

Advisory Board

Prof. Dr. Mochtar Kusuma Atmadja, S.H., LL.M.

Prof. Dr. I. H. Ph. Diederiks-Verschoor

Prof. Dr. Karl-Heinz Böckstiegel

Governing Board

Chairman

Prof. Dr. H. Priyatna Abdurrasyid , S.H., Ph.D., FCBarb.

Members

M. Husseyn Umar

Harianto Sunidja

N. Krisnawenda

BANI Bandung Office Jl. Tubagus Ismail Bawah no. 2, Bandung 40132 •
Tel: 022-2508649/2506246 • Fax: 022-2508649/ 2535307 • e-mail: banibandung@gmail.com;
banibandung@plasa.com

BANI Surabaya Office Jl. Ketintang Baru II/1-3, Surabaya • Tel: 031-8287414 • Fax: 031-8290522

BANI Denpasar Office Jl. Melati No.21, Denpasar 80233, Bali • Tel: 0361-234846 • Fax: 0361-234846

BANI Pontianak Office Jl. Imam Bonjol No. 402, Pontianak 78123, Kalimantan Barat •
Tel: 0561 - 585262 • Fax: 0561 585261

BANI Medan Office Jl. Sekip Baru No.16, Medan 20112 • Tel: 061-4527799 • Fax: 061-4147192

BANI Batam Office Gedung Dana Graha Lt. 3, Ruang 307 A Jl. Imam Bonjol, Nagoya, Batam • Tel: 0778-450539
• Fax: 0778-450537

BANI Palembang Office Gedung KADIN Prov. Sumatera Selatan Lt. 3, Jl. Letkol Iskandar
Kompleks Ilir Barat Permai Blok D1 No. 27, Palembang 30134 •
Tel: 0711-352793 • Fax: 0711-356187

INDONESIA ARBITRATION

QUARTERLY NEWSLETTER

Number 4/2008

Editorial Board

Editor -in-Chief

M. Husseyn Umar

Executive Editor

Madjedi Hasan

Editors

M. Husseyn Umar

Harianto Sunidja

Madjedi Hasan

Huala Adolf

Junaedy Ganie

Secretary

Ade Teti S.

Distribution

Rizky Muzainurasti

**BULETIN TRIWULAN
ARBITRASE INDONESIA**

**INDONESIA ARBITRATION
QUARTERLY NEWSLETTER**

ISSN No. 1978-8398, Number 4/2008

Published by
BANI ARBITRATION CENTER
(BADAN ARBITRASE NASIONAL INDONESIA)

Contents

- From The Editor

Articles

- The New York Convention -
50 Years On
AA de Fina 2
- Court Interventions In International
Arbitration -
Indonesia Experience
M. Husseyn Umar 11
- Enforcement Of Foreign Arbitration
Awards In Indonesia's Court
Madjedi Hasan 17
- Law Governing Arbitration
Proceedings
Meria Utama..... 20

Reader's Comments

- "Certain Indonesian Contract Law
Principles that are Relevant in
International Arbitration" (No. 3/2008)
from Toni de Fina 28

News

- BANI Arbitration Workshop
Arbitration
In Construction Dispute 30

From The Editor

On June 10, 1958 the United Nations adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention. The Convention came into force on June 7, 1959 and its purpose, simply described, "... is to facilitate the recognition and enforcement of awards in countries which have ratified it". As of today, the New York Convention has 142 signatories', it therefore has very wide coverage. This of itself is a startling achievement and underscores the success of a convention which has done much to foster the growth of international arbitration, by setting a universal minimum standard for enforcement. Additionally, the Convention force courts to recognize and enforce foreign arbitral awards despite differences in international law.

Marking its 50th anniversary, in this issue we include two articles on the enforcement of international arbitration. Mr. AA de Fina (one of the BANI's listed arbitrators) analyzes issues developed in the implementation of the Convention. As the world has changed dramatically in the past 50 years, some suggest that based on its age and subsequent developments in trade and law, the Convention should be reviewed and amended. The proposed amendments and changes is to overcome difficulties in interpretation and application that have become evident in the Convention since its inception. The other article is written by Mr. Husseyn Umar – one of the most experienced BANI's arbitrators, who discusses both legal standards and practical issues with the enforcement of an international arbitration award in Indonesia.

In the news, BANI are planning to conduct a two days workshop in October 2008 on Dispute Resolution in Construction. Date and place of the workshop and other details will be announced soon as they are firmed up. Finally, work is underway for the last quarter issue of the 2008 Newsletter. We will be pleased to receive articles (any length) until November 15, 2003 at the e-mail addresses shown below. Letters to the editor are also welcome and should be directed to the Editor.

September 2008

The New York Convention - 50 Years On

ABSTRAK

Makalah berikut membahas New York Convention, yang merupakan salah satu konvensi terpenting dalam abad kedua puluh. Diratifikasi oleh 142 negara, pelaksanaan Konvensi NY telah mendukung pertumbuhan perdagangan transnasional dan konsep otonomi arbitrase internasional.

Sebagaimana dalam setiap perjanjian, Konvensi NY berisi berbagai kompromi, yang cukup signifikan berkaitan dengan ketentuan-ketentuan yang memberikan kebebasan dan otonomi kepada negara-negara yang menandatangani Konvensi, Namun, dengan perubahan dunia sejak Konvensi tersebut dilahirkan 50 tahun yang lalu, maka dirasakan perlu untuk mengkaji hasil-hasilnya dan melakukan amendemen disesuaikan dengan perkembangan dalam bidang perdagangan, komunikasi dan hukum internasional. Selain perbaikan redaksi kata-kata untuk menghilangkan ketidakpastian atau memperjelas apa yang dimaksudkan, amendemen ini juga meliputi hal-hal yang substantif yang bertujuan menambah kepastian.

I. Introduction

It is almost unarguable that the New York Convention is one of the most important international conventions of the 20th century. The Convention and its application have been the steel cable supporting and encouraging transnational trade and commerce and the concept of autonomy of international arbitration.

Born in part to overcome perceived or actual weaknesses in the 1927 Geneva Convention¹ and going to support arbitration as a means of resolving international trade disputes, the New York Convention sponsored by the United Nations was adopted at the time of creation or shortly thereafter by, among others, importantly the two world's superpowers at that time, both of whom had not subscribed to the Geneva Convention, the United States of America and the USSR. That after 50 years since its creation nation states continue to subscribe to

¹ Convention on the Execution of Foreign Arbitral Awards Sept 26, 1927

and adopt the convention proves if such proof were needed, that the convention is as relevant today as it was at inception.

As with most agreements settled by a committee, the New York Convention contained compromises, the most significant of which related to the provisions which effectively maintain or provide for a degree of independence and autonomy of a subscribing State. With 142 signatories, as well as its importance by way of content and application, it is likely the most subscribed international convention ever and a remarkable success.

However, the world has changed dramatically in the past 50 years. The manner and composition of “transnational trade” itself has changed. Instantaneous in communication, concepts of foreign trade², together with the development of international public and private law, as well as change and development in respective national laws, has in one way challenged the concept of an unchanged and immutable 50 year old convention which is, in its terms was understandably created in the commercial and legal environment existing at that time. Some commentators suggest that based on its age and subsequent developments in trade and law, the Convention should be reviewed and amended.

Many aspects and some wording of the New York Convention have been incorporated in the UNCITRAL Model Law adopted by the United Nations Commission on International Trade in 1985 suggesting that at that time the duplicated wording and provisions drawn from the New York Convention were not perceived as outdated or inappropriate. Whatever the situation, it is difficult to conceive of a review and amendment process which could be implemented without potentially affecting the support presently given to the Convention by all 142 signatories, and that it could be carried out in a reasonable time. The Convention came into existence principally because of a perceived need because of inadequacies and limitations of earlier conventions having in part like effect, the international environment being receptive at the time, and the hard work, dedication and influence of its creators.

II. Discussion

In the 50 years of its existence, the New York Convention has understandably and necessarily been the subject of interpretation by Courts of nation states

² Development of agency and distributorship, joint ventures infrastructure, technology transfer, finance, consultancy, patent and trademarks, insurance, acquisition and mergers and the like.

worldwide, nation states with their own culture and legal regime, with, among other things, greater or lesser direct or indirect avenues for political interference in the judicial system, or potential bias against particular aspects of the Convention notwithstanding subscription to or adoption of the Convention.

Courts, particularly in nation states where applications for recognition and enforcement were and are relatively rare or where judiciary exposure to the theory and practice of international arbitration is limited, have sometimes dealt with application for recognition and enforcement in a manner which has disappointed the international arbitration community. There are exceptions.

More importantly, in nation states which regularly deal with applications for recognition and enforcement such as France and the United States of America, interpretations and exceptions applied by the courts, albeit with different emphasis, have given interpretations to the wording and effect of the Convention which arguably establish a wider more definitive international interpretation. History has shown that the courts of certain nation states have regularly or consistently acted in a manner contrary to what is generally accepted as the proper or intended application and enforcement of the Convention.

III. Refusal to Enforce

Particularly, a number of important nation states subscribing to the Convention, and not the rare exceptions of occasional refusal to enforce, have a history of regular and consistent refusal to enforce foreign arbitral awards. That these countries are significant global transnational traders is a matter of concern. Four countries, India, China, Indonesia and Thailand, are particular examples and some concerns have recently arisen in respect of some Middle East nation states.

That India and China are now major traders and will likely increase their international trade in the future, the bad experience of enforcement demands attention by the international arbitral community.

a) Peoples Republic of China (PRC)

Enforcement of foreign awards in the PRC has been uncertain for a variety of reasons adopted by courts and apparently because of regulations enacted setting limits on enforcement and providing for defenses to enforcement not available even under a broad interpretation of the New York Convention.

Particularly enforcement of an award may not be granted where it violates “the basic principles of law of the PRC or the national social interest of the PRC”.³ The Central Supreme Peoples’ Court in Beijing some 15 years ago through Supreme Justice Ren attempted to educate regional judges, which are mainly responsible for dealing with applications for recognition and enforcement of the duties and obligations under the Convention. This essentially failed and the policy relating to “national or social interest” as a defense against enforcement is both wide and indeterminate allowing courts to deny enforcement.⁴ Such provisions are beyond the defenses available under the Convention. Although not mandatory, the discretion provided by this reservation is advanced as being public policy under the Convention and almost universally adopted by courts as a rationale for denying enforcement.

A further difficulty arises because enforcement is often sought in relevant regional courts where considerations of deleterious effect on local communities and businesses become important, because of unfamiliarity of courts with the provisions and obligations under the Convention, and vagaries, uncertainties and express provisions of local laws. Where the PRC government or arguably PRC state owned entities, are the award debtor in a foreign arbitral award, a prohibition upon Chinese courts recognizing or enforcing awards favoring foreign investors creates likelihood of failure of enforcement applications.

China adopted the commercial reservation available under the convention but excluded from the definition of commercial “disputes between foreign investors and governments of host countries.”⁵ This reservation precludes a court recognizing and enforcing an award on disputes between foreign investors and the PRC government. Some difficulties have also arisen in respect of awards made in Hong Kong (as a special region of the PRC) since China resumed sovereignty over Hong Kong in 1997.

For example, the Indian Supreme Court relied upon the public policy reservation of the Convention as applying where an “error of law” occurred in an award.⁶

3 See Sidel & Tong “Recognition and Enforcement of Foreign Arbitral Awards Under the Convention 10:5 Asian Exec. Rep 14 (1988).

4 Personal discussions with author

5 Sidel & Tong *supra* at 4

6 See Darwayeh & Linnane “Set aside and Enforcement Proceedings: The 1996 Indian Arbitration Act under Threat Int.A.L.R. 2004, 7(3) 81-87

b) India

The courts of India consistently set aside awards or refused to enforce awards citing grounds not provided by even a generous reading of the New York Convention but relying on the express wording of the Convention providing for refusal on public policy grounds.⁷

d) Thailand

Enforcement of arbitral awards in Thailand has generally proved to be difficult, particularly when the award debtor is the state or a state owned entity. For example, a large award made over 10 years ago, has still not been satisfied and attempts at enforcement remain in limbo.⁸

(e) Middle East

The recent adoption of the New York Convention by a majority of Persian Gulf Arab nation states (excluding Kuwait which subscribed to the Convention in 1978) and the growing influence and importance of those states in world commerce together with the significant building, construction, and major infrastructure development in region, has given rise to much international arbitration. Some of these have involved as a party, a government or a state owned enterprise.

Where enforcement is sought against a state or state enterprise, some courts have appeared reticent to enforce. The attitude of the courts appears consistent not necessarily with the law, but with the traditional institution and practice of government and the cultural values of each community. Alternatively, the position being taken by the courts may arise out of the relative newness of the adoption of the New York Convention and unfamiliarity with the obligations and internationally held interpretations.

⁷ *Sumitomo v ONI* (reported) Supreme Court of India; Substantive Law – London arbitration situs – English procedural law – when arbitration complete by publication of award Indian law permits Indian court to review entire award and proceed.

⁸ *Bilfinger Berger v Ministry of Transport*. (Bilfinger Berger GmbH re construction of Bangkok Expressway [unreported]) Award rendered in 1998 against the Thai Government for a sum in the order of USD 100 million – enforcement proceedings continuing.

An example of avoidance of enforcement of an award in favour of a contractor against a government department relied upon maladministration of witness oaths to invalidate the award.⁹

IV. Arbitrability

The New York Convention provides a limitation on the scope of an arbitration clause¹⁰ by excluding application to disputes “not capable of settlement by arbitration”. Thus, public policy of the jurisdiction applicable to the situs of the arbitration, or the jurisdiction in which enforcement is sought may allow that a narrowly drawn arbitration clause gives rise to unenforceability. The question of whether or not the question of arbitrability is of itself arbitrable has been addressed in the United States.¹¹

V. Foreign or Domestic Arbitrations and Awards

Where both enforcement of an agreement to arbitrate is sought or enforcement of an award is sought interpretation of what constitutes a foreign or a domestic arbitration or award interpretations in differing jurisdictions differ. The New York Convention, by its terms¹², relies upon “nationality” of the arbitration or award which without further definition potentially gives rise to uncertainty.

VI. Changes to New York Convention

The widely recognised expert and commentator on the New York Convention, Dr Albert Jan Van den Berg¹³, recently proposed amendments and changes to the New York Convention to overcome difficulties in interpretation and application that have become evident in the Convention since its inception.¹⁴

In part these proposals consist of wording change to remove uncertainty or improve clarity, but some are of a substantive nature which if adopted would

9 *Bechtel International Inc v Department of Civil Aviation of the Government of Dubai*. (unreported) Dubai Court of Appeal 8th June 2003, Presiding Abdul Wahab Saleh Hamoodah, Members Ramadhan Amin Al Liboodi, Ahmed Mahammed Essa. By failing to administer witness oath in terms in accordance with the express requirements of the Evidence Code, the resulting award in favour of Bechtel was annulled by the Court of Cassation upholding a first instance judgement.

10 New York Convention Art II(1) Art V(2)(a)(b)

11 See - First Options of *Chicago v Kaplan*, 514 U.S.938,944-945 in construing the U.S. Federal Arbitration Act

12 Convention Art I(1)

13 Partner, Van den Berg & Hanitou, Brussels, Belgium

14 2008 ICCA Conference Dublin Ireland

likely add more certainty to the Convention and hopefully remove or diminish the power of courts such as those referred to above to avoid enforcement of arbitration agreements or awards. But not all of the proposals are of this character and in some instances the change may fly in the face of relevant domestic law provisions from some nation states. Absent a degree of certainty in obtaining enforcement of an award, the whole purpose of arbitration may be lost and engaging in arbitration may be an exercise in futility.

The essential features of Dr Van den Berg's proposals are:

Article I

(a) The introduction of reference to an arbitration agreement in addition to the award as referred to in Art I (1) of the Convention. Necessary as the Convention obliges enforcement of agreements and is not limited to enforcement of awards. The proposed change defines arbitration as international by reference to differing places of business or residence or that the subject matter of the arbitration agreement related to more than State.¹⁵

The proposal also ties the award to the arbitration agreement, avoids the provisions of Art I (2) of the Convention and also removes the provisions of Art I (3) and transfers these to a General Clause.

Article II

The proposals are for some word changing and reordering of Art II provisions, but introduce a new provision on grounds for refusing to refer a dispute to arbitration requiring assertion and proving by the objecting party, that include

- A procedural ground that the request for referral was made subsequent to the submission of a first statement on the substance.
- That there is a prima facie valid arbitration agreement in the country where the award will be made.
- The introduction of limitation on violation of international public policy in the country where the agreement is invoked (as opposed to [domestic] public policy referred to in Art III 2(b) of the Convention) and empowering a court to act on its own motion relying on this ground to refuse reference of the dispute to arbitration

¹⁵ cf Art I(1) which refers to "recognition and enforcement of arbitral awards"

Article III

Apart from some reordering, Dr Van den Berg proposes a provision requiring courts to act expeditiously in dealing with a request for enforcement of an arbitral award.

Article IV

The changes clarify and specify requirements in respect of documentation and language of awards for which enforcement is sought.

Article V

The changes proposed seek to limit grounds for refusing enforcement solely to those set forth in the change draft which essentially replicate the grounds in the New York Convention but add a limitation on refusal to enforce “in manifest cases” only.

The change proposals also provide that a party against whom the award is invoked cannot rely on specified grounds for refusal if not raised in the arbitration expeditiously after the existence of such grounds became known.

Article VI

The change proposes relatively simple rewording and reclassification. Particularly, the Van den Berg proposals include a series of general clauses adopting many of the provisions excluded from his adoption of New York Convention Articles.

The most significant being a requirement for designation of a [single] Competent Enforcement Court, compatibility with other treaties, transitional clauses and language of authentic texts.

The proposals of Dr Van den Berg, among other things, go to overcoming some of the difficulties cited in this article, but a new or revised Convention of itself is unlikely to have the desired effects when the courts of the difficult nation states may still act in a manner to avoid a restated Convention as they do with the present Convention and with impunity.

There are no sanctions and it is doubtful that there could be sanctions enshrined in such a Convention.

Meritorious as the proposals of Dr Van den Berg are the greatest difficulty and the greatest danger in attempting a review as proposed is that some of the existing signatories to the New York Convention may take the opportunity of review and redrafting to either “drop out” or change the Convention in such a manner as to defeat in whole or in part the spirit of the Convention.

Education of judges on the obligations and benefits of the Convention might overcome some of the difficulties, particularly of enforcement but concepts of national sovereignty, individuality, and a belief in and reliance upon local laws are unlikely to be dismissed or affected by obligations under an international Convention whether or not there is familiarity and understanding.

The New York Convention achieved the almost impossible, compromise or not, and is not of itself through inadequacy or uncertainty the reason for difficulties in recognition and enforcement in some nation states. The solution may be in diplomatic pressure, or changes in economic circumstances, or great universality brought about by the expansion of global trade and trading power shifts.

AA de Fina

*Partner in Defina Consultants based in Australia
and a listed arbitrator in BANI.*

Court Interventions In International Arbitration - Indonesia Experience

ABSTRAK

Undang-undang Nomor 39 Tahun 1999 (UU Arbitrase) menetapkan bahwa adanya suatu perjanjian arbitrase tertulis meniadakan hak para pihak untuk mengajukan penyelesaian sengketa ke Pengadilan Negeri (PN) dan PN wajib menolak penyelesaian sengketa yang telah ditetapkan melalui arbitrase, kecuali dalam hal-hal tertentu. Campur tangan PN dibatasi untuk hal-hal tertentu, misalnya pengangkatan arbiter dalam hal para pihak gagal mencapai kesepakatan dan adanya kebutuhan akan penyitaan terhadap aset dalam putusan sela. Pembatalan putusan arbitrase hanya dapat dilakukan untuk hal-hal yang menyangkut penggunaan dokumen palsu, dokumen penting yang disembunyikan dan putusan berasal dari hasil tipu muslihat.

UU Arbitrase ini tidak menetapkan aturan khusus untuk arbitrase internasional, yakni putusan-putusan yang dibuat oleh lembaga arbitrase/ arbitrase adhoc yang berada di luar yurisdiksi Pemerintah RI atau putusan arbitrase internasional yang diakui, yakni dari negara-negara yang meratifikasi Konvensi New York 1958 dan tidak bertentangan dengan kebijakan publik. Pasal 65 menetapkan bahwa hanya PN Jakarta Pusat yang berwenang menangani masalah pengakuan dan pelaksanaan putusan arbitrase internasional.

Selanjutnya, dalam UU Arbitrase, Indonesia tidak mengakomodasi keseluruhan dari Artkel V Konvensi NY. Namun demikian, dalam putusan perkara Karaha Bodas lawan Pertamina Mahkamah Agung (MA) telah mengacu pada Artikel V tersebut, yang dapat ditafsirkan bahwa pembatalan putusan arbitrase internasional hanya dapat dilakukan oleh otorita yang berkompeten berdasarkan undang-undang di mana putusan ditetapkan. Hal ini dapat diartikan bahwa pembatalan putusan dalam Pasal 70 hanya diberlakukan untuk putusan-putusan yang ditetapkan di Indonesia. Meskipun Indonesia telah meratifikasi Konvensi NY, umumnya

PN di Indonesia tidak akan memberlakukan, kecuali ketentuan tersebut telah merupakan bagian dalam hukum acara. Penafsiran MA tersebut sejalan dengan penafsiran MA di India dan putusan US District Court for the Southern District of New York, yakni bahwa putusan berdasarkan Article V (1) (e) Konvensi NY adalah sebagai lex arbitri dari proses arbitrase. Dengan demikian, argumen kebijakan publik hanya merupakan satu-satunya kriteria yang signifikan untuk membatalkan putusan arbitrase internasional.

General

The Indonesia Law of Arbitration (Law No. 30/1999) stipulates the role of court to strengthen the whole process of arbitration, i.e. from the initial stage of the commencement of arbitration until the enforcement of the award. Article 11(1) of the Law stipulates that the existence of an arbitration agreement eliminates the right of the parties concerned to submit the dispute to court. While paragraph (2) of that provision provides that the court is obliged to reject and shall avoid any interference in the dispute which is to be settled by arbitration, except in cases which are specifically determined by law.

With respect to procedural matters, assistance of the court can be requested in case the disputing parties could not come to an agreement to appoint an arbitrator, in which case the court can appoint an arbitrator or designate a panel of arbitrators. This may happen, in particular, in the case of ad hoc arbitration. To render such assistance the court will take into consideration the views of the parties concerned or consult an arbitration institution. The Law also provides requirements and conditions to become an arbitrator (Art. 12) and reasons for the challenge of arbitrator(s) based on family relationship or financial reasons or any other reasons that may allegedly influence the neutrality and independency of the arbitrator (s).

Interference or assistance of court can be requested in the case an arbitrator has been challenged and a need to be replaced. This is in particular important in the case of ad hoc arbitration, while arbitration institutions normally provide this particular matter in their established rules of procedure. Court interference needs to be required with regard to the execution of certain provisional or interlocutory awards, such as in respect of conservatory attachment of asset, which is

to be conducted under the provisions of the Law on Civil Procedure. The court, i.e. the District Court functions as the depository agency for arbitration awards which are rendered in Indonesia. It is provided under the law that the depository of the original or authentic copy of the award should be conducted within 30 days as of the day of the official granting/presentation of the award. In respect of the depository of the award, the court looks only at the matter whether the award is based on arbitration agreement and that it does not violate the principles of morality and public policy. The court does not look into the merit of the case. The actual enforcement/execution of the award itself will take place in accordance with provisions of the Law on Civil Procedure. Under certain conditions as provided in article 70 of the Arbitration Law an arbitration award can be annulled by the court.

Court Interventions in International Arbitration

As far as international arbitration is concerned Law No. 30/1999 (Arbitration Law) provides rules pertaining to the recognition and enforcement of international arbitration awards (Chapter VI Articles 65 to 69). Those provisions are related to the rules of the Convention on the Recognition and Enforcement of International Arbitration Awards 1958 (New York Convention). Although Indonesia has already ratified the Convention in 1981, a vacuum period of almost 10 years took place before in 1990 the Indonesian Supreme Court issued a procedural rule (Perma No. 1/1990) for the implementation of the Convention, i.e. with respect to the recognition and enforcement of international arbitration awards. During that period it has not been very clear or there was a certain uncertainty as to the enforcement of international arbitration awards in Indonesia. It was in this period that the Indonesian court practically could not enforce international arbitration awards only because the absence of the implementing regulation for the application of the Convention.

Law No. 30/1999 now clearly provides rules for the recognition and enforcement of international arbitration awards. The Law does not provide special rules for conducting international arbitration. In fact international arbitration can be conducted in anywhere and at any place and referring to any law or jurisdiction as agreed upon by the parties concerned. Under the Arbitration Law an international arbitration award is defined as an award which is issued by an arbitration institution or ad hoc arbitrator (s) outside the jurisdiction of the Republic of

Indonesia or an award which is issued by an arbitrator (s) which under Indonesian law is deemed to be an international arbitration award.

Article 65 of the Law provides that the District Court of Central Jakarta is competent to deal with the recognition and enforcement of international arbitration awards. Paragraph d of article 66 provides that international arbitration awards can be enforced in Indonesia after obtaining an *exequatur* (approval for enforcement) from the Chairperson of the District Court of Central Jakarta. Only international arbitration awards that are issued in countries which are parties to the New York Convention and which deal with commercial disputes and which are not in contradiction with public policy of Indonesia, will be recognized and enforced. Article 66 paragraph e provides that international awards which involve the state of the Republic of Indonesia as a party can only be enforced after obtaining an *exequatur* from the Supreme Court of Indonesia the execution of which will then be implemented by the District Court of Central Jakarta.

Article 67 paragraph 1 provides that the application for the enforcement of an international arbitration award is to take place by submitting and registering the award at the District Court of Central Jakarta. Article 68 paragraph 1 provides that the Decision of the Chairperson of the District Court of Central Jakarta to recognize and enforce the award cannot be appealed or brought to cassation. On the other hand the Decision of the Chairperson of the District Court of Central Jakarta which refuses the recognition and enforcement of an international arbitration award can be brought to cassation at the Supreme Court. The Supreme Court will render its decision within 90 days. The decision of the Supreme Court in this respect cannot be challenged (article 68 paragraphs 4). The actual enforcement/execution of the award will be delegated by the District Court of Central Jakarta to the competent court of the respective jurisdiction in the country.

Chapter VI Section 2 of the Arbitration Law which deals with the recognition and enforcement of international arbitration awards does not include the whole article V of the Convention, except the provision pertaining to public policy argument. Although Indonesia has ratified the Convention (under certain reservation), provisions which are not embodied in the implementing national law or regulation, normally the Indonesian court would not apply such provisions which are not part of the national procedural law.

A question has ever been raised, besides the refusal based on public policy argument, whether an international arbitration award can be subject to the

provision of article 70 of the Arbitration Law which stipulates the reasons for a request to have an arbitration award be annulled by the court.

Article 70 provides that an application to annul an arbitration award may be made if any of the following conditions are allegedly to exist:

- a. letters or documents submitted to the hearing are acknowledged to be false or forged or are declared to be forged after the award has been made;
- b. after the award has been rendered documents are founded which are decisive in nature and deliberately concealed by the opposing party, or
- c. the award was rendered as a result of fraud committed by one of the parties in the dispute.

With respect to the question whether the above provision is applicable to international arbitration, we have to refer to the Supreme Court on the Pertamina vs. Karaha Bodas Case (Supreme Court Decision No. 01/BANDING/WAS/T.INT/2002 dated March 8, 2004).

The Supreme Court has eliminated the Decision No.86/PDT/G/2002/PNJKT PST dated August 27, 2002 of the District Court of Central Jakarta which had annulled the international arbitration award on the Pertamina vs. Karaha Bodas case which was rendered in Geneva (Switzerland). In annulling the award, the District Court of Central Jakarta held that the award is in contradiction with Indonesian law which is the applicable law of the contract in dispute and that the award was made against the public policy of Indonesia.

As mentioned earlier, Indonesia does not include the whole article V of the New York Convention in Chapter VI Section 2 of the Arbitration Law. However, the Supreme Court in its judgment did refer to Article V (1)(e) of the Convention which provides or that can be interpreted that an international arbitration award can only be set aside or suspended by a competent authority in which or under the law of which that award is made. The Supreme Court put aside the view of the District Court of Central Jakarta which applied or mixed up the matter or issue on governing law on the substance of disputing contract and the matter with regard to the law under which the arbitration proceeding is conducted and the award is made. In other words the provision on the annulment of award which is contained in article 70 of the Arbitration Law is only applicable to arbitration conducted or the award of which is made in Indonesia.

The view of the Indonesian Supreme Court in this regard is in line with the view of the Supreme Court of India (in the case of Oil and Natural Gas Commission vs. Western Company of North America, Decision of January 16, 1987), and the Decision of the US District Court for the Southern District of New York (in the case of American Construction Machinery & Equipment Corporation Ltd. vs. Mechanized Construction of Pakistan, No. 85 Civil 3765, March 23, 1987) with respect to the interpretation of “under the law of which that award was made” as provided in Article V (1)(e) of the New York Convention as the procedural law (*lex arbitri*) of the arbitration process.

The Decision of the Supreme Court on the above matter is in line with the view and the fact that Law No. 30/1999, as far as international arbitration award is concerned, only deals with the aspects of recognition and enforcement of the award. Public policy argument seems to be the only significant criteria for refusing the enforcement of international arbitration award. However, a wide interpretation of public policy may in practice also deal with matters or provisions in particular pertaining to the principles of due process of law as stipulated in the whole Article V of the New York Convention.

M. Husseyn Umar

Vice Chairman of BANI Arbitration Centre

and partner in Ali Budiardjo, Nugroho, Reksodiputro, Jakarta, Indonesia.

Enforcement of Foreign Arbitration Awards In Indonesia's Court

One of the common scenario in an international arbitration is the winning foreign party would like to enforce its award in Indonesia. Will it be able to do so? Will the losing party have grounds to resist? This article looks at recent developments regarding the enforcement of foreign arbitral awards in Indonesia.

In 1981 Indonesia ratified the 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), providing that the foreign-rendered arbitration may now be enforced in Indonesia without imposing substantially more onerous conditions than are imposed upon recognition of domestic awards. Nonetheless, it almost took ten years for Indonesia to issue implementation regulations to guide the courts in procedures necessary to enforce foreign-rendered awards in the Indonesian courts. Such an implementation regulation for enforcement of arbitral awards rendered was provided in the Supreme Court's Regulation Number 1 of 1990. The regulation also designated the District Court of Central Jakarta as the venue to which application for enforcement of foreign-rendered arbitration was to be made. The court has 14 days to transmit the request file to the Supreme Court, which was the sole court with jurisdiction to issue the enforcement order for foreign-rendered awards.

In 1999 Indonesia finally promulgated Law Number 30 of 1999, covers the Arbitration and Alternate Dispute Resolution ("Arbitration Law") and went into effect on 12 August 1999 by its terms rescinding and superseding Articles 615 through 651 of the Burgelijke Reglement of de Rechtsvordering (known as "RV"), covering those arbitration. Under the Arbitration Law, the District Court has no jurisdiction for settlement of dispute if the parties have been bound by written arbitration agreement. Note that under the RV, enforcement of an award was handled in the same manner as enforcement of a final court judgment, including execution of property and possessions of losing party. The rule provided that only domestic-rendered arbitration may be enforced or awards judgments of foreign courts were not enforceable in Indonesia.

The Arbitration Law (Article 66) defines a foreign arbitral award as an award either made by an arbitration tribunal outside Indonesia or otherwise deemed to be foreign under the laws of Indonesia. By the terms of the Regulation, a foreign arbitral award may be recognized and enforced when (i) it is rendered by a tribunal in a country which is a party to a bilateral or multilateral convention with Indonesia concerning recognition and enforcement of foreign arbitral awards; (ii) it relates to the field of commercial law as that term is defined under Indonesian law; and (iii) the arbitral award does not “manifestly” contravene “public order”. These conditions in the Regulation are consistent with the New York Convention. The scope of the “public order exception” under Indonesian law, however, remains unclear because there is no Indonesian case law providing criteria on determinations of international public policy. Most contracting parties to the New York Convention, where the objective is to facilitate international trade, apply the public order exception more sparingly in an international context than in a purely domestic context.

The jurisdiction to issue orders of enforcing the international arbitral awards vests in the District Court of Central Jakarta, except in the case that Republic of Indonesia itself is the party to the arbitrated dispute. Applications for enforcement of a foreign-rendered award if the party is the Republic of Indonesia must be submitted to the Supreme Court. Applications for enforcement of a foreign-rendered award attach the original award, or a certified copy thereof, together with an official translation thereof; the original or a certified copy of the agreement forming the basis of the award, together with an official translation thereof; and a statement from the Indonesian diplomatic mission in the jurisdiction in which the award was rendered to the effect that such country has diplomatic relations with Indonesia and that Indonesia and such country are contracting states to an international convention regarding implementation of foreign arbitral awards. Appeals may be submitted to the Supreme Court if the Central Jakarta District Court refuses to grant the enforcement of a foreign-rendered award.

The District Court may not review the reasoning in the award, but it may only execute if both nature of the dispute and agreement to arbitrate meets the requirement as set out in the Arbitration Law, namely the dispute is commercial in nature and within the authority to the parties to settle, and arbitration clause must be contained in signed agreement. The parties may submit request for annulment of the arbitral award only for domestic awards and if the award involves withholding of false document, important document is concealed and

forgery or fraud. However such annulment provision it is only applicable to the domestic awards and not international arbitration awards.

As Prof Hikmahanto Juwana said, such view is based on the way or systematic used in writing of the Arbitration Law, which separates the provisions on international arbitration from the domestic awards in different sections under the different headings. For example, article 65 through 69 on international arbitration is provided in Section VI under the heading “International Arbitration”, while the articles 70 through 72 in the Section VII provide the annulment of the awards by the court under the heading Annulment of Arbitration Awards. Other indication is that the execution of international arbitration law is exclusively vested in Central Jakarta District Court, while in the case of domestic awards the registration of awards must be made with the clerk of the District Court “having jurisdiction over the respondent” (which would be that court sitting in the district in which the losing party is domiciled or maintains assets).¹ On 23 November 2004, the Supreme Court reverted the award of the Central Jakarta District Court which annulled the international arbitration award in the case of Pertamina v. Karaha Bodas Company (Nr 86/PN/Jkt.Pst/2002, 9 September 2002). In its award, the Supreme Court views that the District Court does not have power to annul the international arbitration award.

Madjedi Hasan

Independent Petroleum Consultant and a listed arbitrator in BANI.

¹ Hikmahanto Juwana, *Pembatalan Putusan Arbitrase Internasional oleh Pengadilan Nasional*, Jurnal Hukum Bisnis, Volume 2, 2002, Jakarta, p 69

Law Governing Arbitration Proceedings

ABSTRAK

*Makalah ini membahas hukum-hukum yang digunakan dalam proses arbitrase, khususnya bagaimana menentukannya dan bagaimana pula hukum internasional mengatur mengenai hal ini. Walaupun sudah ada pengaturan umum ini dimana teori *lex arbitri is lec loci arbitri* dan penentuannya juga dapat didasarkan pada kesepakatan, para pihak yang terlibat dalam suatu sengketa dan bersepakat untuk menyelesaikan kasus mereka ke arbitrase tetap harus berhati-hati ketika melakukan pemilihan hukum. Karena terkait dengan beberapa hal yang penting dalam proses arbitrase, ketidak hati-hatian ini dapat berakibat fatal, misalnya dibatalkannya putusan arbitrase dikarenakan salah dalam memilih hukum yang akan digunakan ketika beracara di arbitrase. Disarankan agar dalam perjanjian arbitrase dicantumkan secara jelas hukum beracara.*

Introduction

Arbitration is subject to different laws and they are summarized as follows:

- 1) The law governing the parties relating to the capacity of the parties entering into an arbitration agreement;
- 2) The law governing the arbitration agreement;
- 3) The law governing the arbitral tribunal and its proceedings (*lex arbitri* - procedural law);
- 4) The law governing the substance of the dispute (*lex causae* or applicable or substantive law); and
- 5) The law governing recognition and enforcement of the award.¹

¹ Julian, D.M. Lew, *The Place of Arbitration and The Applicable Procedural Law in the English Common Law*, in Storm; Marcel and Filip De Lay, *The Place of Arbitration*, Third International Symposium on The Law of International Commercial Arbitration, Gent, 30 – 31 May 1991, Mys & Breech, Uitgevers, 1992, p. 78.

Arbitration Agreement

As an English Judge Thomas said (and quoted by Alan Redfern and Martin Hunter) “the law governing arbitration is a body of rules, which sets as standard external to the arbitration agreement, and the wishes of the parties, for the conduct of arbitration. The law governing the arbitration comprises the rules governing interim measures (e.g. Court orders for the preservation or storage of goods), the rules empowering the exercise by the Court of supportive measures to assist an arbitration which has run into difficulties (e.g. filling a vacancy in the composition of the arbitral tribunal if there is no other mechanism) and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitration (e.g. removing an arbitrator for misconduct”.²

Important features of arbitration are severability and competence-competence. Under severability principle, arbitration agreement lives a life of its own and is autonomous of the main agreement. Invoking the invalidity of the main agreement may not necessarily bring with it the invalidity of the arbitration clause. Competence-competence refers to the ability of the arbitration tribunal to decide on its own jurisdiction. Therefore a party who is trying to avoid arbitration at an early stage by claiming that the main contract is invalid will face the arbitration agreement separate from the main one and the arbitrators deciding on their own competence.

Law Governing the Arbitration

The following lists some relevancies of the law governing the arbitration:

1) Arbitrability

The arbitrator powers lies with arbitrability, i.e. that dispute can be referred to the arbitration for resolution.³ If the dispute is not arbitrable based on the applicable law of the arbitration proceeding, it can become the ground of refusal to settle the case in arbitration, and the court may take the case or the court may

² Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, Thomson Sweet and Maxwell, London, 2003, p.79

³ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards regulates that the arbitrability can become an issue when the national court is called upon to recognize an arbitration agreement or requested to enforce an arbitral awards. The arbitrability is the first question that should be answered. See Art II and article V on New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

intervene the arbitration with the ground of arbitrability. Or if there has been an award, then the award may be challenged.⁴ Thereby it is very important to check first whether the dispute can be resolved by arbitration or not.

2) Time limit for commencing of the arbitration

If the parties have chosen the law of the arbitral tribunal and its proceedings, then this will be the basis for time limit of the commencing of the arbitration.⁵ In practice institutional rules such as ICC rules or UNCITRAL Arbitration Rules also regulate this matter.⁶

3) Interim measure and protection

Lex arbitri in this case provides power to the arbitral tribunal to order provisional and protective measures, however different laws usually have different regulations. In some countries national court have a jurisdiction to order provisional and protective measures upon requested by the arbitration parties, but in the other countries the lex arbitri prohibits the court to intervene the arbitration proceeding even related to the interim measures.⁷

4) The power of the arbitrator

The power of the arbitrator is basically established by the agreement of the parties. However the power of the arbitrator can be given by the applicable law in arbitration proceeding. For example, if the parties have no agreement regarding the expert then based on the law applicable to the proceeding the arbitrator has the power to appoint the expert on behalf of the parties. However if the agreement is silent on the composition and appointment of the arbitrator or arbitral tribunal, then the law that is applicable to the arbitration proceeding must be considered. In this case the applicable law on arbitration proceeding will provide as to how the appointment of the arbitrator or the arbitral tribunal should be made and the commencement of the arbitration.

4 Collier, John and Vaughan Lowe, *The Settlement of Disputes in International Law, Institutions and Procedure*, Oxford University Press, 1999, at p. 229-230.

5 Ibid, p.230.

6 James, Huleatt Mark and Nicholas Gould, *International Commercial Arbitration*, second Edition, London Hong Kong, LLP, 1999, p. 48-49.

7 Senen, Ibrahim, *Provisional and Protective Measures in Arbitration (Comparative Study between Indonesia and the Netherlands)*, Rotterdam, 2004, at p. 55-56.

5) The conduct of the arbitration proceeding regarding the disclosure of the documents, evidence of witnesses

These matters usually covered by the arbitration agreement itself. In case there is no agreement as such, then the law applicable to the arbitration proceeding will regulate the matters.

6) Validity of the arbitral award

The arbitrator or arbitral tribunal will do their best effort to make the award is valid and enforceable. Usually the validity of the arbitral awards will depend on the provisions of the arbitration agreement and the law governing the arbitration (*lex arbitri*). The arbitral awards will be made based on the rules of the applicable law and requirement of the form of the award also dictate base on this rules. If the disputing parties want to challenge the award, again it is also based on the applicable law in the arbitration proceeding, and the court that has jurisdiction to challenge is the court at the place of arbitration.

Determination of the Applicable Law Governing Arbitration Proceeding

The law governing the arbitration (*lex arbitri*) is usually determined by the will of the parties and the place of the arbitration. It is up to the parties to choose which law would be applicable in the arbitration proceeding, although in general the law that governs the arbitration is the local or national law where the arbitration proceeding takes place. That is why the parties in determining the arbitration need to consider carefully the place that they want to choose as the seat or arbitration. While the parties may choose the place of arbitration based on the tradition and neutrality, the arbitration agreement may stipulate that choice of the place of the arbitration is determined by the arbitrators or arbitral tribunal.

The parties shall state in their arbitration agreement which law will governing the arbitration process. In the absent of such provision the law of the place of arbitration would then play an important role. In practice in the absent of provision on choice of the applicable law governing the arbitration proceeding, then the law of the place where the arbitration is held will be considered as the applicable law in the arbitration, known as “*locus arbitri*” of the arbitration.

As John Collier and Vaughan Lowe said the *lex arbitri* is much influenced by fundamental conceptions of the nature of the arbitration. It is the common

assumption that *lex arbitri* is the law of the seat of arbitration. In this respect, it is of interest to note a number of theories about the nature of the arbitration. Known as ‘the seat theories’, this old theory says that *lex arbitri* is *lex loci arbitri*. This means that the law at the seat or place of arbitration will govern the arbitration proceeding.

In addition, the first modern theory (known as jurisdictional theory) says that the arbitration is based on the sovereignty of one state. It is equally true that the parties are free to arbitrate, but that the law of the state grants that freedom, then it is the right of the state to impose such arbitration regulation. Based on this theory, the arbitral procedure or the applicable law regarding the proceeding of the arbitration has connected to the place of arbitration. So, the law applicable in arbitration procedure is the law of the place of arbitration.

The second modern theory is contractual theory, which states that it is the freedom of the parties to make the contractual arrangement for their arbitration proceeding, and therefore it is also the freedom of the parties to determine as to what is the applicable law that to be applied in the arbitration proceeding, so it is not subject to the place of the arbitration law.⁸ Finally, the third theory is autonomy theory which supports the freedom of the parties or the arbitrators to choose the *lex arbitri*. Under the theory, the arbitration shall be treated as an autonomous legal institution, so it cannot be forced by a legal category. Since arbitration is basically based on the general principle of party autonomy, then the autonomy of the parties will not to be bound by a domestic procedural law and they can choose any other law that is appropriate for them.

The Choice of Applicable Procedural Law under Indonesian Law

Indonesia Law Number 30 of 1991 On Arbitration and Alternative Dispute Resolution (“Arbitration Law”) provides the choice of the arbitration procedural, i.e. in the articles 31, 34 and 37 of the Chapter IV regarding procedure applicable before the arbitration tribunal. The Article 34 Paragraph 1 states that the parties may choose to settle their case in national or international arbitration institution. This choice is explicitly stated in their arbitration clause or their arbitration

⁸ In practice, even the parties has freedom to determine the law besides the law of the seat of arbitration, usually they still choose the *lex loci arbitri* as their applicable law, this is because not all countries that become the place of arbitration allow the parties choose another law. Then if the parties still do so, then the court may intervene that arbitration that applied the foreign procedural law. See Filip De Ly, *The Place of Arbitration*, Mys and Breesch, Uitgever, 1992, at p.23.

agreement. Furthermore, the article also provides that the arbitration which has been chosen by the parties shall be executed in accordance to the rules and procedures of such designated, except otherwise agreed by the parties.⁹

Article 31 provides that the parties are free in determining the arbitration procedures to be applied in hearing the dispute, and put it in an explicit written agreement. This article provides that the procedure may not conflict with the provisions of Arbitration Law. The next paragraphs 3 and 4 stipulate that in case the parties do not decided the procedure to be applied by them then the arbitrator or the arbitrator tribunal will decide it for the parties based on this law. After the parties have agreed on it, the parties should determine the venue of that arbitration. If the parties do not determine that venue, the arbitrator or arbitral tribunal will determine it on behalf of the parties.¹⁰

Article 34 and 31 confirms that Indonesia also applies the party autonomy in selection of the governing law in arbitration. Under this provision, the parties may choose any other institution that they think the best for them to settle their disputes, while textual interpretation of the Article 34 paragraph 1 confirms that the parties are free to choose the law governing their arbitration proceeding. Usually the arbitration institution has their own arbitration sets of procedural law, and if the parties have agreed to submit their case to solve that institution, the parties mostly used that procedural law to govern their dispute.¹¹ Moreover, Article 37 paragraph 3 provides that the examination of the witness before the arbitrator or arbitral tribunal shall be carried out in accordance with the provisions in the procedure of Civil Code.

Regarding the Ad-hoc Arbitration, Indonesian's Arbitration Law stipulates that it is the right of the parties to apply any rules governing their arbitration as long as the disputing parties agreed upon. Indonesian Arbitration Regulation also provides default procedural law apply of no other rules have been designated. In practice, there are some companies that settle their dispute by using the ad-hoc arbitration besides using the national or international arbitration institution. The Ad-hoc arbitration in this case will adopt its own rules governing the arbitration proceeding. And the adoption of rules in the ad-hoc arbitration in this case based on the agreement of the parties. The rules used for the arbitra-

⁹ See Arbitration Law; article 34 paragraphs 1 and 2.

¹⁰ See Arbitration Law, article 31 paragraphs 1, 2, and 3.

¹¹ For example the parties choose the ICC Court of the arbitration, then based on ICC rules, the parties can use the ICC Rules to govern their dispute. See supra, International law in determining the law governing the arbitration procedure, p.35.

tion proceeding may include UNCITRAL Arbitration Rules or ICC Arbitration Rules.¹² The selection of UNCITRAL Arbitration Rules or ICC Arbitration Rules is due to that the rules are considered to be more flexible than any other rules.

Furthermore, on the issue of the choice of foreign procedural law in Indonesia arbitration, the Article 34 provides that the parties may choose national and international arbitration institution, and may agree on the governing law for the arbitration proceeding based on the chosen institutions procedural law. However, it is noted that this does not necessarily mean that the law will allow the selection of foreign procedural law in the Indonesia arbitration proceeding.

Laws Governing Arbitration Proceeding Based on International Law

There are a number conventions or international laws that stipulate the law applicable in the arbitration proceeding. These include Arbitral Proceeding under ICC Rules of Arbitration of 1998, UNCITRAL Model Law, and ICSID.

ICC rules of arbitration are the flexible rules because it contains provisions that generally accepted by many jurisdictions in different legal system. These rules do not cover all the arbitration procedures that may arise in practice. It just stipulates general rules in arbitration proceeding. Paragraph 1 of Article 15 stipulates that in the arbitration proceeding, the ICC rules will apply first, but if such matter is not determined by ICC rules the parties will then determine it by themselves. ICC rules recognize party autonomy as the basic principle of the arbitration although there are limitations. For example, the agreement to choose the applicable law governing the arbitration procedure that do not stipulated by the ICC rules may not against the public policy or mandatory rules of the applicable law in such countries.¹³ Based on the Article 18(1) of ICC rules, the agreement of the parties on the arbitration procedure should be stated in Terms of Reference.

In the situation that the parties do not agree with the additional procedure then the arbitral tribunal will determine that for them. The arbitral tribunal also has a duty to check, if the parties have agreed with an additional procedure, they have to ensure that the agreement is not against the mandatory rules and public

¹² See Information for Foreign Investment Indonesia, <http://www.kanwilpajakhusus.depkeu.go.id>.

¹³ Eric Schäfer, at al, *ICC Arbitration in Practice*, Kluwer Law International 2005, p. 75-7.

policy in the place of arbitration. It is important with regard to the recognition and enforcement of the award.¹⁴

The Geneva protocol 1923 mentions that an arbitration is governed both by the will of the parties and by the law of the countries where the arbitration is held.¹⁵ This also means that the parties have a freedom to determine the law applicable in arbitration proceeding and that law is usually the law where the arbitration takes place. Also, the New York Convention stipulates that the award can be set aside if the arbitral procedure is not based on the will of the parties or not in according to the law of the place of arbitration.¹⁶

This differs with the institutional arbitration, which has its own set of rules for arbitration proceeding. This will benefit the parties because they do not have to spend much time to set such rules to govern their arbitration proceeding; as the parties may apply directly the ICC Arbitration rules. The disadvantage, however, is that the fee for institutional arbitration is usually more expensive than that of ad hoc arbitration.

Meria Utama

The author is a lecturer at Faculty of Law, Sriwijaya University, Palembang and Secretary of BANI Palembang Office.

14 ICC Rules article 35 provides that the arbitral tribunal has an obligation to make every effort to ensure that the arbitral award is enforceable at law. That is why they have to check everything carefully to know that there is no agreement of the parties that against the mandatory rules and public policy of the place of arbitration.

15 See Geneva Protocol 1923, Article 2.

16 See New York Convention, Article V.I (d).

Reader's Comment on Newsletter 3/2008 Article

“Certain Indonesian Contract Law Principles that are Relevant in International Arbitration”

August 15, 2008

Dear Fred,

We have not met but I read with interest your article Certain Indonesian Contract Law Principles that are Relevant in International Arbitration in the recent issue of “Indonesian Arbitration”.

It might be of interest to you to know that certain Common Law jurisdictions do provide for Good Faith principles in contracts. For example, New York law requires in both the creation and conduct of a contract “good faith and fair dealing” as a statutory duty. Other common law jurisdictions have adopted principles of “good faith” and are being introduced into the development of the law.

Yours sincerely,

Toni de Fina <AA de Fina; aa.defina@definaconsultants.com>

August 20, 2008

Dear Toni,

Thank you very much for your input on the recognition and the requirement of “good faith and fair dealing” as a statutory duty in both the formation and implementation of contracts in certain common law jurisdictions.

Yours sincerely,

Fred B.G. Tumbuan <tumbpan@attglobal.net>

August 26, 2008

Dear Fred,

Thank you so much for your letter. I hope you did not think I was criticizing your article because that was not the case. I thought you may not have been aware of the provisions of the US Uniform Commercial Code requiring “good faith and fair dealing”.

I do not think other common law countries will adopt like provisions by statute, but interestingly in Australia, under the provisions of the Trade Practices Act 1974 (Clth) there is by s.52 a prohibition on “misleading or deceptive conduct or conduct likely to mislead and deceive”. This is, of course, not a positive obligation for “good faith and fair dealing” but it could be argued that there are some common elements.

In any case it is good to hear from you and may be, if the opportunity arises in the future, we will meet again.

Kind regards,

Toni <aa.defina@definaconsultants.com>

Bani Arbitration Workshop

28 – 29 October 2008, 9.00 am – 5.00 pm

ARBITRATION IN CONSTRUCTION DISPUTE

Disputes are a reality in every construction project. Without a means to address them, minor issues can grow into serious disputes, with crippling consequences for project participants. The rising cost, delay and risk of litigating construction disputes has prompted the construction industry to look for more efficient ways to resolve these disputes outside of the courtroom.

In response to demand, BANI plan to conduct a two days workshop specifically dedicated to resolve settlement in the construction dispute. The workshop will discuss all aspects of arbitration from framing the submission to the issue of an enforceable award. Among other things, it provides the formation and enforcement of arbitration agreements; the conduct of arbitral proceedings; the recognition and enforcement of arbitral awards; the international conventions, national laws, and institutional arbitration rules that govern the arbitral process and the enforcement of arbitration agreements and awards; the strategic issues that arise in the course of international arbitration proceedings; and the practical benefits (and disadvantages) of arbitration.

- ▶ VENUE : **Financial Club**
Gedung Graha Niaga 2, Jalan Sudirman Kav. 58,
Jakarta
- ▶ FEE : Rp 3,500,000

As limited places are available, please register early (before 15 October 2008 for Rp 3.000.000). For queries, please contact :

Ms. NINA SILVANA

by Tel: +62 21 7940542 or Fax +62 21 7940543 or by email: bani-arb@indo.net.id