and discovery procedures are far less developed than those of common law jurisdictions.

69 See Article 46 (3) of the Arbitration Law.

70 Article 32 of the Law and BANI Rule 19 (e).

71 Rule 19 (f)

72 Article 45 of the Arbitration Law, reflected in BANI Rule 20.

The Arbitration Law provides only that the parties are afforded an opportunity to explain their respective positions in writing and to submit evidence deemed necessary to support such positions⁷³. Articles 49 and 50 of the Law set out procedures for summoning and utilisation of witnesses, both expert and factual. Otherwise, Article 37 (3) provides that examination of witnesses shall be carried out in accordance with the provisions of the RV.

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

Articles 1865 of the RV and 163 of the HIR provide that a party arguing that he has a certain right or seeking to establish facts to strengthen such right, or deny the other party's right, must present evidence of the existence of such right or fact.⁷⁴ Articles 1866 of the RV and Article 164 of the HIR define evidence to comprise written evidence, testimony of witnesses, inference, acknowledgements and oath.

Article 1867 of the RV distinguishes between authentic written evidence and non-notarial written evidence. Authentic written evidence is evidence made before notary public⁷⁵ and should be considered as perfect, or undeniable, evidence in respect of matters contained therein⁷⁶. Article 1878 provides

73 Article 46 (a)

74 See also BANI Rule 23 (a) which simply places the burden of proof of a matter upon the party so claiming.

75 Article 1868 RV.

76 Article 1870 RV.

that non-notarial evidence which is contested shall be examined by the Court. The BANI Rules expressly leave it to the tribunal to determine the admissibility, relevance and weight of all evidence offered by the parties.⁷⁷ But it is implicit in the Arbitration Law that the functions assigned to the court for litigation cases are to be exercised by the tribunal in arbitrations.

Witnesses

The Arbitration Law allows witnesses, of fact or expert witnesses, to be called, either at the request of a party or as ordered by the tribunal.⁷⁸ The BANI rules give the tribunal authority to summon witnesses, but no right to sanction a witness who does not appear.⁷⁹ Witnesses are to testify upon oath⁸⁰. The party calling such witness is required to cover the costs thereof.

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, in the same manner as in court cases. This is one of the provisions repealed under the new Arbitration Law, however, and there is no substitute provided, leaving no effective means to subpoena recalcitrant witnesses.

Expert Witnesses are covered in Article 50 of the Arbitration Law, which provides:

“Article 50

“(1) The arbitrator or arbitration tribunal may request the assistance of one or more expert witnesses to provide a written report concerning any specific matter relating to the merits of the dispute.

“(2) The parties shall be required to provide all details and information

77 Rule 23 (c).

78 Article 49.

79 Rule 23 (d).

80 The BANI Rules leave it to the tribunal to determine whether an oath is necessary.

that may be deemed necessary by such expert witnesses.

- “(3) The arbitrator or arbitration tribunal shall provide copies of any report provided by such expert witnesses to the parties, in order to allow the parties to respond in writing.*
- “(4) In the event that any matters opined upon by any such expert witness is insufficiently clear, upon request of either of the parties, such expert witness may be requested to give testimony in a hearing before the arbitrator(s) and the parties, or their legal representatives.”*

The BANI Rules are less specific, affording more flexibility to the tribunal. Article 23 (d) simply states:

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

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. Family, relatives, those having relation with a disputant through marriage and divorced husbands or wives are generally not qualified/permitted to act as witnesses, except in certain exceptional cases.⁸¹

Discovery

As noted above, for the most part, both arbitral references and court cases are based upon documents. But there are no formal discovery procedures of the type

⁸¹ Article 1910 RV.

known in common law jurisdictions. Parties are expected to list in their initial pleadings all documents upon which they base their argument or case, and those which are not submitted with those pleadings must be submitted at a subsequent hearing. This is explicit in the BANI Rules⁸², 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 its general powers over the conduct of the hearings. And Rule 20 (f) of the BANI Rules allows the tribunal to impose sanctions against a party that fails to comply with its orders. This rule has not as yet been tested, however.

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

Transcript

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 examination of witnesses, to be drawn up by a secretary and should cover: “. . . *all activities in the examination and arbitration hearings*”. The BANI rules provide for a transcript to be made by an independent court reporter if required by either party.⁸³ But even if there is no such transcript made, BANI provides a Secretary to take minutes of the proceedings and rulings, and for such minutes to be signed by the Tribunal.⁸⁴

6. AWARDS

82 Rules 16 (c) and 17 (b).

83 Rule 19 (c).

84 Rule 19 (b).

Timing

After close of hearings, the tribunal is allowed only 30 days to render its award⁸⁵. The BANI Rules provide that this time limit may be extended on agreement of the parties.⁸⁶ The parties are then afforded 14 days in which to submit a request to the tribunal (or to BANI in case of a BANI arbitration) 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.*”⁸⁷

Basis

The award shall be based upon the underlying contract and the governing law or justice and fairness⁸⁸

BANI Rules spell out these criteria more fully and workably. If the parties have not designated the governing law in their underlying contract, nor have subsequently agreed, the tribunal has the authority to decide upon the most appropriate law to govern. Trade practices may also be taken into consideration. But the tribunal may only assume the powers of an *amiable compositeur* or decide *ex aequo et bono* where the parties have so agreed.⁸⁹

Requirements

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

“Article 54

“(1) *An arbitration award must contain:*

85 Article 57, Arbitration Law.

86 BANI Rule 25.

87 Article 58, Arbitration Law & BANI Rule 34.

88 Article 56, Arbitration Law.

89 BANI Rule 15.

- a. *a heading to the award containing the words “Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa” (for the sake of Justice based on belief in the 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 effectivity 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.”

The BANI Rules do not set out these requirements in full, but are consistent therewith, providing only that the award must be in writing and shall state reasons, unless the parties have otherwise agreed.⁹⁰ Also consistent with the Law, the BANI Rules call for the award to be signed and dated, with the place of issuance indicated, and note that if one arbitrator does not sign the reason therefor must be indicated.⁹¹ No provision is made in the Law for issuance of an award where the arbitrators are unable to reach an unanimous or majority decision. The BANI Rules, however do provide that in such case the points in question shall be decided by the chairman of the tribunal.⁹²

90 Rule 29.

91 Rule 30.

Review

BANI requires that all awards be reviewed by its Board to ensure compliance with the Law and with public policy. If BANI has no objection within seven days, the tribunal will deliver the award to the parties at a final hearing.⁹³ To date, no award has been rejected by BANI, although the facility afforded the parties to correct errors has been utilised on occasion with some success.

Registration

The tribunal is required to register a signed original, or authentic copy, of the award with the court within 30 days of its rendering.⁹⁴ 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.

Although not specified in the Arbitration Law, as a practical matter, in order to register the award the court will require 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 translation⁹⁵. It is important to ensure that any translation into Indonesian is accurate, because that is the

92 Rule 27.

93 Rule 31.

94 Article 59 (1), Arbitration Law.

95 See BANI Rule 14 (d).

version which will be operative in case the award must be enforced in Indonesia.

Note that failure to register will render the award unenforceable.⁹⁶

7. ENFORCEMENT

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

Neither Indonesian law and practice nor BANI rules make any distinction between “domestic” and “international” arbitrations, in the sense of any diversity in the nationality of the parties, the only distinction being the place in which the arbitration is held. Article 1 (9) of the New Law, consistent with the previous legislative regime, defines international arbitral awards as: “. . . awards handed down by an arbitration institution or individual arbitrator(s) outside the jurisdiction of the Republic of Indonesia, or an award by an arbitration institution or individual arbitrators(s) which under the provisions of Indonesian law are deemed to be International arbitration awards” As there has been no legislation, nor Supreme Court ruling, to the contrary, an award rendered in an arbitration with venue within Indonesia will be domestic without exception. This was confirmed by the Supreme Court, under the old legislation, in dismissing an application to enforce, as an international award, an award rendered in an arbitration held in Indonesia between a foreign and a domestic domiciled party.⁹⁷

Awards rendered in Indonesia are registered in and executed through the court of first instance (District Court) in the district in which they were rendered, 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*, which order can then be implemented in the

⁹⁶ Article 59 (4), Arbitration Law.

⁹⁷ *Ascom Electro A.G. v. P.T. Manggala Mandiri Sentosa*; W7.Dc.Ht.02/Pdt.Eks/Abt.Int/1993.3746IX.1993.03, 22 September, 1993.

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. It is anticipated that giving *Exequatur* power to the Central Jakarta District Court will expedite this process, and thus far this has proved to be the case.

Domestic awards:

As mentioned above, domestic awards, that is awards rendered within Indonesia, must be registered with the Clerk of the District Court, in the district in which the losing party is domiciled or maintains assets, within 30 days of rendering.⁹⁸ Failure to register will render the award unenforceable.

The enforcement procedure for domestic awards allows the appropriate District Court to issue an order of execution directly if the losing party does not, after being duly summoned and so requested by the court, satisfy the award. Although there is no appeal process, the losing party does have the opportunity to contest execution, both at the hearing and also after issuance of any execution order by filing a separate contest. Although the District Court may not review the reasoning in the award itself⁹⁹, it may only execute the award if both the nature of the dispute and the agreement to arbitrate meet the requirements set out in the Arbitration Law¹⁰⁰

98 Article 59, Arbitration Law.

99 Article 62 (4), Arbitration Law.

100 Articles 4 and 5.

and if the award is not in conflict with public morality and order¹⁰¹. There is no recourse against rejection by the court of execution¹⁰². To date, there have been very few domestic awards which the courts have declined to enforce, and even those which have been refused enforcement by the District Court have for the most part been reversed on appeal.

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 the provisions of the RV, in the same manner as execution of judgements in civil cases which are final and binding.¹⁰³

International Awards:

As mentioned above, application for enforcement of international awards, that is awards rendered in arbitral reference held outside out Indonesia, must be 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 arbitrations¹⁰⁴. Where the Government of the Republic of Indonesia is a party only the Supreme Court has jurisdiction to issue *Exequatur*¹⁰⁵. The requirements for such application¹⁰⁶ mirror those of the previous legislation, which in this case were the implementing regulations for enforcement of foreign awards 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 Indonesia¹⁰⁷, and a certificate from the diplomatic representative of the Republic of

101 Article 62 (2).

102 Article 63 (3).

103 Article 64, Arbitration Law.

104 Article 65.

105 Article 66 (e).

106 See Article 67.

107 Article 66, Arbitration Law.

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*¹⁰⁸. Indonesia is a party to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “**New York Convention**”)¹⁰⁹, and thus an award rendered in any of the 117¹¹⁰ other signatory states will be enforceable in Indonesia under the provisions of the Arbitration Law.

Before application for *Exequatur*, the award must be registered, by the arbitrators or their legal representatives, with the clerk of the District Court of Central Jakarta.¹¹¹ There is no time limit on such registration of international awards, as there is for domestic awards.

Appeal

Rejection of *Exequatur* by the Central Jakarta District Court can be appealed to the Supreme Court, which must decide upon the appeal within 90 days of application therefor.¹¹² Issuance of *Exequatur*, however, is not subject to appeal¹¹³. Nor may a decision of the Supreme Court either issuing or rejecting *Exequatur* where the Government of Indonesia is a party be appealed¹¹⁴.

Execution

As with domestic arbitrations, *Exequatur* orders may be enforced by attachment and/or seizure and sale of the debtor’s assets and property in accordance with the normal provisions of the RV.¹¹⁵ Where such assets are located in a district other

108 Article 67 (2) (c), Arbitration Law.

109 Ratified by Presidential Decree No 34 of 1981.

110 As at time of writing.

111 Article 67 (1), Arbitration Law.

112 Article 68, Arbitration Law.

113 See Article 68 (1) & (2), Arbitration Law.

114 Article 68 (4), Arbitration Law.

115 Article 69 (3), Arbitration Law.

than Central Jakarta, the Central Jakarta court will forward the execution order to the Chief Judge of the District Court having jurisdiction to enforce such order.¹¹⁶

Annulment

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.¹¹⁷ Any such application must be submitted within 30 days of registration of the award¹¹⁸, and a decision must be made upon such application within 30 days of submission thereof. Appeal may be made to the Supreme Court against any such decision, and the Law requires the Supreme Court to decide upon such appeal within 30 days of application¹¹⁹.

7. HISTORY OF RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS IN INDONESIA

The Indonesian Code of Civil Procedure (RV) provides that, except for general average awards, judgments of foreign courts cannot be enforced in Indonesia¹²⁰. Based on this provision, it had long been assumed that the same applied to foreign-rendered arbitration awards and that these could not be enforced here.

No law or regulation provided the contrary until 1981 when Indonesia ratified the 1958 New York Convention¹²¹. Nonetheless, for the ten-year period following such ratification, the Indonesian courts were still reluctant to grant enforcement of foreign arbitral awards against Indonesian parties. The rationale given was usually the absence of any implementing regulations to guide the courts in the procedures

116 Article 69 (2), Arbitration Law.

117 Article 70, Arbitration Law.

118 Article 71, Arbitration Law.

119 Article 72.

120 Article 463, RV.

121 By Presidential Decree No 34 of 1981, published in the State Gazette (*Berita Negara*) of 1981, as No. 40, of 5 August, 1981.

necessary to enforce foreign-rendered awards. This position followed a 1984 conclusion of the Supreme Court to such effect, often criticised by scholars as directly contradicting the language of Article III of the New York Convention itself, 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.

But the members of the Supreme Court were apparently unable to agree as to which court one would apply to for enforcement of a foreign-rendered award. Since registration and application for enforcement of domestic-rendered awards was to be made to the District Court in the district in which the award was rendered¹²², there would have been no District Court in which to register, nor which would have had jurisdiction to grant enforcement of, a foreign-rendered award. 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.

The breakthrough occurred only in 1990, when the Supreme Court promulgated its Regulation No. 1, 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 and designating the District Court of Central Jakarta as the venue to which application for enforcement thereof, through an order of *Exequatur*, was to be made. The Chairman of that court was then required to transmit the *Exequatur* request file to the Supreme Court within 14 days of receipt, attaching: (i) the original award, or a certified copy thereof, together with an official translation thereof; (ii) the original or a certified copy of the agreement forming the basis of the award, together with an official translation thereof; and (iii) a statement from the Indonesian diplomatic mission in the jurisdiction in which the award was rendered to the effect that such country has diplomatic relations with Indonesia and that Indonesia and such country are contracting states to an international convention regarding implementation of

122 Article 634, RV.

foreign arbitral awards.

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. And, as with the new Arbitration Law, if execution was to be effected in a different jurisdiction, the Central Jakarta court was to transfer the order to the most suitable District Court for implementation.

Unfortunately, however, Regulation 1/1990 did fully not solve the problem, as it did not set any time limits: either within which the Supreme Court was required to rule on an application nor for transfers from one court to another. It appears that such applications were simply docketed into the Supreme Court's normal case-load, thereby likely to await up to three years for attention.

E.D. & F. Man “Sugar” Case

It is unfortunate that the first order of *Exequatur* issued by the Supreme Court was later nullified by that same court on rather tenuous grounds relating to public policy. That case (*ED&F Man (Sugar) Limited v. Yani Haryanto*) became rather notorious and gave Indonesia something of a negative reputation in arbitration circles.

The case has not been officially reported and thus the ensuing summary is based upon informal discussions with various parties, both involved and observing only, and thus may not be entirely accurate. Haryanto ordered a shipment of sugar from E.D. & F. Man, FOB an Indonesian port, and when the shipment arrived it was neither collected from the port, nor paid for, by Haryanto, the consignee. Man claimed against the consignee, and eventually a settlement agreement was entered into whereby the consignee was to make partial restitution on an installment basis, any disputes to be settled by arbitration in London. After making only some initial payments, the consignee failed to continue payment and Man commenced, and won, arbitration in London. The award was at first granted *Exequatur* by the Indonesian Supreme Court, following the procedures set down in Law No. 1 of 1990, the predecessor legislation to Articles 66 and 67 of the new Arbitration Law,

as outlined above. Haryanto brought an action in the District Court of Central Jakarta, which court set aside the the execution order, declaring it irrelevant, and the original purchase order null and void, on the grounds that at that time only the Government Logistics Bureau (“*BULOG*”) could import, or authorise the import of, of certain staples, including sugar, and that the consignee did not have a permit from BULOG to import the sugar. The court held that the basic purchase agreement was contrary to public policy and thus any arbitration in relation thereto was invalid. That it was the consignee and not the shipper that had violated the BULOG regulations and that the arbitration was based upon breach of the settlement agreement and not the original sale contract, were apparently also deemed irrelevant. Both the Jakarta Appellate Court and the Indonesian Supreme Court upheld the District Court’s decision.

Public Policy

“Public Policy” was not, nor is it now, clearly defined in the laws, nor in jurisprudence, and the courts therefore have considerable discretion in application of this concept. In the drafting of the new Arbitration Law, there was considerable discussion as to whether such a definition should be included so that the concept could become equitable and workable in the context of arbitration. But the Law emerged without any such clarification. Article 66 (c) only specifies that International Arbitration Awards may be enforced in Indonesia only if they do not violate public order.

Fortunately no similar aberration has been encountered since that 1991 decision, but the stain on Indonesia’s name has not been excised.

Applications Under Previous Legislation

The initial nine applications to the Supreme Court, those filed between 1991 and mid-1993, were acted upon with reasonable promptness - some in less than six months. However, no orders were issued on foreign arbitral awards by the Supreme Court, either of Exequatur or rejection thereof, after mid-1994. Thus the remaining seven applications are apparently still pending.

However, it should be noted that of the nine applications which were acted upon, all but three were granted Exequatur. One was withdrawn (presumably settled) before any action could be taken; one, referred to earlier, was sent back down to the District Court because it was not an international award, having been rendered in Indonesia; and only one was rejected - on the grounds that the instrument containing the arbitration clause had not been executed by the parties to the reference.

Applications under New Law

The new Arbitration Law is expected to expedite matters considerably. Vesting jurisdiction to enforce international awards with the same court that regularly exercises such jurisdiction over domestic awards now makes the procedure more consistent with Article III of the New York Convention and there should no longer be any reason for foreign-rendered awards to be handled substantially differently from those rendered within Indonesia. Supreme Court records for the year 2000, as at October, 2000, show only two foreign awards registered, for which one had already been issued with the *Exequatur* order and no application for enforcement had as yet been received for the other.

Note, however, as mentioned earlier, Article 80 of the new Arbitration Law provides that awards rendered prior to the effectivity of such law, which are final and binding but have not yet been executed, are to be implemented in accordance with the new Law. This means that the seven applications for issuance of Exequatur orders of enforcement still lodged with the Supreme Court should be transferred back down to the Central Jakarta District Court for issuance of such order, assuming these have not yet been satisfied or settled. It is unlikely that this will happen automatically and thus counsel for successful parties who are still awaiting *Exequatur* orders would be well advised to make application to have the files sent back from the Supreme Court to the to Central Jakarta District Court.

8. PRACTICAL INFORMATION FOR VISITING ARBITRATORS OR COUNSEL

Consult Local Counsel

Indonesian law and culture diverge greatly from that to which westerners are accustomed. Anyone drafting an agreement to be arbitrated in Indonesia, and anyone intending to act as counsel or arbitrator in any reference to be held within Indonesia, would be well advised to consult local counsel for assistance in all aspects of such endeavour.

Where to Arbitrate

Although Bali is a most desirable, and highly recommended, place to visit, most arbitrations are held in Jakarta, Indonesia's capital and by far the largest and most business-oriented city. All modern facilities are to be found here and its many international standard hotels all have meeting rooms and business centres available and offer up-to-date communications and information technology systems, as well as a selection of fine cuisine from all over the globe. Hotel standards in most of Asia far surpass that of Europe, and Jakarta hotels are at the top of the class, whereby even a three-star Jakarta hotel will be more comfortable and offer more features than many five-star hotels in, for example, Paris.

Indonesia's second largest city is Surabaya in the eastern part of the island of Java. A great deal of manufacturing, forestry product business and other industry is carried on here and a few Jakarta law firms maintain offices in Surabaya, but by far the greatest amount of legal practice occurs in Jakarta. BANI also maintains a small office in Surabaya.

Expenditures

Room rates in Jakarta would normally range from approximately U.S. \$ 100 to \$

500 but, due to the present economic crisis, are now being offered at a fraction of those rates, with centrally located full feature rooms now available between U.S. \$ 50 and \$ 250. Prices of meals in restaurants would normally be equivalent to those in any major city but, again, because of the recent devaluation of the local currency, are now very reasonable indeed. Wine and imported alcoholic beverages, as well as imported speciality foods, however, tend to be more expensive than elsewhere. Modern business hotels can also be found in most other major cities, with rates generally somewhat lower than in Jakarta.

Taxi's are readily available and the unfamiliar visitor is advised to use either a Silver Bird or Blue Bird taxi, both of which are available at the airport, as there are certain other companies that are less reputable. A ride from Sukarno-Hatta International Airport to almost any hotel in central Jakarta is not likely to run more than U.S. \$ 10.00 at present (end-2000) exchange rates. Depending upon the time of day, and consequent density of traffic, the trip requires between 1/2 to 1 1/2 hour. In some locations, such as Bali, taxi rates from the airport are fixed, depending upon destination, and are paid in advance at the airport authority.

There is an airport departure tax of Rp. 50,000 (just under \$ 5.00 at present) for all international flights. Indonesian residents are also required to make a substantial prepayment of income tax, in the amount of Rp. 1,000,000, on each departure, but this does not apply to tourists and those traveling on business visas.

Tipping is expected, and 10% - 15% for taxis is normal. Most restaurants add a service charge of 10%, but a tip is nonetheless recommended.

Notaries and Translations

Other costs that might be required in conjunction with an arbitration are Notary fees and costs of translation and possibly interpreters. For court actions all documents must be in the Indonesian language, and where the originals are in another language these must be translated by a government-licensed sworn translator. If an arbitral

reference is to be held in the Indonesian language, a similar requirement would be in place. But even if the reference is held in English or another language, translations, or the assistance of an interpreter, may be required, particularly if a party, witness, or even an arbitrator, is not sufficiently fluent in such foreign language. Costs of translation to and from English range, according to the translator, from the equivalent of approximately \$ 5.00 to \$ 10.00 per page (of resultant translation) at present, although the cost prior to the recent devaluations ranged from \$ 10.00 to \$ 25.00 per page. Costs for other languages tend to be higher. Interpreters are more difficult to find and their fees range from approximately \$ 10.00 per hour to as much as \$ 1,000.00 per day.

Notary fees also vary greatly. Notarial Deeds taken for establishment of companies or execution loan agreements or security documentation will be based upon the quantum, i.e. the authorised capital of the company or total principal of the loan, in the range of between 1/2 % to 1% of such quantum. For legalisation/witness of signatures, fees rate from \$ 5.00 to \$ 20.00 per legalisation, and for certification of photocopies of documents, the charges are in the range of \$ 2.00 to \$ 10.00 per copy.

Visas

Tourist visas can be issued upon entry for citizens of most major countries. However, visiting arbitrators and counsel, as well as businesspersons, would be well advised to obtain a business visa at an Indonesian consulate outside of Indonesia if they wish to perform any work here. A tourist visa prohibits its holder from engaging in commercial activities and holders of tourist visas have occasionally been deported or, worse, detained, when discovered working.

Conduct

It is considered poor conduct to lose one's temper, use harsh language, or offer insults. A smile and polite request will achieve far more than a demand. Once two parties engage in any kind of yelling match, both lose face and it become very

difficult for them to deal with each other in the future. Thus, the best advice one can give is: be patient, take local advice, maintain equanimity and always display a sense of humor.

A list of useful addresses is attached as Appendix III.

Karen Mills, J.D.; F.C.I.Arb; F.S.I.Arb, F. HK I. Arb
Chartered Arbitrator
Jakarta; December, 2000

9. APPENDICES:

- I Law No. 30 of 1999 (Arbitration Law)
- II BANI Rules
- III Useful Addresses

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