Arbitration

Contributing editors
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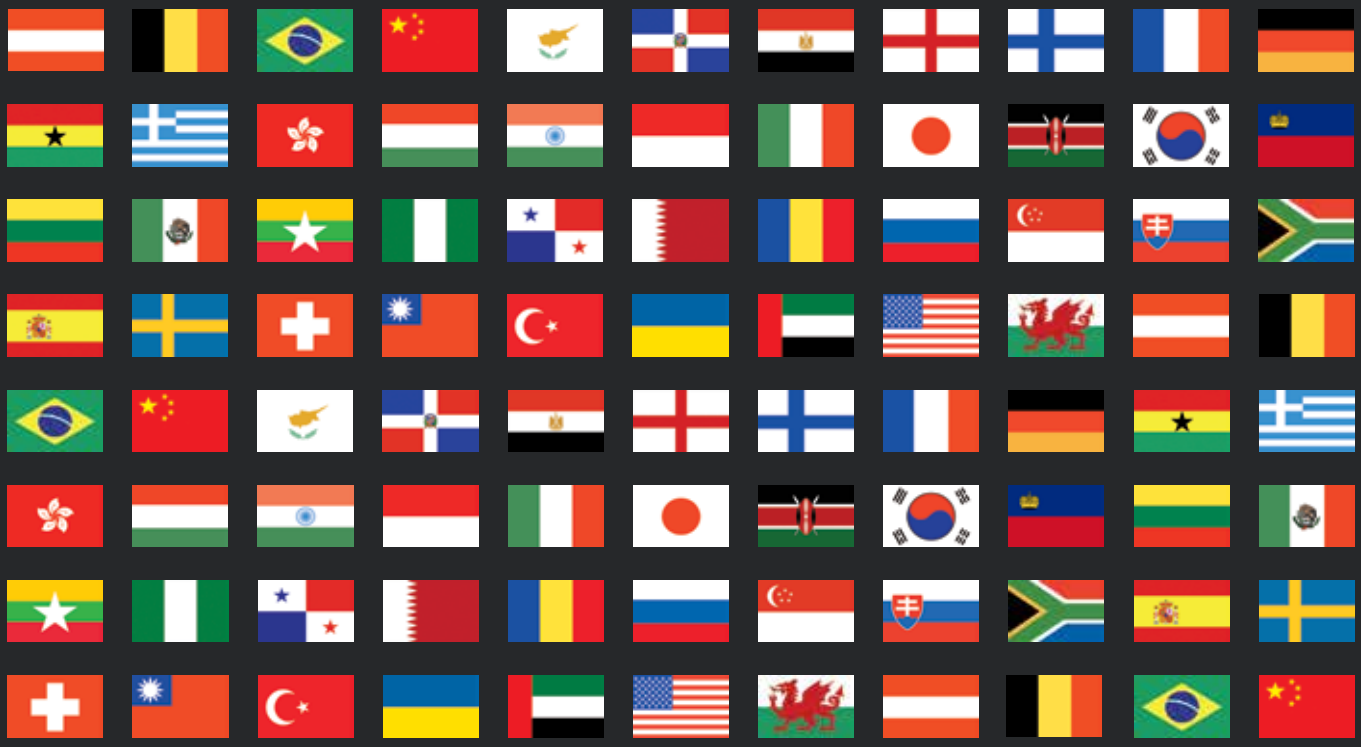

2018

GETTING THE DEAL THROUGH

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Arbitration 2018

Contributing editors

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Gleiss Lutz

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Arbitration 2018

Thirteenth edition

Getting the Deal Through is delighted to publish the thirteenth edition of *Arbitration*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Cyprus, Finland, Liechtenstein, Lithuania, Panama, Russia and South Africa.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Gerhard Wegen and Stephan Wilske of Gleiss Lutz, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
January 2018

Indonesia

Pheo M Hutabarat, Asido M Panjaitan and Yuris Hakim
Hutabarat, Halim & Rekan

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Through Presidential Decree No. 34 of 1981, dated 5 August 1981, Indonesia ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. In addition, Indonesia also signed (on 16 February 1968) and ratified, as the 27th member state (on 28 September 1968), the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (the ICSID Convention).

Under Indonesian law, international arbitral awards will only be recognised and may only be enforced within the jurisdiction of Indonesia if they fulfil the following requirements:

- the foreign arbitral award is rendered by an arbitration body or an individual arbitrator in a country that is bilaterally bound to Indonesia or jointly with Indonesia to an international convention regarding the recognition and enforcement of foreign arbitration awards. The enforcement thereof is based on the principle of reciprocity;
- the foreign arbitral awards are only limited to awards that, according to Indonesian law, fall within the definition of commercial law;
- the foreign arbitral awards are not in contravention of public order under Indonesian law;
- the foreign arbitral awards may be enforced in Indonesia only after the Chairman of the Central Jakarta District Court has issued an order of execution (exequatur);
- if the Republic of Indonesia is a party to the foreign arbitration award, this award may be enforced in Indonesia only after the Supreme Court of the Republic of Indonesia has issued an exequatur; and
- the application for the enforcement of the foreign arbitral awards must be accompanied by:
- the original or duplicate of the foreign arbitration award, authenticated pursuant to the provisions regarding authentication of foreign documents, and an official translation thereof, pursuant to the legal provisions in force in Indonesia;
- the original or duplicate of the agreement, as the basis for the foreign arbitration award, authenticated in accordance with the provisions regarding authentication of foreign documents, and the official translation thereof, pursuant to legal provisions in force in Indonesia; and
- a statement from the Indonesian diplomatic representative in the country where the foreign arbitration award was rendered, stating that such country is bilaterally bound to Indonesia or jointly bound with Indonesia in an international convention regarding the recognition and enforcement of a foreign arbitration award.

The Law Number 30 of 1999 dated 12 August 1999 (the Law) stipulates that arbitral awards shall be a final, binding and enforceable decision against the disputing parties; therefore, there is no possibility to appeal an arbitration award. The enforcement of a foreign (international) arbitral award relating to legal persons in Indonesia (other than the government of Indonesia) can only be implemented after having obtained an exequatur issued by the Central District Court of Jakarta. The granting of the exequatur by the Central District Court of Jakarta is not subject to an appeal. However, if the Central District Court of Jakarta refuses to issue the exequatur, this rejection is subject to an appeal to the Supreme Court. The enforcement of a foreign arbitral award in which the Republic of Indonesia is a party can only be implemented in Indonesia after having an exequatur from the Supreme Court of the Republic of Indonesia, and this is not subject to an appeal.

The Law also stipulates that, in the event that the parties have agreed that disputes between them will be settled through arbitration and the parties have given the authorisation, the arbitrator is competent to rule on his or her own jurisdiction, and the Indonesian courts do not have the jurisdiction to adjudicate a dispute where the parties to the contract are bound to an arbitration agreement, since any arbitration agreement concluded in writing by the parties will preclude any right of the parties in the future to submit the dispute to the district court. Therefore, the Indonesian courts must reject, and should not be involved in, any dispute agreed to be under the arbitration proceedings.

Although the above non-involvement of the Indonesian courts in arbitration matters is clearly stipulated in the Law, legal practice in Indonesia shows that some jurisprudence decided by the Supreme Court has justified the non-applicability of the arbitration awards.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Regarding bilateral treaties, Indonesia until 2016 had signed 47 bilateral investment treaties with several countries. Most of these BITs have been entered into force. The arbitration mechanism under the ICSID Convention has mostly been stipulated in these BITs. No standard terms or model languages have been adopted in the BITs to which Indonesia is a party. However, the BITs mostly contain similar provisions in promoting and protecting investment bilaterally.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Domestic arbitration and foreign arbitration are embodied and governed within one law, which is the Law.

The Law generally governs matters relating to domestic and international arbitration proceedings. The Law mostly governs the provisions in relation to all arbitration proceedings commencement and conduct in Indonesia, and the arbitration awards that are rendered in Indonesia, regardless of the nationality of the parties, location of the subject of the dispute, governing law, etc. This is defined in the law as domestic arbitration. These provisions on domestic arbitration relate to, among others:

- the legal requirements of the domestic arbitration award;
- the time period for rendering and enforcing the domestic arbitration awards; and
- the requirement to register the domestic arbitration awards with the relevant district court, as these issues will be further explained below.

For the arbitration proceedings held outside of Indonesia, the Law has categorised these arbitration proceedings as international arbitration, and the Law further stipulates the general procedures for the enforcement of international arbitration awards in Indonesia. There are different procedures to be applied in relation to the enforcement of domestic arbitration awards and international arbitration awards under the Law. They relate to, among others, the different courts for enforcing domestic arbitration awards (ie, through the district court in which the respondent has its legal domicile) and international arbitration awards (ie, through the Central District Court of Jakarta).

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The Law is not based on the UNCITRAL Model Law, and Indonesia cannot be qualified as a Model Law country, since the Law does not contain a number of provisions modelled along the lines of the UNCITRAL Model Law.

The following are, to name a few, the differences between the two:

- the Law differentiates between domestic arbitration awards, in which the arbitration awards are rendered in Indonesia, and international arbitration awards, which are rendered outside of Indonesia;
- the procedures for enforcement and the refusal of the arbitral awards pursuant to the Law differ with those stated in UNCITRAL Model Law, in which the Law provides more limited grounds to challenge arbitral awards than those contained in the UNCITRAL Model Law. Based on the Law, the arbitral awards can be set aside based on the grounds of the award being based on forged documents, the opposing party having concealed important documents and the award being a result of fraud;
- the Law stipulates that the language of the arbitration process will be the Indonesian language, unless otherwise determined by the parties or the tribunal; and
- the Law basically requires the principle that the case is decided based on the submission of documents, unless the parties agree otherwise, whereas the UNCITRAL Model Law requires that the case is decided based on hearings, unless the parties agree otherwise.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

As explained in questions 1 and 3, domestic arbitration law is governed by the Law. Other than the Law, one of the arbitration institutions that is commonly used in Indonesia is Badan Arbitrase Nasional Indonesia (the Indonesian National Board of Arbitration), known by its acronym, BANI. This also provides an Arbitral Procedure (the BANI Rules).

Nevertheless, article 4(2) of the BANI Rules stipulates that the arbitrators are allowed to apply any other arbitration procedures other than BANI Rules (Indonesian Civil Code (the ICC), UNCITRAL, etc) as long as such applicable procedure has been agreed upon by the parties in dispute.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

See question 5.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

In 1977, BANI (www.baniarbitration.org) was established in Jakarta by the Indonesian Chamber of Commerce and Industry (KADIN) by the Decision Number SKEP/152/DPN/1977 as a private arbitration institution in Indonesia. Although BANI is closely related to KADIN, in its work it is completely independent and free from the intervention of any other body or authority. It is also important to note that quite recently another arbitration institution came into being under the name of Badan Arbitrasi Muamalat Islam Indonesia (the Indonesian Islamic Muamalat Board of Arbitration (BAMUI)).

BANI is an arbitration institution in Indonesia with the purpose of providing an equitable, fair and quick settlement of commercial disputes arising in the fields of trade, industry and finance at the national as well as the international level. At present, BANI has its head office in Jakarta and branches in Padang, Medan, Surabaya and Ujung Pandang.

See question 24 in conjunction with question 40 for further information as to the arbitration rules of BANI and fee structure for arbitrators.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

Under article 5(1) of the Law, which stipulates that only disputes that are commercial in nature or those concerning rights that according the laws and regulations are fully under the control of the parties in dispute, may be settled through arbitration. Furthermore, article 5(2) further states that disputes that according to the Indonesian laws cannot be settled amicably cannot be submitted to arbitration.

In practice, disputes that cannot be submitted to arbitration are, among others:

- criminal cases;
- industrial relationship cases (manpower);
- administrative cases;
- bankruptcy cases; and
- other related family matters (divorce and adoption).

As an example, it is worth mentioning a decision of the Supreme Court of the Republic of Indonesia under number No. 013PK/N/1999 in relation to the bankruptcy case between *PT Putra Putri Fortuna Windu, et al (as applicant) v PT Environmental Network Indonesia, et al*. In this case, although the parties had agreed that all disputes including those relating to bankruptcy must be settled through arbitration, the Supreme Court refused and set aside the applicability of the arbitration agreement, the reason being that the Indonesian Bankruptcy Law has given a specific authorisation to the Commercial Court to have absolute jurisdiction over bankruptcy issues in Indonesia.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

The Law stipulates that an agreement to arbitrate must be made in writing either before or after the dispute arises. The parties to the contracts are free to determine the applicable procedural rules in a written arbitration clause before the dispute arises or a separate arbitration agreement after the dispute has arisen.

In concluding a separate arbitration agreement before the dispute arises, the Law does not specifically provide requirements as to the format and the substance of this arbitration agreement. The parties are free to determine the applicable procedural rules in a written arbitration clause in a commercial transaction before the dispute arises. From article 1(2) of the Law, it can also be concluded that the parties to the arbitration agreement are the legal persons, both entities and individual persons, in accordance with civil law and public law. Based on the Law, not only an individual person but also a government body or a state-owned company in Indonesia could be a party to the arbitration agreement, and there is no special requirement or formality required for them to enter into an arbitration agreement in the framework of a commercial transaction.

The following should be taken in consideration when concluding the arbitration clause (before the dispute arises):

- the rules of the arbitration institution that will govern the arbitration proceedings, unless they are modified by the parties. If the parties have not determined the rules of the arbitration institution, and have only appointed the arbitrator or arbitration institution, the arbitrator or the arbitration institution will determine these applicable rules;
- in the event that the parties disagree with the appointment of an arbitrator or in the absence of any provision to determine the procedures for the appointment of the arbitrators, the chair of the district court will appoint one arbitrator or arbitrators;
- if the parties have agreed the rules of arbitration, the parties must also agree on the venue and the period of time for the arbitration process, failing which the arbitrator or the arbitration institution will determine these matters. Based on article 48 of the Law, the arbitration process or the hearings must be completed within a time limit of 180 days from the constitution of the tribunal, unless the tribunal, with the approval of the parties, waives such time limitation;
- the parties are entitled to determine that the arbitrators will decide the matter based on the applicable substantive law (governing law) or based on ex aequo et bono. If the parties agree to choose ex aequo et bono, the arbitrators can set aside the applicable law in determining the award, provided that in certain circumstances the mandatory laws of the dwingend recht (applicable laws) must be implemented and cannot be set aside by the arbitrators. If the parties do not stipulate the governing law, the chosen law will be the law of the venue where the arbitration is to be conducted (see article 56, paragraph 2 of the Law);
- article 28 of the Law stipulates that the language of the arbitration process will be the Indonesian language, unless otherwise determined by the parties and the tribunal; and
- article 27 of the Law only stipulates that all hearings will be closed to the public. The parties may further stipulate the degree of confidentiality of any other process or document involved in the arbitration process.

If the agreement to arbitrate is agreed by the parties after the dispute has arisen, article 9 of the Law requires that a separate arbitration agreement must at least contain the following requirements:

- the subject matter of the dispute;
- the full names and addresses of the parties;
- the full name and addresses of the arbitrator or arbitral tribunal;
- the place where the arbitrator or arbitration panel will make the decision;
- the full name of the secretary;
- the period in which the dispute will be resolved;
- a statement of acceptance by the arbitrator or arbitrators; and
- a statement of acceptance of the disputing parties that they will bear all costs necessary for the resolution of the dispute through arbitration.

Failing to comply with the above formal requirements will mean that the separate arbitration agreement (after the dispute has arisen) will be null and void. It should be addressed that the validity of an agreement is subject to the decision of Indonesia's civil court.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

See question 9.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Article 30 of the Law stipulates a general provision that third parties may participate or join an arbitration proceeding if:

- there exists an interest of such third parties in relation to the relevant case; and
- the involvement of such third party is agreed by the disputing parties and approved by the tribunal.

If one of the disputing parties rejects any third parties joining the arbitration, these third parties may not be involved in the arbitration process. This is in line with the principle adopted in the Law of 'no contract no arbitration'.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

See question 11.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

See question 11.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

See question 11.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

There is no restriction or limit to the parties' autonomy to select arbitrators. The Law guarantees the party autonomy to select the arbitrators. With regard to the required qualifications for arbitrators in domestic arbitration, article 12 of the Law stipulates that the arbitrators must meet the following requirements:

- be capable of performing legal actions;
- be at least 35 years of age;
- have no family relationship by blood or marriage, up to the third degree, with either one of the disputing parties;
- have no financial or other interest in the arbitration award; and
- have at least 15 years' experience in a certain field.

Furthermore, the Law clearly prohibits judges, prosecutors, clerks of courts, and other government or court officials from being appointed as the arbitrators.

16 Background of arbitrators

Who regularly sit as arbitrators in your jurisdiction?

Article 9 of the BANI Rules stipulates that only those who are included in the list of arbitrators issued by BANI may act as arbitrators to be appointed in the BANI arbitration proceedings. This list will contain panel of arbitrations who have complied with the requirements, eg, the appointed arbitrators have obtained ADR or arbitration certificates recognised by BANI and they can be either legal experts or practitioners or non-legal practitioners or experts, such as engineers and architects. Judges, prosecutors, clerks of courts and other government or court officials are prohibited from being appointed as arbitrators. There is no preference regarding the gender of the appointed arbitrators.

17 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

There are certain default procedures in relation to the selection of the arbitrators to be applied in Domestic Arbitration set forth in the Law, which are as follows.

- In the event that the parties disagree with the appointment of an arbitrator or in the absence of any provision to determine the procedures for the appointment of the arbitrators in the arbitration agreement, based on article 13 of the Law, the chairman of the district court will appoint one arbitrator or arbitrators.
- If there is disagreement between the parties to appoint one or more arbitrators in ad hoc arbitration, each of the parties can submit an application to the chair of the district court in order to appoint an arbitrator or the arbitrators to settle the dispute.
- If the parties have agreed to appoint a single arbitrator, but they fail to reach the consensus to appoint the appointed arbitrator, the chairman of the district court will appoint such single arbitrator.
- If the two arbitrators have been appointed by the parties, but these two arbitrators fail to appoint the third arbitrator as the chair of the arbitrators, then the chair of the district court will appoint the third arbitrator, and this decision made by the district court cannot be set aside.

The chair of the district court referred to the above is the chairman of the district court in which the respondent is domiciled.

The above default procedures stipulated by the Law are for the avoidance of any possible deadlock situation in appointing arbitrators and where the separate arbitration agreement before the dispute arises is silent on stipulating this provision in detail. However, note that the above default procedures would not be applied in the event that the parties to the arbitration agreement have clearly designated for an arbitral institution to administer the arbitration or have otherwise determined specific rules of procedure to govern the arbitration proceedings, and if the designated rules of procedure or arbitration institution set out another method of selection or default selection, the provision of these rules or institution will prevail.

18 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

In order to preserve the independence of the arbitrators in domestic arbitration, article 18 of the Law obliges the arbitrators to inform the parties of any matters that could influence independence or could affect impartiality in rendering the award.

Furthermore, article 22 of the Law also provides the right of refusal for the parties to refuse the arbitrators if there is found to be sufficient reason and ample evidence to create the doubt that the arbitrators would not have the independence to perform their duties and would not be neutral in rendering the awards. For example, if it can be proven that the arbitrator has a family, financial or working relationship with one of the parties or their proxies, one of the parties could implement the above right of refusal.

Whereas article 75(3) of the Law stipulates that in the event that an arbitrator passes away, the parties are obligated to appoint a new arbitrator. The newly appointed arbitrator must continue the arbitration proceedings following the existing process that has been agreed previously.

19 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

As defined by the Law, the arbitrator is a person who has been appointed, either by the parties, the district court or by an arbitration institution, to make a decision in an arbitration dispute. See also question 18.

20 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The Law does not specifically regulate the matter of liable negligence or intentional breach of duty. However, the Law clearly stipulates under article 21 that no arbitrator is to bear any legal liability for any actions he or she conducted while performing his or her duty as an arbitrator, unless, it can be proven that there is *itikad tidak baik* (bad faith) from his or her actions.

Jurisdiction and competence of arbitral tribunal

21 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

Article 3 of the Law clearly stipulates that the Indonesian courts do not have the jurisdiction to adjudicate a dispute where the parties to the contract are bound to an arbitration agreement. Furthermore, article 11 of the Law has also clearly stated that any arbitration agreement concluded in writing by the parties will preclude any right of the parties in the future to submit the dispute to the district court. Therefore, the Indonesian district court will not have any jurisdiction to adjudicate the dispute that has been agreed by the parties to be brought to the arbitral tribunal.

In general, the courts in Indonesia have honoured the above principle, and this has been shown by the permanent jurisprudence decided by the Supreme Court in several cases, and these decisions have been followed in many instances by the lower courts in Indonesia. However, in practice, some jurisprudence has justified the non-applicability of the arbitration agreements in the event that the cases are not related to the breach of contract of agreements per se, but related to the tort or illegal action. In these cases, the plaintiffs have proved that the cases are relating to the tort claim, which is outside of the applicability of the arbitration agreements agreed by the parties. The plaintiffs argued that arbitration agreements only cover any disputes arising out of the implementation or breach of contract of the agreements between the parties.

22 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The Law and other prevailing laws in Indonesia do not specifically stipulate that the arbitrators are competent to rule on their own jurisdiction. However, from article 4(1) of the Law, it can be concluded that the arbitrator is permitted to rule on the question of his or her own jurisdiction. Article 4(1) stipulates that in the event that the parties have agreed that disputes between them will be settled through arbitration and the parties have given the authorisation, the arbitrator is competent to rule on his or her own jurisdiction to adjudicate the dispute.

However, it is worth noting that in one of the landmark cases in Indonesia (*Lippo Group v Astro Group*), the Indonesian court refused an international arbitration award that ordered the Indonesian courts to discontinue the trial process in Indonesia related to the disputed parties bound to the arbitration clause (anti-suit jurisdiction arbitration award). Based on a decision issued by the chair of the district court of Central Jakarta on 28 October 2009, it has ordered to set aside and declare that an anti-suit jurisdiction award issued by Singapore International Arbitration Centre (SIAC) is a non-enforceable (non-exequatur) international arbitration award in Indonesia, and therefore this award cannot be enforced in the territory of Indonesia. This SIAC award among others contain orders to Lippo Group to discontinue the Indonesian legal proceedings of a tort case and prohibit Lippo Group from bringing any further proceeding in Indonesia against Astro Group and its related parties. This decision has been confirmed and upheld by the Indonesian Supreme Court through its decision No. 01 K/Pdt

Sus/2010 dated 24 February 2010, which confirms that any anti-suit jurisdiction award ordering the Indonesian courts to discontinue the court proceedings in Indonesia violates the principle of sovereignty of the Republic of Indonesia and public policy in Indonesia, and there is no foreign power that can interfere in any existing legal process in Indonesia.

Arbitral proceedings

23 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Based on the Law, if the parties have already agreed to choose a specific forum to conduct the arbitral proceedings, the parties are, therefore, obligated to commence the arbitration in the said and agreed place.

Article 28 of the Law provides that the language of the arbitration proceedings will be in the Indonesian language, unless otherwise determined by the parties and the tribunal. Pursuant to Chapter V, article 14 of the BANI Rules, the using of another language other than Bahasa Indonesia is allowed; however, an award should be written in the Indonesian language. However, upon a request from a party or opinion of the arbitrator, the award may be written in English or any other language. In the event that the award will be written not in Bahasa Indonesia, an Indonesian sworn translation of such award must be made for registration purposes.

24 Commencement of arbitration

How are arbitral proceedings initiated?

The procedure of arbitration is primarily governed under Chapter IV of the Law; under articles 27 to 51, these provisions only apply for domestic arbitration (ie, all arbitration proceedings that are conducted and held in Indonesia).

There is no specific provision on the rules governing the procedure of international arbitration stipulated in the Law. The Law only stipulates the issues relating to the procedures for enforcement of international arbitral awards in Indonesia.

The summary of arbitration procedure under the Law is as follows.

Registration and pre-tribunal stage

(i) The appointment of arbitrators and registering the request for arbitration (the claim) consists of lodging: the name and address of the parties involved and a summary of the dispute along with attaching the evidence and also a clear demand (relief).
(ii) The claim will then be provided to the respondent by the arbitrators. The respondent has up to 14 days to submit a written response to the arbitrators. Once the response is received by the arbitrators, it is immediately to be provided and obtained by the applicant or claimant.
(iii) Subsequently, the arbitrators will summon the disputing parties to attend and appear before the arbitration hearing, which will be commenced at the latest 14 days from the issuance of the summons.

If the respondent fails to submit a response within 14 days as mentioned in point (ii) above, the arbitrators will summon the respondent by way as mentioned in point (iii) above.

In the event that the applicant or claimant fails to appear at the arbitration hearing, as mentioned in point (iii) above, even though having been properly summoned, his or her claim is, therefore, declared to be lost and the arbitrators' work is deemed to have been completed.

In the event that the respondent fails to appear at the arbitration hearing, as mentioned in point (iii) above, the arbitrator will conduct a second summons. Should the respondent still not attend the arbitration hearing within 10 days of the second summons, the arbitration proceeding will continue to be conducted and the entire claim shall be awarded to the applicant, unless the claim is unreasonable or is baseless.

The tribunal session stage

(i) Once the disputing parties have attended the said arbitration hearing, the arbitrators will first provide an opportunity for the parties to settle amicably.
(ii) If the parties fail to reach an amicable settlement, the arbitrator will conduct or start the examination of the merits. At this stage, the parties are given a last opportunity to submit in writing their arguments along with evidence to the arbitrators. The arbitrators will determine the date for the parties to submit the said final arguments. At this stage, parties are allowed to also submit witnesses and expert witnesses.
(iii) The examination process is to be completed at the latest 180 days from when the arbitrators have been appointed.

The awarding or judgment stage

(i) The award shall be announced at the latest 30 days after the examination is completed. Within 14 days of the declaration of the award, parties may submit an application to the arbitrators to conduct correction against an administration error or to add or decrease a claim.
(ii) Within 30 days from the date the award was announced at the latest, the arbitrator shall hand over the award and register it with the bailiff of the district court.

The post-award stage

(i) In the event that the disputing parties do not undertake the award by arbitrators, by the request of one of the disputing parties, the award shall be conducted based on the order of the chair of the district court.
(ii) The above order of the chair of the district court, shall be issued at the latest 30 days after the application of enforcement is registered with the bailiff of the district court.

The above procedures are the most common procedures conducted by disputing parties that have not established or agreed on the procedures for proceedings in their arbitration agreement.

25 Hearing

Is a hearing required and what rules apply?

Article 27 of the Law only stipulates that all hearings will be closed to the public.

26 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

The Law stipulates certain provisions in relation to the rules of evidence and the procedure for the examination of witnesses. However, in a large part, the Law does acknowledge the applicability of the Indonesian civil procedural laws to domestic arbitral proceedings in Indonesia.

The following are, among others, certain provisions relating to the rules of evidence as stated in the Law:

- article 36 of the Law stipulates that the arbitration case is decided on documents, unless the parties or the arbitrators wish to have hearings;
- article 46(2) of Law provides that the parties will be given a last opportunity to explain their respective positions in writing and to submit evidence deemed necessary to support their positions; and
- articles 49 and 50 stipulate procedures for the summoning and using of witnesses, both expert and factual.

Other than the above, article 37(3) of the Law further stipulates that the procedures for the examination of witnesses in domestic arbitration shall also be implemented in accordance with the provisions of the Indonesian civil procedural laws, although in practice an arbitral tribunal will have more flexibility in applying these than those in the courts.

There are no uniform rules of civil procedure in Indonesia. During the colonial period, the Dutch established plural court civil procedure laws in Indonesia that are still applicable to date. In the courts of the Java and Madura islands, the Revised Indonesian Regulation of 1847

(HIR) is applied, and in the other islands in Indonesia outside Java and Madura, the Civil Procedural Laws outside Java and Madura Islands (RBG) are applied. The RBG essentially follows the HIR but provides for longer terms of notice, service and limitation period. When the HIR or RBG is silent on a particular matter, the courts turn to the Civil Procedural Laws in Java and Madura Islands (Staatsblad 1847 No. 52 as amended). In some cases, the rules of evidence are also regulated in Book IV of the ICC.

The following is a summary of relevant provisions on the rules of evidence contained in the Indonesian civil procedural laws:

- in general civil proceedings, the general principle of onus of proof would be applied, which stipulates that any party asserting any claim has the burden of proving its existence. This burden of proof is particularly relevant, since Indonesian civil procedure does not allow for any form or disclosure of discovery. This onus of proof is stipulated in article 1865 ICC and article 163 HIR; and
- article 1866 ICC and article 164 HIR define that evidence consists of written evidence, witness testimony, inference, acknowledgements and oath.

Article 1867 ICC distinguishes between authentic written evidence and privately made written documents. The authentic written evidence in the form as prescribed by the laws and made before a government official is considered as the strongest evidence (prima facie evidence).

27 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

Insofar as it is related to domestic arbitration, the local court will have jurisdiction to deal with:

- the default procedure for the appointment of the arbitrators;
- the enforcement of interim measures of relief granted by the arbitral tribunal;
- the enforcement of the arbitral awards (including the refusal and rejection of the arbitral awards); and
- the enforcement of the injunctive relief to be implemented after the rendering of the final awards.

Other than that the local courts do not have jurisdiction to deal with procedural issues arising during the arbitration process (see article 3 in conjunction with article 11 of the Law).

28 Confidentiality

Is confidentiality ensured?

The Law is silent on the degree of confidentiality of any other process or document involved in the arbitration process. Article 27 of the Law only stipulates that all hearings will be closed to the public. In practice, the parties may further stipulate the degree of confidentiality of any other process or document involved in the arbitration process. In general practice, arbitration proceedings are subject to the basis of confidentiality. However, since the Law does not provide any legal consequences or sanctions for breaching confidentiality, such matter is easily breached in practice without any consequence.

The Law only stipulates that the hearings are closed to the public. However, since the Law does not provide any legal consequences or sanctions for breaching the confidentiality as referred to above, the proceedings are not fully protected by confidentiality.

Interim measures and sanctioning powers

29 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Articles 3 and 11 of the Law clearly stipulate that the Indonesian district court does not have the jurisdiction to interfere in, or adjudicate, a dispute where the parties to the contract have agreed to an arbitration agreement, the reason being that any arbitration agreement concluded in writing by the parties will preclude any right of the parties in the future to submit the dispute to the district court. The restriction of this court intervention will also be relevant for any application to grant preliminary or interim relief in proceedings subject to arbitration. Therefore, no preliminary or interim relief should be available to the court where the dispute is to be resolved by arbitration.

30 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The Law does not provide for, nor does it govern, the appointment of an emergency arbitrator, other than the issues that have been explained in question 29.

31 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Based on article 32, paragraph (1) of the Law, upon the request of one of the parties, the arbitrator or arbitral tribunal may decide on a provisional award or other interlocutory decision in order to uphold the proper examination of the dispute, including the decision on the attachment for security purposes, ordering the deposit of goods with third parties or the sale of perishable goods.

Pursuant to the Law, the implementation of the above powers by the arbitrators or arbitral tribunal does not require court intervention. However, since there are no sanctions provided by the Law for the non-compliance with these interlocutory arbitration awards, in practice this may lead to difficulty in implementing this interlocutory arbitration award.

32 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

The Law is silent concerning such matters. However, according to the BANI Rules, the arbitrator is allowed to stipulate sanctions against parties who refuse to obey the code of conduct or any action that will result in a delay to the arbitral proceedings.

Awards

33 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

The Law does not specifically stipulate any provision in relation to this matter, but refers this matter to the rules of arbitration chosen by the parties. In the case of the BANI Rules, it is stipulated that in the event that more than one arbitrator is appointed, an arbitration award must first be made on the basis of a consensus among the arbitrators, failing which the award will be made by a majority vote among the arbitrators. Any dissenting opinion from the arbitrator must be recorded in the written arbitration award.

34 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

Based on article 27 of the BANI Rules, in the event the arbitrators have not found any common ground in granting the award or if there exists any different opinion among the arbitrators, the decision of the chair of the arbitrators shall prevail, with the requirement that the dissenting opinions among the arbitrators must be noted in the award.

35 Form and content requirements

What form and content requirements exist for an award?

With regard to domestic arbitration awards, article 54 of the Law has set forth the following legal requirements to be fulfilled in making domestic arbitration awards:

- the heading of the award states the following words 'For the Sake of Justice Based on Belief in the Almighty God' (Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa);
- the full name and addresses of the disputing parties;
- a brief description of the matter in dispute;
- the respective position of each of the parties;
- the full names and addresses of the arbitrators;
- the considerations and conclusions made by the arbitrator or arbitral tribunal concerning the dispute as a whole;
- the opinion of each arbitrator in the event that there is any dissenting opinion in the arbitral tribunal;
- the order of the award;
- the place and date of the award; and
- the signature(s) of the arbitrator or arbitral tribunal.

In addition to the above, the following are further legal requirements relating to domestic arbitration awards:

- the tribunal must determine the time period for the enforcement of the award;
- the award must be rendered and read no later than 30 days from the close of the hearings; and
- no later than 30 days as from the date the arbitration award is rendered by the tribunal, the arbitration award must be registered by the tribunal or its attorney in the relevant district court in which the respondent is domiciled.

The Law does not stipulate the requirements to be made for international arbitration awards, except for the procedures of the enforcement of international arbitration awards in Indonesia.

36 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

Based on article 54(4) of the Law, it is only mentioned that an award (domestic) should stipulate the time line of when the award should be conducted. In the event that one of the disputing parties does not follow it, one of the disputing parties may request the chair of the district court to issue an order to implement the said award. Pursuant to the Law, the chair of the district court is to deliver an order within 30 days of the registration of the application of execution (implementation) to the district court. This order is deemed to be final, binding and enforceable on the parties.

37 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The Law is silent on that matter but only sets out that the matter in relation to a time limit must be stated in the award. See question 36.

38 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The Law does not specifically dealt with this issue. The Law only stipulates that the final award may include sanctions, penalties and interest in the event that the losing party neglects to conduct (implement) the award.

39 Termination of proceedings

By what other means than an award can proceedings be terminated?

The Law is silent on the issue of termination of the proceedings, other than an award. Based on the BANI Rules, as long as the tribunal has not taken a decision, the claimant can revoke his or her claim and, therefore, the proceeding will be terminated, but if the defendant has already given his or her answer, the claim can only be revoked with the defendant's prior consent. The withdrawal must be decided through an award issued by the arbitrators. See also question 24.

40 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Under the Law, the arbitrator will determine the cost of the arbitration, which includes the following

- honorarium of the arbitrator;
- accommodation of the arbitrator;
- witness and expert witness costs;
- an administration fee; and
- other expenses and costs arising out of, or in connection with, the proceeding.

With regard to the administration fee and registration fee, this is set out in the BANI Rules. All above costs are to be borne by the losing party. However, in the event that the claim is only partially granted, the arbitration expenses shall be charged to the parties in equal proportions.

41 Interest

May interest be awarded for principal claims and for costs and at what rate?

Based on Indonesian laws, the parties can agree in writing on the amount of interest to be applied between them. However, in the absence of any agreement between the parties, the statutory interest stipulated in the usury law will be applicable. Indonesia has a usury Law of 1983 (Woeker Ordonantie as contained in the State Gazette 1938 Bo, 524) that restricts the imposition of excessive or extraordinary interest rates, if the parties have not previously agreed on the provision of the interest. The statutory interest of 6 per cent per annum will be applicable.

Proceedings subsequent to issuance of award

42 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The Law is silent on the issue. In practice, after the granting of the award, the arbiters upon request from one of the disputing parties may issue an explanatory note to the award, insofar as this note shall not be contrary to or inconsistent with the petitions made in the award.

43 Challenge of awards

How and on what grounds can awards be challenged and set aside?

The Indonesian Arbitration Law clearly stipulates that arbitral awards shall be a final, binding and enforceable decision against the parties, therefore there is no possibility to appeal an arbitration award. If one of the parties refuses to enforce the domestic arbitral award, the enforcement would be implemented based on the order of the chair of the district court based on the request of one of the disputed parties. The decision of the chair to reject or accept the application for the execution of the arbitral award cannot be appealed. The enforcement of a foreign (international) arbitral award relating to legal persons in Indonesia (other than the government) can only be implemented after obtaining an order of execution (exequatur) issued by the Central District Court of Jakarta. The granting of the exequatur by the Central District Court of Jakarta is not subject to an appeal. However, if the Central District Court of Jakarta refuses to issue the exequatur, this rejection is subject to the appeal to the Supreme Court. The enforcement of a foreign arbitral award in which the Republic of Indonesia is a party can only be implemented in Indonesia after having an exequatur from the Supreme Court of the Republic of Indonesia, and this is not subject to an appeal.

44 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

See question 43.

45 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

See questions 1 and 43.

46 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

It should be noted that in practice the District Court of Central Jakarta, as the court having the jurisdiction to grant or not to grant the exequatur for the enforcement of a foreign (international) arbitral award, has not always or automatically granted the decision on the exequatur. The examination on the application of exequatur by the District Court of Central Jakarta is on a case-by-case basis. There are some cases in which the court has rejected granting the exequatur, for example, the *Lippo Group v Astro Group* case as explained in question 22.

47 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

There exists no regulation or case law in Indonesia in relation to this issue.

48 Cost of enforcement

What costs are incurred in enforcing awards?

The relevant district court, the High Court and the Supreme Court each has its own official rate as to the administrative court costs applicable to the enforcement of domestic and international arbitration awards, the amount of which is not substantial.

Other

49 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Indonesian procedural law follows the tradition of a civil law system, and it does not commonly acknowledge the disclosure of documents and other disclosure or discovery. There is no mechanism to enforce any order relating to disclosure or discovery in the Indonesian courts.

Under civil procedural laws, the roles of the presiding judges in a trial process are generally passive, which means that principally the judges' authority to adjudicate the dispute is limited only to claims and evidence submitted by disputing parties. This is different from the common law (adversarial) system. In Indonesia, the judges are not allowed to take any initiative or ask the party to submit or add additional evidence during the proceeding. Therefore, in practice, the scope of the dispute matters to be examined by the presiding judges will principally be determined by the disputing parties and not by the presiding judges.

In addition to the above, the civil procedural laws require that the party or plaintiff who asserts any claim has the burden of proving its existence in front of the court, and therefore the pleading must be proved by the plaintiff or claimant (onus of proof or burden of proof principle). There are no clear standards that determine when the burden has been satisfied in a case. However, in practice, the plaintiffs should meet the following three fundamental key tests in asserting their claim in the court:

- the course of action of the defendants can be proven by the plaintiffs in court and that these actions have breached the relevant contract (in a breach of contract case) or violated the prevailing laws, customary laws or prudential principles or the right of the plaintiffs (in a tort case); and
- the plaintiffs must be able to prove that as a consequence of these actions conducted directly or indirectly by the defendants, the plaintiffs have suffered damages.

The civil procedural laws do not recognise the concept of pretrial discovery procedure. Parties are expected to prove their cases by giving upfront disclosure, that is, as of the commencement of the proceeding and thereafter during the trial, and to list in their initial pleadings all documents upon which they base their argument or case. In the proceedings, the disputing party does not have any right to request the other disputing party to disclose documents or additional documents, and judges do not have the authority to request the disputing parties to submit evidence.

Even though there is no pretrial discovery process in Indonesian proceedings, the civil procedural laws have applicable procedures that enable a party to obtain evidence that is in the possession of an opposing party or a third party. Pursuant to article 137 of HIR and in conjunction with article 1886 of the ICC, a party may file a request with the court to order the opposing party to submit or present specific documents and evidence owned and controlled by it that are related to the case, and if the other party refuses to disclose such documents, the presiding judges may draw whatever inference they deem appropriate from such non-disclosure and may draw the conclusion that such evidence is not favourable to the party that refused to produce it.

50 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

The laws of Indonesia do not provide any specific professional or ethical rules applicable to counsel in domestic as well as international arbitration, including there being no rules follow or reflect the IBA Guidelines on Party Representation in International Arbitration. Generally, Indonesian lawyers (advocates) and foreign lawyers who practice in Indonesian territory must adhere to the Code of Ethics 2003 and the Indonesian Advocate Law (Law No. 18 of 2003). Any foreign lawyers who practice in Indonesia must pass the Indonesian examination and shall be required to obtain their licences from the Minister of Law and Human Rights of Indonesia. Therefore, in view of these regulations, only licensed foreign lawyers can act as counsel in domestic arbitration proceedings in Indonesia. Indonesian law does not touch on any issue in relation to the lawyers' (including foreign lawyers) representation in international arbitration proceedings.

51 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

No specific stipulation under the laws of Indonesia exists on this particular matter. Based on the Indonesian Advocate Act and the Indonesian Lawyers Code of Ethics 2002, the parties are free to agree on the legal fee arrangements to be paid by the client to its lawyers (freedom of contract), including contingency fee. This agreement for the provision of the legal fees can be made either verbally or in writing. The Indonesian Advocate Act only requires that the amount of the legal fee must be agreed based on the fairness principle, which means that the determination of the legal fees should consider the risk, time, capability and interest of the client. Article 4 of the Indonesian Lawyers Code of Ethics 2002 only stipulates that in determining the legal fee, lawyers must consider the client's ability to pay, and lawyers cannot impose unnecessary expenses on their clients.

In practice, advocates (barristers) usually charge a fixed flat fee for each level of litigation with or without a combination of the success fee. In some cases, it not uncommon that a contingency fee arrangement is also offered by Indonesian barristers. For large and complex litigation

cases, a reputable law firm in Indonesia commonly charges according to an hourly billing arrangement. It is not uncommon in practice for litigation funding to be facilitated by a disinterested third party. However, there are no specific prohibitions on how parties conclude funding or financing for litigation cases.

52 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

See question 50.

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