Arbitration Guide
IBA Arbitration Committee

INDONESIA

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I. Background

(i) How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?

Arbitration has long offered a preferable alternative to court proceedings in Indonesia due to its flexibility and shorter period of time it consumes to settle a dispute.

The principal advantages of arbitration include, perhaps most importantly, both universal enforceability, thanks to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), and the freedom of the parties to choose their own arbitrators.
Foreign court judgments are not enforceable in Indonesia and Indonesian court judgments are usually difficult, if even possible, to enforce in most other jurisdictions. Parties have no say in the choice of court judges who will decide their fate.

Another advantage is the relatively short period of time involved in settling a dispute through arbitration. According to Article 48 of Law Number 30 Year 1999 ('Arbitration Law'), arbitration hearings must be completed within 180 days from constitution of the tribunal, the award must be issued within 30 days of the close of hearings, and any extension of time may only come about through the mutual agreement of the parties. In contrast court proceedings may take a great deal longer, as the law imposes no particular time limit. The court's judgment is also subject to two, sometimes three, levels of appeal. Arbitral awards are final, binding and not subject to appeal at all. Another advantage is that the Indonesian Arbitration Law affords some level of confidentiality, and allows the parties to agree on any higher level of protection they may desire.

One disadvantage could be cost. Court actions in Indonesia are relatively inexpensive compared to those in most common law jurisdictions, whereas arbitration could result in higher costs. However, those costs are to some extent controllable by the parties, particularly if they take a cooperative attitude towards the procedure.

(ii) Is most arbitration institutional or *ad hoc*? Domestic or international? Which institutions and/or rules are most commonly used?

Indonesia's Arbitration Law takes the territorial view of the nature of arbitration, meaning that all arbitrations conducted in Indonesia are considered domestic. Those conducted outside of the archipelago are considered 'international', regardless of the nationality of the parties, governing law, or location of the subject of the dispute.

Indonesia has several arbitral institutions, the oldest and most common being *Badan Arbitrase Nasional Indonesia* (BANI), which hears a fair number of cases every year. There are also industry-specific institutions which hear fewer. *Ad hoc* and ICC administered arbitration are also common, but there are no statistics from which to make a comparison.

(iii) What types of disputes are typically arbitrated?

Article 5(i) of the Arbitration Law stipulates that only commercial disputes may be arbitrated. Probably the most common cases that are arbitrated involve insurance, termination of agency agreements or commercial leases, disputes between or among oil, gas or mining contractors, and other general contractual claims.

(iv) How long do arbitral proceedings usually last in your country?

Although, as mentioned above, the Arbitration Law technically limits the time to 210 days from constitution of the tribunal to award, these time limits are often waived. However, even if waived, a substitute time limit must be given, and thus it is unusual for any arbitration in Indonesia to last more than a year. The tribunal does possess the authority to extend the proceedings if there is a request from either party concerning a specific matter, as a consequence of a provisional or other interim award or the tribunal otherwise feels the need in the interest of examination. See Article 33 of the Arbitration Law.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

The Arbitration Law does set out some criteria for who may act as arbitrator but nationality is not included. The main qualifications include age, experience and independence from court or government (see Section V.(iii), below). Although BANI restricts its arbitrators to those listed on its panel, the panel includes a number of foreign-national arbitrators. To date foreign arbitrators have not been required to obtain work permits to sit as arbitrators in Indonesia. So long as they are not present in the country more than 60 days (or a larger number if domiciled in a country with which Indonesian maintains a Tax Treaty) , they are not subject to Indonesian income taxation. Thus there is no effective restriction on foreign nationals acting as an arbitrator in Indonesia.

Article 29(2) of the Arbitration Law states that parties may be represented by counsel. The only restriction is that such representative must have power of attorney. Thus there is no impediment to foreign counsel representing a party in an Indonesian arbitration. To date, there has been no indication that any such foreign counsel requires a work permit, although this could become an issue if such counsel were to spend a substantial amount of time in the country. However,

the provisions of the tax laws also must be considered, particularly if any counsel were to be present in Indonesia for 60 days or more in any 12 month period.

II. Arbitration Laws

(i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?

Law No. 30 of 1999 governs all arbitrations conducted within Indonesia. These laws are all considered domestic and also regulate enforcement of "international" awards, being those rendered in any other state signatory to the New York Convention.

Indonesia's Arbitration Law is not based upon the UNCITRAL Model Law, although it has a number of similar provisions.

(ii) Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?

As mentioned above, Indonesia takes the territorial approach. Article 1(9) of the Arbitration Law makes it clear that all arbitrations held within Indonesia are considered 'domestic' and all those held outside Indonesia are characterised as 'international' arbitrations, regardless of the nationality of the parties, location of the subject of the dispute, and governing law. The differences are in terms of enforcement as provided in Section XIII(i) below.

(iii) What international treaties relating to arbitration have been adopted (*eg*, New York Convention, Geneva Convention, Washington Convention, Panama Convention)?

Indonesia, through Presidential Decree Number 34 Year 1981, has ratified the New York Convention and, through Law No. 5 of 1968, has ratified the Washington Convention. Indonesia made both the commerciality and reciprocity reservations in its accession to the New York Convention.

(iv) 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?

There is no mention under the Arbitration Law that provides any guidance as to applicable substantive laws. There are certain transactions over which the state has control, such as those relating to transfers of or security interests in land seagoing vessels and shares in private Indonesian companies which can only be governed by Indonesian law. There are also various contracts relating to infrastructure and

resource projects which are required by other laws to be governed by Indonesian law. Otherwise parties are free to mutually designate the substantive law that will govern the interpretation and performance of their contract.

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

As a general rule, Indonesian courts will apply Indonesian law where no other has been designated and, unless there is a strong indication that some other law should govern, arbitrators also are more likely to apply Indonesian law where there is a significant Indonesian connection, especially if the disputes relates to a project or business in Indonesia.

III. Arbitration Agreements

(i) Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?

An agreement to arbitrate must be in writing and must otherwise comply with the general requirements for validity of contract as contained in the Civil Code (Article 1320 *et sec*). Those requirements include legal capacity, a meeting of the minds by free consent, clear definition of the parties' respective obligations and a legal purpose.

More specific requirements apply where the agreement to arbitrate is entered into after the dispute has already arisen. Article 9 of the Arbitration Law requires, *inter alia*, that such agreement be rendered as a notarial deed and set out the substance of the dispute, the identities of parties and arbitrators, and the place and time frame for the arbitration. Failure to meet those requirements will invalidate the agreement.

Both the Arbitration Law and the Rules of BANI recognise electronic communications as 'writings'. The Arbitration Law provides that if the agreement to arbitrate is contained in an exchange of correspondence (including telefax or e-mail), a record of receipt of such correspondence is also required (Article 4(3)).

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, the

contesting party must have read the arbitration clause and consented in writing to its applicability. This position is based upon the writing requirement of Article 4 of the Arbitration Law coupled with Article 1320 *et seq* of the Civil Code, as mentioned above.

(ii) What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?

Under the Arbitration Law, when a dispute has been referred to arbitration or if there is an agreement to arbitrate, the courts do not possess any power to adjudicate the matter and must allow the arbitration tribunal to handle the dispute. See Articles 3 and 11 of the Arbitration Law.

There is nothing in the Arbitration Law that requires a court to order parties to an arbitration agreement to arbitrate. It must only decline jurisdiction. Thus, it is up to the parties whether to proceed to arbitration or not.

(iii) Are multi-tier clauses (*eg*, arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?

Multi-tier clauses are reasonably common, but probably not found in a majority of contracts. Indonesian culture would in any case dictate an attempt at amicable resolution before arbitration or litigation were to be commenced. Article 45 of the Arbitration Law also requires the tribunal to seek to encourage amicable settlement before hearing the case. In court cases, the court is legally required to order the parties to mediate before it can hear the case.

Where the contract requires an attempt at mediation or other means of ADR before arbitration can be commenced, and a party commences arbitration without attempting such means of amicable settlement, it is up to the respondent to make the appropriate objection to the tribunal. As mentioned above, the courts do not have jurisdiction to interfere. However, Article 1338 of Indonesia's Civil Code requires that any contractual agreement validly entered into between the parties act as law as between or among them and, if the contract is governed by Indonesian Law, the tribunal should either decline jurisdiction or order the parties to exhaust the prerequisite tiers before hearing the case.

(iv) What are the requirements for a valid multi-party arbitration agreement?

The Arbitration Law does not set any specific provisions regarding multi-party arbitration agreements. Thus the applicable provisions, as elaborated above in

Section III (i) regarding legal requirements of arbitration agreements, would prevail.

(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?

The Arbitration Law strictly requires both parties to agree on arbitration in order to arbitrate their disputes. As long as both parties agree to resort to arbitration, the agreement would be enforceable.

(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?

The Arbitration Law requires a clear written agreement between the parties to actually bind them to arbitration. Furthermore, Article 1338 of the Indonesian Civil Code makes it clear that only the parties who have entered into a contract are bound by that contract.

IV. Arbitrability and Jurisdiction

(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?

As mentioned above, the Arbitration Law provides that only disputes of a commercial nature and those that are within the authority of the parties themselves to resolve may be arbitrated. Although there is no explicit provision providing *kompetenz-kompetenz*, it should be implicit from Articles 3 and 11 of the Arbitration Law that only the arbitral tribunal has the jurisdiction to determine its own jurisdiction, as well as whether a matter is capable of being arbitrated or not.

(ii) What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?

Technically, it is a violation of the Arbitration Law to initiate court proceedings to resolve a dispute where the parties have agreed in writing to arbitrate. By law, the judges must declare themselves to have no jurisdiction over the dispute. See Article 11(2) of the Arbitration Law. However, the courts will entertain any case submitted to it, so it is up to the party seeking, or who has commenced, arbitration to submit its challenge to the court's jurisdiction based upon the agreement to arbitrate.

Any such challenge to jurisdiction should be submitted by the defendant before any reply to a plaintiff's statement of claim is submitted. Submitting any such jurisdictional objection does not constitute a waiver of a party's right to arbitrate.

(iii) Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?

Please see Section IV.(i) above.

V. Selection of Arbitrators

(i) How are arbitrators selected? Do courts play a role?

In line with the general freedom of contract provisions of the Civil Code, unless they have otherwise agreed, the parties may designate the arbitrators. However, where the parties cannot agree upon, or have failed to designate an arbitrator in accordance with the terms of their agreement to arbitrate, and have not designated a different appointing authority in their agreement to arbitrate (either directly or by reference to specific procedural rules or administering institution) the Arbitration Law calls for such designation to be made by the Chief Judge of the District Court.

In a BANI arbitration, the approval of the Chairman of BANI is required for all appointments, even one appointed by two party-appointed arbitrators to fill a third chairman for the tribunal. In practice, BANI will often appoint the chair without first consulting the parties or their appointed arbitrators.

Every arbitrator must indicate his or her acceptance of the mandate in writing. Once the mandate is accepted, the arbitrator may not withdraw without consent of the parties or, if the parties do not consent, the Chief Judge of the District Court may release the arbitrator from his or her duties. See Article 19 of the Arbitration Law.

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

Article 18(1) of the Arbitration Law obliges every candidate for arbitrator to disclose to the parties any matter that could influence his or her independence or give rise to bias in the rendering of the award. Only if an arbitrator was appointed by the court would the court be involved in any application or recusal of such arbitrator.

If it is a sole arbitrator who is challenged, the challenge is first made directly to the arbitrator. Where the dispute is to be heard by a panel of arbitrators, the challenge is presented to the whole panel. If the arbitrator to be challenged was appointed by the court, the challenge is submitted to the court. See Article 23 of the Arbitration Law.

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

The Arbitration Law (Article 12) sets out limitations for those who may serve as an arbitrator. The arbitrator must be: competent to perform legal actions; be at least 35 years of age; have no family relationship by blood or marriage, to the third degree, with either of the disputing parties; have no financial or other interest in the arbitration award; and have at least 15 years experience and active mastery in the field. Further, judges, prosecutors, clerks of courts and other government or court officials may not be appointed or designated as an arbitrator.

(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?

There are no specific rules governing conflict of interest for arbitrators outside the Arbitration Law. No reference to the IBA Guidelines appears in the Arbitration Law, nor anywhere else, although most professional arbitrators are cognisant of the Guidelines and tend to respect them.

The Arbitration Law allows the parties to challenge, or request recusal of, an arbitrator if '*there is found sufficient cause and authentic evidence to give rise to doubt that such arbitrator will not perform his/her duties independently or will be biased in rendering an award*'. Article 22(1) of the Arbitration Law. An arbitrator may also be removed *'if it is proven that there is any familial, financial, or employment relationship with one of the parties or its respective legal representatives*'. Article 22(2) of the Arbitration Law.

VI. Interim Measures

(i) Can arbitrators enter interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?

The Article 32 of the Arbitration Law gives the tribunal the authority to issue both provisional and interlocutory awards, including security attachments, deposit of goods with third parties and sale of perishable goods.

Arbitrators, like courts in litigation cases, may order an attachment as to secure properties for any possible award in the future. Article 32(1) of the Arbitration Law. The tribunal, however, has no power of execution and only a court may execute any such order. However, since, as a general rule, only final and binding awards and court judgments will be enforced by the courts, and since there are no sanctions provided in the Law for failure to comply with these interlocutory arbitral awards, the provision may prove difficult to implement against a recalcitrant party in practice. Such a scenario has not yet been tested. In effect, compliance by a party will depend upon good faith and reticence to prejudice the tribunal against it by disobeying their orders.

(ii) Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following constitution of the arbitral tribunal?

See Section VI.(i) above.

(iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?

Courts may only execute final and binding arbitral awards and court judgments. The court has no power to provide evidentiary assistance, even in court cases.

VII. Disclosure/Discovery

(i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?

Indonesia, like other civil law countries, subscribes to the theory that a party must present its own evidence to prove its case and thus does not recognise the concept of discovery. Parties are expected to list in their initial pleadings all documents upon which they base their argument or case, and those which are not submitted with those pleadings must be submitted at a subsequent hearing. This is explicit in the BANI Rules (16(c) and 17(b)), although not specified in the Arbitration Law. Arbitrators have authority to order production of documents, under their general powers over the conduct of the hearings, but no executory powers.

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 or refuses to produce same, the arbitrators are free to draw their own conclusion on the matter and rule accordingly.

(ii) What, if any, limits are there on the permissible scope of disclosure or discovery?

There is no discovery. See above.

(iii) Are there special rules for handling electronically stored information?

Law Number 11 Year 2008 on Electronic Information and Transaction governs electronic documents. However, there are no provisions therein specifically relating to electronic discovery in either the court or arbitration.

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

The Arbitration Law (Article 27) provides that all hearings are closed to the public. Moreover, the general explanation of the Arbitration Law stipulates that the award and the dispute are not to be disclosed to public. However, the parties may require a greater degree of confidentiality in their agreement to arbitrate if they so agree.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

Indonesia does not have a law on privacy, thus parties wishing to maintain confidentiality of any information or documentation should so agree on specific terms.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

The Arbitration Law is silent on the rules of privilege. However, client-advocate confidentiality is governed under the Indonesian Advocate Law (Law No. 18 of 2003), specifically in Article 19(1) and (2) thereof.

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

It is uncommon for the parties and arbitral tribunals in Indonesia to adopt the IBA Rules on the Taking of Evidence in International Arbitration.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

Any such limits might appear in the specific rules chosen by the parties, but not by the Arbitration law.

(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?

Article 49 of the Arbitration Law gives the arbitrator or an arbitral tribunal the power to order witnesses to give their testimonies before them. However, there is no mechanism for an arbitral tribunal to subpoena an uncooperative witness. Such practice is only applicable in criminal cases.

It is up to the tribunal how to examine witnesses. Witness written statements as well as oral testimony are usually required. Both the arbitrators and the other party may examine witnesses with the tribunal deciding in which order such examinations shall be conducted.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

The Arbitration Law does not specifically regulate these matters. As a result, decisions on who can or cannot appear as a witness is left to the discretion of the tribunal. Normally an oath or affirmation is taken.

There is a general rule under the Indonesian civil law that a person with a familial relation with, or any personnel of, a party is not considered as a 'witness' but as part of the party. This has not operated to prevent any such person to appear as witness in arbitration as far as the writers are aware. The relationship is just taken into consideration by the tribunal in evaluating the veracity of the testimony.

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (*eg*, legal representative) and the testimony of unrelated witnesses?

See Section IX.(iv) above.

(vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?

According to Indonesia's Code of Civil Procedure, expert witnesses may testify either orally or in a written report. In most arbitration cases both are employed. Although there is no formal requirements, in practice, expert witnesses should declare that they are independent and impartial to give their testimonies. Unfortunately, many experts do not understand this concept and many still view their role as a backup advocate for the party that engaged them.

(vii) Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?

Article 50 of the Arbitration Law gives an arbitral tribunal the capacity to appoint experts, however this mechanism has rarely, if ever, been applied to date. However, if the parties have chosen other specific rules to govern, such rules will prevail over the above-mentioned provisions.

(viii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?

The Arbitration Law does not address witness conferencing. However, there is no prohibition against employing this system if the parties agree or the tribunal should order. It has been successfully applied in at least one *ad hoc* case in Indonesia. In that case the Dutch expert witnesses were examined by the arbitrators and by counsel for both parties, together.

(ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?

Article 51 of the Arbitration Law requires that minutes of the hearings and examination of witnesses to be drawn up by a secretary.

Although the BANI Rules have a similar requirement, and BANI provides a secretary to record and take minutes of hearings, such minutes are provided, in summary, only to the arbitrators and never to the parties. Thus, if the parties wish to have a record of BANI hearings they would be well advised to arrange for their own transcript service. To date there is no 'live note' service in Indonesia, but it is a simple matter to bring them in from Singapore.

X. Awards

(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?

The Arbitration Law requires the award to be reasoned and in writing, and sets out a minimum criteria for the award under Article 54, as follows:

'(1) An arbitration award must contain:

1. 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 One Almighty God);
2. the full name and addresses of the disputing parties;
3. a brief description of the matter in dispute;
4. the respective position of each of the parties;
5. the full names and addresses of the arbitrators;
6. the considerations and conclusions of the arbitrator or arbitration tribunal concerning the dispute as a whole;
7. the opinion of each arbitrator in the event that there is any difference of opinion within the arbitration tribunal;
8. the order of the award;
9. the place and date of the award; and
10. the signature(s) of the arbitrator or arbitration tribunal.

If one arbitrator fails to sign the award, the reason for such failure must be stated. A time limit for implementation should also be specified.

According to Article 1267 of the Indonesian Civil Code, relief permissible to be granted includes 'costs, damages, and interests.' The term 'interest' is understood to include a loss of expected future income.

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

Indonesian law does not recognise punitive or exemplary damages. Interest is not assumed but is awardable if provided for in the underlying contract, or if mandated by the governing law if such law is not Indonesian law. If interest is payable but no interest rate has been agreed upon or so mandated, the statutory rate of six per cent per annum, not compounded, will be applied. (See Article 1767 of the Indonesian Civil Code). If no interest has been agreed upon by the parties, the tribunal may award interest at the statutory rate for the duration between the time the award is ordered to be satisfied until actual payment.

(iii) Are interim or partial awards enforceable?

Only final and binding court judgments and arbitral awards can be enforced by the court. Therefore, although enforcement of an interim arbitral award has not yet been tested, it is highly questionable that it would be possible. It is assumed that a partial final award should be enforceable, as long as it is in fact a final award and clearly noted as such.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

The Arbitration Law does not regulate matters of a dissenting opinion other than the requirement set out in Article 54(g) of the Arbitration Law requiring that a reason be provided when one arbitrator fails to sign an award. However, there is no impediment to the issuance of a dissenting opinion and to our knowledge such opinions have occasionally been handed down.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

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

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

Article 73 of the Arbitration Law sets out the circumstances under which the mandate of the tribunal will terminate. The mandate will terminate when:

- an award has been rendered with respect to the matters in dispute;
- the time limitation, as set out in the arbitration agreement, including any extension thereto agreed upon by the parties, has expired; or
- the parties mutually agree to rescind the arbitrators' appointment.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

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

> '*Within not more than fourteen (14) days after receipt of the award, the parties may submit a request to the arbitrator or arbitration tribunal to correct any administrative errors and/or to make additions or deletions to the award if a matter claimed has not been dealt with in such award*.'

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

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

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

Article 77 of the Arbitration Law governs that the costs of the arbitration should be awarded to the successful party in the final award. However, in the event that a claim is only partially granted, the arbitration fees shall be charged to the parties equally.

(ii) What are the elements of costs that are typically awarded?

Article 76 of the Arbitration Law sets out expenses that are regarded as costs of the arbitration to be awarded. Those include arbitrators' fees, travel costs and other costs expended by arbitrators, costs of witnesses and/or required expert witnesses for dispute examination and administration costs. Other costs that may be required in conjunction with arbitration, aside from counsel fees, are notary fees and costs of translation and possibly interpreters and transcript costs.

Note that unless the parties have agreed upon a different language, the arbitration will be held in Indonesian, which will then require all documents to be in the Indonesian language. Where originals are in another language, these would then have to be translated by a government-licensed sworn translator.

Parties' counsel fees are generally not awarded unless the parties have so agreed in their agreement to arbitrate or elsewhere.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

As there is no guidance in the Arbitration Law, the tribunal may handle the payment in any manner that they deem appropriate, including requiring a deposit or that a substantial portion of the fees be paid in advance. If the parties have agreed on specific rules or an administering institution, the procedures set out therein will be followed. Somewhat similar to that of the ICC, BANI's fee structure is based upon a percentage of the quantum of the claim (ranging from 10% to .5%) and requires that the parties deposit the whole of the initially anticipated fees in advance. Under BANI's current policy, less than half of that amount is actually paid to the arbitrators.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

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

(v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?

There is no provision under the Arbitration Law granting any power to the court to review any part of a tribunal's decision. It is thus understood that the arbitral tribunal has the ultimate say on the costs.

XII. Challenges to Awards

(i) How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?

An Arbitral Award may be challenged through an application to the court for annulment of the award. Article 70 of the Indonesian Arbitration Law provides rather limited grounds for annulment. These include false or forged letters submitted in the hearings, discovery after the award of decisive documents intentionally concealed by a party and where an award was rendered as a result of fraud committed by one of the parties to the dispute.

A request to annul an arbitral award must be submitted in writing within 30 days of the date of registration of said award with the registrar of the applicable District Court (foreign-rendered awards are registered with the District Court of Central Jakarta). The average duration for challenge proceedings is approximately six to eight months.

The challenge proceedings would stay any enforcement proceedings and no leave to enforce may be granted during the annulment process.

(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?

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

(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?

The Arbitration Law does not allow for appeal of any arbitration award. This is clear from the language of the Indonesian Arbitration Law (Article 60) which stipulates that arbitration awards shall be final and binding.

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

Courts may not remand an award to the tribunal. The courts must either choose to enforce the award or not. They have no jurisdiction to consider the merits. Furthermore, the mandate of the arbitrators terminates upon issuance of the award.

XIII. Recognition and Enforcement of Awards

(i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?

The enforcement process differs slightly as to domestic (Indonesian-rendered) and international (foreign-rendered) awards.

In either case the award must first be registered with the court, by the arbitrators or their duly authorised representatives. Domestic awards must be registered within 30 days of rendering with the District Court having jurisdiction over the respondent. International awards must be registered with the District Court of Central Jakarta. There is no time limit for registration of international awards.

The enforcement procedure for domestic awards allows the appropriate district court to issue an order of execution directly if the losing party does not, after being duly summoned and so requested by the court, satisfy the award. In the case of international awards, the successful party must apply for an order of *exequatur* from the District Court of Central Jakarta. Once issued, this order will be sent to the district court having jurisdiction over the losing party or its assets (if that is not Central Jakarta) for execution by that court. Although no appeal is available, the losing party does have the opportunity to contest execution by filing a separate contest; however, the district court may not review the reasoning in the award itself. See Article 62(4) of the Arbitration Law. An award will not be executed while such a contest is pending.

There are several grounds for refusal of enforcement of an award including where both the nature of the dispute and the agreement to arbitrate do not meet the requirements set out in the Arbitration Law (the dispute must be commercial in nature and within the authority of the parties to settle and the arbitration clause must be contained in a signed writing) or where the award is in conflict with public morality and order. See Articles 4,5 and 62(2) of the Arbitration Law. There is no recourse against an order of *exequatur* or execution, whereas rejection by the court of execution can be appealed to the Supreme Court. See Article 68 of the Arbitration Law.

Registration is required to be effected by the arbitrators or their duly authorised representatives. Arbitrators issuing awards likely to be enforced in Indonesia should include in the award a power of attorney to the parties, or either of them, to effect registration of the award. Power of attorney may also be given in a separate document.

Aside from such powers of attorney, Article 67 of the Arbitration Law requires applications for registration of International awards to attach the following:

'(i) the original or a certified copy of the award, together with an official translation thereof (to Indonesian, unless the original award is rendered in Indonesian);

(ii) the original or a certified copy of the document containing the agreement to arbitrate, together with an official translation thereof; and

(iii) a certification from the diplomatic representative of the Republic of Indonesia in the country in which the award was rendered, stating that such country and Indonesia are both bound by a bilateral or multilateral treaty on the recognition and implementation of International Arbitration Awards'

Despite the Arbitration Law having been in effect for well over ten years at the time of writing, this requirement still often proves difficult to satisfy. Unfortunately, the Foreign Ministry has not advised its diplomatic missions of the requirement and thus many consulates are at a loss when asked to provide such certification. This can cause considerable delays, as well as some annoyance for all concerned.

(ii) If an *exequatur* is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

As mentioned above, in the case of a domestic award the *exequatur* is rendered in the district court having jurisdiction over the losing party or its assets, and thus the

same court will also handle the execution. In the case of an international award, unless the losing party is domiciled or maintains assets in Central Jakarta, the District Court of Central Jakarta will send the *exequatur* order to the district court where such party is domiciled or maintains its assets. It is that court that will handle execution.

Normally the executing court will summon the losing party and afford it a certain period of time to comply with the award (typically eight business days). If the party does not so comply then the court may order sale of the losing party's identifiable assets.

(iii) Are conservatory measures available pending enforcement of the award?

Article 32 of the Arbitration Law provides for conservatory measures to be issued during the arbitral process when requested by one of the Parties.

Once the award is rendered, the arbitrators lose their mandate and thus they cannot issue any conservatory orders at that stage. Of course any and all of the losing party's assets will be subject to seisure to execute the award, as long as they can be identified.

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

As long as the awards comply with the requirements of the Arbitration Law (see Section XIII.(i) above), the courts have no option but to enforce awards.

Because Indonesia does not acknowledge decisions of foreign courts, theoretically they could enforce an international arbitral award which was set aside by the court in the seat of arbitration. However, Indonesia is a signatory to the New York Convention, which at the least *allows* the court to refuse enforcement if the award has been set aside at the seat. This situation has not yet occurred in Indonesia.

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

Although issuance of *exequatur* in recent years has proven reasonably quick, the execution process can take considerably longer depending upon the nature and location of the assets to be seised and sold.

The only effective time limits are a 30-day period for registration of domestically-rendered awards (Section XIII(i)); and a 90-day time limit in which the Supreme Court must rule on any appeal against rejection by the district court of enforcement of an award.

XIV. Sovereign Immunity

(i) Do state parties enjoy immunities in your jurisdiction? Under what conditions*?*

By agreeing to arbitration the state and any of its instrumentalities are deemed to have waived any right of immunity.

(ii) Are there any special rules that apply to the enforcement of an award against a state or state entity?

According to the Arbitration Law, if the Republic of Indonesia is a party to an arbitration, the order of *exequatur* may only be issued by the Supreme Court, rather than the district court.

XV. Investment Treaty Arbitration

(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?

Indonesia is a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. Indonesia signed the convention on 16 February 1968. The convention entered into force in the same year. In addition, Indonesia has also signed the 2009 ASEAN Comprehensive Investment Agreement.

(ii) Has your country entered into bilateral investment treaties with other countries?

Indonesia was party to approximately 71 bilateral investment treaties, however 29 BITs have already been terminated, and more may be for the high-jump as well. The BITs to which Indonesia is a party may be found at the following website: **http://investmentpolicyhub.unctad.org/IIA/CountryBits/97**.

XVI. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

To understand how arbitration is practiced in Indonesia, one may refer to the following materials:

Karen Mills:

‘Arbitration Procedures in Indonesia’, *Arbitration Procedures in Asia* (Sweet & Maxwell, London, UK 1999; revised in 2001 edition).

Chapter on Indonesia: ‘Arbitration in Indonesia’, *Arbitration in Asia, a Compendium*, Michael Moser, ed. (Butterworths Asia, Hong Kong, January 2001).

Chapter on Indonesia: ‘Dispute Resolution in Indonesia’, *Dispute Resolution in Asia*, 2nd ed., Michael Pryles, ed. (Kluwer Law International, The Hague, London, Boston 2002, revised 2006).

‘Indonesia: The New Arbitration Law of 1999: Indonesia’s First Comprehensive Arbitration Law’, 3 Int. A.L.R. (2000, no. 3) N 39-41.

‘Enforcement Of Arbitral Awards In Indonesia’, 3 Int. A.L.R. (2000, no. 6), pp. 192-195.

‘Arbitration And The Indonesian Judiciary – Enforcement And Other Issues’, 5 Int. A.L.R. (2002, no. 5) pp. 150-159.

‘Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto’, ICCA Congress Series no. 11, *International Commercial Arbitration: Important Contemporary Questions* (Kluwer, The Hague 2003); also published in 5 Int. A.L.R. (2002, no. 4).

‘Recent Developments in Arbitration and ADR – Indonesia’, 6 Int. A.L.R. (2003, no. 4) pp. 110-119.

‘Indonesia: PT. Bahari Cakrawala Sebuku v. PT. Leighton Contractors Indonesia – Arbitration agreements and court jurisdiction’, 8 Int. A.L.R. (2005, no. 1) N 12-13.

‘Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration’ in *Selected Perspectives on International Arbitration 2006*, Dennis Campbell, ed. (Yorkhill Law Publishing 2006); also available on Transnational Dispute Management at **www.transnational-dispute-management.com.**

'Government of The Republic of Indonesia v. PT. Newmont Nusa Tenggara-Specific Enforcement of Contractual Obligations', International Arbitration Law Review, Vol. 12 Issue 3, 2009, pp 41-42.

'Country Report-Indonesia', ICCA Handbook, Intl. Handbook on Comm. Arb.Suppl. 47, October 2006.

Mulyana and Jan K. Schaefer**:**

'Indonesia's new arbitration law: salient features and aberrations in the application', 5 Int. A.L.R. (2002, no. 2) pp. 41-49.

'Indonesia's New Framework For International Arbitration: A Critical Assessment Of The Law And Its Application By The Courts', 17 Mealey's International Arbitration Report (2002, no. 1) pp. 39-70.

Ilman F. Rakhmat**:**

'Government of The Republic of Indonesia (The "Government") v. PT. Newmont Nusa Tenggara ("NNT") – Ad hoc Arbitration Under UNCITRAL Rules-Respondent's Request for "Interpretation" of the Award', International Arbitration Law Review, Vol. 12 Issue 5, 2009, pp 65-67.

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

The Chartered Institute of Arbitration (CIArb) - Indonesia Chapter conducts basic courses for membership in CIArb, more or less annually. The Chapter, often in conjunction with the ICC National Committee, also occassionally conducts seminars and conferences on arbitration. Some law schools also hold occasional courses in arbitration, but not as part of their regular curriculum.

XVII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

There are no statistics, but it would appear that most businesses now opt for arbitration clauses in their commercial contracts. The upstream regulatory body for oil and gas, SKK Migas, applies a standard arbitration clause in its production sharing contracts with oil companies, and as well mandates arbitration clauses in other contracts. Banks seem more reticent to use arbitration in standard loan contracts, although some designate the *sharia* financing institution to resolve disputes in *sharia* finance contracts.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

In Indonesia, parties having disputes before courts are obliged to exhaust mediation first before settling their disputes in courts. See Supreme Court Regulation Number 1 Year 2016. This is highly influenced by the fact that Indonesia is not a litigious country and has the tendency to settle dispute amicably to avoid litigation proceedings.

(iii) Are there any noteworthy recent developments in arbitration or ADR?

It is unfortunate that abuses of the system, in blatant violation of the law, are once again commencing. Losing parties in arbitrations have been filing claims against the winning parties in the courts in order to avoid their obligations under arbitral awards. This is contrary to Articles 3 and 11 of the Arbitration Law which provide that the courts do not have, and may not take, jurisdiction to try disputes between parties who have agreed on arbitration. Parties circumvent this restriction by bringing actions in tort or by joining third parties not party to the agreements to arbitrate. Normally these cases are eventually dismissed, but it often requires one or even two appeal processes.

Parties not satisfied with foreign arbitral awards have also been filing applications to have the awards annulled or contesting enforcement on very tenuous grounds.

In at least two cases losing parties have even brought court actions against the arbitrators or arbitral institutions as defendants. In one recent case a party has persuaded the court to hear an action to annul an award rendered elsewhere, and under a foreign *lex arbitri*, in contradiction to the New York Convention. It is most unfortunate that these practices are commencing once again after the retirement of some of the Supreme Court justices who understood and supported arbitration. At the time of writing, the authors, together with other serious arbitration practitioners, are urgently seeking a route to reverse this very worrying trend.

On a brighter note, the last few years saw cases which are significant to the development on the use of international arbitration in Indonesia. In 2009, the Government of Indonesia won an arbitration against a subsidiary of a major US based mining company, Newmont, in joint venture with a major Japanese conglomerate, Sumitomo, for violation of their contract of work. In addition to being the first major arbitration won by Indonesia on the merits, this case was one of the first times (if not the first time) a state had brought an arbitration against an investor. Additionally, in 2010, the nation's state-owned oil and gas company won in an arbitration against a subsidiary of a major German bank, Commerzbank AG, which had defaulted on its financing obligations. Then in 2013 Indonesia

successfully dismissed one ICSID case on jurisdiction and prevailed in another, under the OIC convention, on the merits, both arising out of a bank bailout resulting from the 2008 financial crisis. The outcome of these arbitrations is viewed by many as a turning point for Indonesia in international arbitration.