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BANI ARBITRATION CENTER

INDONESIA ARBITRATION QUARTERLY NEWSLETTER

No. 12/2013

UNCITRAL MODEL ARBITRATION LAW : A SOLUTION ?

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Corinne Montineri

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From the Editor

Issues on International Commercial Arbitration is on the air again. This is because the cross border trade and foreign investment are necessary for Indonesia sustainable economic growth.

In this respect, BANI newsletter have chosen the seminar of UNCITRAL Model Arbitration Law as it main topic. In relation to the issue, we have chosen some of the paper presented at the seminar as well as discussion notes that had warmed up the seminar.

It is of our interest that limited paper quoted in this newsletter is considered as a start to awake public interest on the Arbitration Law.

Finally, we welcome some of the presenter in the seminar : Prof. Colin Ong and Dr. Frans Winarta as well as brief but most importantly notes given by Corinne Montineri and M. Husseyn Umar. As side topics we have chosen notes on the initiative to create another Board of Arbitration for Government Goods and Services by Agus G. Kartasasmita. We hope all these would trigger further discussion for the sake of reaching better Indonesia Arbitration future.

December, 2013

MESSAGE FROM THE CHAIRMAN

Prof. Dr. H. Priyatna Abdurrasyid

In celebrating the 36th Anniversary of BANI Arbitration Center (BANI) and the First Anniversary of Indonesian Arbitrators Institute (IArbI), I am pleased to present the re-publishing of the newsletter.

I hope that you will now enjoying again in following the various writings and events related to BANI and arbitration/ADR activities in general.

I am also expecting articles and news coming from the readers and feel free to circulate this newsletter to those who might be interested in reading, writing and/or reporting in this newsletter. I do hope to be able publishing this newsletter on regular quarterly basis.

Jakarta, December 2013

Prof. Dr. H. Priyatna Abdurrasyid

Corinne Montineri is a Legal Officer in the International Trade Law Division of the United Nations Office of Legal Affairs, the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL). Her main field of activity relates to arbitration. She has been servicing the sessions of the UNCITRAL Working Group II (Arbitration and Conciliation) since October 2003 and is the Secretary of Working Group II which currently works on the preparation of a legal standard on transparency in treaty-based investor-State arbitration.

The UNCITRAL Model Law
on International Commercial Arbitration

Corinne Montineri

The questions considered at the one day seminar organized by BANI in cooperation with the United Nations Commission on International Trade Law (UNCITRAL) early October in Jakarta were whether the Indonesian Arbitration Law is friendly to business, and whether the UNCITRAL Model Law on International Commercial Arbitration[1] ("the Model Law") should be considered for enactment in Indonesia. The conclusions, at the end of the day, were that Indonesia should consider reforming its law on arbitration, and in doing so, should base its efforts on the existing framework designed by the United Nations. Since its adoption by UNCITRAL, the Model Law has come to represent the accepted international legislative standard for a modern arbitration law; legislation based on the Model Law has been enacted in around ninety jurisdictions which represent all legal traditions, and have very different economies, and levels of development[2]. Countries in the ASEAN region have based their arbitration law on the Model Law, and well-renowned arbitration centres in the region have used the UNCITRAL Arbitration Rules as their institutional Rules. UNCITRAL texts on arbitration constitute a sound basis for harmonization and modernization of arbitral procedures, and the way forward for Indonesia.

As a matter of background, the Model Law was adopted by UNCITRAL in 1985, and amended on 2006[3]. The General Assembly of the United Nations, in its resolution 61/33 of 4 December 2006, recommended "that all States give favourable consideration to the enactment of the revised articles of the Model Law, or the revised Model Law (…) when they enact or revise their laws (…)".

The Model Law was developed to address considerable disparities in national laws on arbitration. The need for

[1] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I; United Nations publication, Sales No. E.95.V.18.

[2] Information on jurisdictions having enacted legislation based on the Model Law is provided on UNCITRAL's website at http://www.uncitral.org.

[3] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), annex I; United Nations publication, Sales No. E.08.V.4.

improvement and harmonization was based on findings that national arbitration laws – even those that appeared to be up-to-date and comprehensive – were often drafted with domestic arbitration primarily in mind, and were particularly inappropriate for international cases. In harmonizing national law with internationally accepted standards, the Model Law is seen to enhance predictability of arbitration, and consequently the confidence of parties and investors in the reliability of arbitration law in the enacting State.

The Model Law covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice.

The Model Law thus has a universal character, and provides for the reduction of uncertainty in the sphere of international arbitration, and the promotion of an arbitral process that is fair, efficient and predictable, both to national constituents as well as to foreign investors. Adoption of the Model Law signals a move toward a robust international arbitration system and a supportive national framework for the resolution of commercial disputes, and one that meets the need of modern commercial practices.

ROADSHOW ON
NEW YORK CONVENTION
IN MEGA MENDUNG – INDONESIA
03 OCTOBER 2013

On 03rd October 2013 at the Supreme Court Training Center for Judges in Mega Mendung (about 60 km from Jakarta) BANI Arbitration Center as local organizer of ICCA (International Council for Commercial Arbitration) conducted a Roadshow Seminar on New York Convention. The event is also supported by the Indonesian Supreme Court and USAID Program Change for Justice. Prof. Albert Jan van den Berg of ICCA's Judicial Committee talked to the seminar.

The Seminar was attended by thirty district court judges from various cities in Indonesia, some Supreme Court Justice and arbitrators of BANI. The Seminar was opened with introductory remarks by Deputy Chief Justice of the Supreme Court, Dr. H. Muhammad Saleh, who thanked ICCA for having the Seminar in Indonesia which will enlarge the knowledge and awareness of judges on the importance of international arbitration and the New York Convention.

After the interactive and successful Seminar, the judges noted that the Seminar had given them the importance of international arbitration and the New York Convention and that there should be less or little intervention in the Indonesian courts when it comes to the recognition and enforcement of international arbitration awards.

Interview On

M. Husseyn Umar is currently Vice Chairman of the Board of Management of BANI Arbitration Center, Jakarta, Indonesia. He is also an Of Counsel of the Law Firm ALI BUDIARDJO, NUGROHO, REKSODIPUTRO (ABNR), Jakarta.

He has held various positions at the Ministry of Transport and Communications. He was then appointed as Transport and Communications (including Tourism) Attaché at the Indonesian Embassy in the Netherlands (1969-1974). He was appointed as the Sectoral Support Adviser at the Permanent Secretariat of the United Nations Conference on Trade and Development (UNCTAD) in Geneva.

He has acted in arbitration cases, as arbitrator and counsel or expert, either in ad hoc arbitrations or in arbitrations administered by BANI, ICC and other international arbitration centers. He handled various dispute cases, such as dispute on investment, finance, corporate, banking, shipping, Insurance and construction.

Indonesia and UNCITRAL Model Law

M. Husseyn Umar
(Question & Answer)

Question #1 :
One of the key issues behind the preference of choosing International Arbitration to resolve dispute between parties of diverse Nationalities is the so called"….Removing the dispute from the interference of domestic courts."
Question : Could you explain what behind all this issue of a neutral, non-politicised independent tribunal to avoid National Biasness, from the Indonesia perspective?

Answer :
Parties of diverse nationalities prefer to choose international arbitration to resolve disputes mainly because there are quite a lot of advantages to resolve disputes through international arbitration rather than to go to the domestic courts. Those advantages are among others that international arbitration conducted in a third country will be out of reach of interference of domestic courts which mostly tend to apply domestic/national law which foreign parties are not familiar with. Lengthy course of proceedings through various stages of courts (district court, appeal court and supreme court) and increasing costs involved are other causes why court proceedings in domestic courts are not preferable. This situation is not only valid in Indonesia, but also in other countries.

Question #2 :
What is your comments on the remarks that there is "…. A need for Indonesia Courts to be friendlier and more supportive to the International Arbitration process"?
Question : Is this statement valid exclusively for country like Indonesia or applied to any other country as well?

Answer :
Like in any other countries there is a need for courts in Indonesia to be friendly and supportive to international arbitration, in particular to make it easier and speedy in processing recognition and enforcement of international arbitration awards. Much progress is now taking place in this respect. On 03 October in Mega Mendung, BANI as local organizer of ICCA (International Council for Commecial Arbitration) conducted the Roadshow Seminar on the New York Convention in collaboration with the Indonesian Supreme Court and supported by the USAID Program Change for Justice. Prof. Albert Jan van den Berg from the Judicial Committee of ICCA acted as speaker. The seminar will

surely enlarge the awareness of the Indonesian judges on the importance of the New York Convention, in particular with respect to recognition and enforcement of international arbitration awards. There is a need for less or little intervention by the courts regarding the implementation of international arbitration awards. This is not only valid for Indonesia but also for any other countries as well.

Question #3 :
Question : How urgent do you perceive on the implementation of Model Law in Indonesia Arbitration Law? What are the benefits and the obstacles for Indonesia in relation to the cross border trade and foreign investment?

Answer :
There is indeed an urgent need for Indonesia to consider to perceive the application of the Model Law by reviewing and adjusting the current law with respect to international arbitration. This will attract parties of diverse nationalities in the cross border trade and foreign investment to arbitrate in Indonesia. It will also benefit Indonesia in promoting the country as one of the attractive venues for international arbitrations.

Question #4 :
Most countries in the ASEAN Region had based their Arbitration Law on the Model Law and also well renowned Arbitration countries in the Region have used the UNCITRAL Arbitration Rules as their institutional rules.
Question : Why Indonesia chose to be more patient in joining the game? Is this more of a judicial or political reason?

Answer :
It is true that most countries in the ASEAN Region and other countries in the region had based their Arbitration Law on the Model Law. Although the current Arbitration Law of Indonesia is not based on the Model Law, the Law includes general principles of arbitration as they are also embodied in the Model Law. The current law regulates arbitration and alternative dispute resolutions in one law. With respect to international arbitration, the law provides only procedural requirements for recognition and enforcement of the awards. Uncertainties often arise when it comes to conducting arbitration involving parties of diverse nationalities in cross border trade in Indonesia which is often observed as domestic/national arbitration. This is because the current Indonesian law on arbitration (article 1.9) describes international arbitration as arbitration which is conducted outside the territory of Indonesia. While the Model Law defines international arbitration as arbitration which involve foreign elements, either with respect to the status of the disputing parties, or the assets in dispute, etc. There is now a developing thought to have a separate law for the domestic/national arbitration and for international arbitration. Adopting the provisions of in the Model Law could be the most practical way to harmonize the current arbitration law with the arbitration law in other countries in the region and the world at large. This is especially important for Indonesia facing the ASEAN Economic Community in 2015.

Question #5 :
Question : When do you think is the right time for Indonesia to adopt the Model Arbitration Law?

Answer :
It is now the right time for Indonesia to consider for adopting the Model Law. However, it could be a long way to go to convince and coordinate the efforts with related government agencies until it reached the parliament to have it included in the National Priority Legislation Package (PROLEKNAS) to have it adopted as a new law. We hope that the positive and progressive recommendations resulting from the BANI Arbitration Seminar which was conducted on last 02 October 2013 in Jakarta attended by national and international speakers and panelists from UNICTRAL, ICCA and various sectors of trade and industries will pace the speedy way toward reviewing the current law and adjusting it with the provisions of the Model Law.

Colin Ong is Managing Partner of Dr Colin Ong Legal Services, Brunei and a member of the Brunei, English and Singapore bars. He is a practicing barrister in England (Essex Court Chambers) and a Chartered Arbitrator. His experience includes disputes in coal; construction, oil and gas, international trade; investor-state disputes; joint venture, technology, sales and shipping. He has acted as arbitrator or as counsel in arbitrations under most major rules including AAA, BANI, CIETAC, HKIAC, ICC, LCIA, LMAA, SIAC; UNCITRAL and WIPO and also under rules including KLRCA, TAI rules. Listed by Global Arbitration Review as one of 45 leading international arbitration practitioners under the age of 45.

The Meaning of **International Arbitration**

Colin Ong[1]

1. General Introduction

Commercial parties enter into arbitration agreements for several reasons. One important reason is to exclude judicial intervention. Many commercial parties who prefer a long term relationship generally prefer to adopt arbitration as the dispute resolution process as it enables them to settle their current disputes without necessarily ending important commercial relationships. However, one of the thorny issues that remain in the arbitration legislation of some countries is the fact that there is no proper division between international commercial arbitration and domestic arbitration[2].

In this respect, it is essential for foreign investors to understand whether the seat of a particular jurisdiction will treat foreign parties who decide to take their disputes to that country. One of the advantages of going to international arbitration to resolve disputes involving parties of diverse nationalities is the perceived feelings of neutrality and the removal of the dispute from the interference of domestic courts. The perception of having a neutral, non-politicised independent tribunal, generally comprised of a sole arbitrator or presiding arbitrator of neutral nationality that does not harbour any perceived biasness toward nationals of the domestic courts' jurisdiction is one of the major reasons why parties select the international arbitration process over domestic court litigation.

From a conflict of laws perspective, the international nature of a relationship of the parties is generally scrutinized carefully with a view to establishing a connection with a particular national legal system. The existence of a conflict of laws situation tends to arise in the practice of international arbitration. At the outset of arbitration, there is often tension between the parties and

[1] Managing Partner, Dr Colin Ong Legal Services, Brunei. Barrister and Chartered Arbitrator of Essex Court Chambers, London; President, Arbitration Association Brunei Darussalam. Visiting Professor of various universities including Padjajaran University [The views expressed in this paper are the personal views of the author only. Any useful comments are to be sent to onglegal@brunet.bn].

[2] See *Redfern and Hunter on International Arbitration* (5th Ed, Oxford University Press, 2009) at 1.16 where the authors explain "*The term 'international' is used to mark the difference between arbitrations which are purely national or domestic and those which in some way transcend national boundaries and so are 'international'*"

sometimes between the arbitral tribunal and the national courts on crucial issues such as whether the arbitration is a domestic one or whether it is in the nature of an international arbitration. In addition, there may also be a jurisdictional struggle taking place between the arbitral tribunal and state courts at the outset. It is therefore crucial that arbitration legislation is properly drafted to take into account the distinction between national arbitration and international arbitration and to reduce any conflict of laws issues.

The primary text at international law level which defines "international commercial arbitration" is to be found at Chapter 1, Sections 1(3) and 1(4) of the UNCITRAL Model Law 1985. In line with the recommendations of UNCITRAL, there are over 80 countries that have adopted the 1985 UNCITRAL Model Law as their national law for international commercial arbitration[3].

Whilst many were left to implement other statutes to deal with domestic arbitration, 37 countries have decided to adopt the Model law as the basis for their domestic arbitration law as well. Initial Most of the countries adopted the original 1985 text of the Model Law but some countries in the Asia-Pacific have also in different degrees adopted various provisions of the updated 2006 Amendments to the Model Law[4]. This is a good thing for states that are dependent on foreign direct investment. The desirability for states to achieve uniformity within their national laws regarding arbitration is ultimately helpful in encouraging international investors who may themselves be from Model Law jurisdictions.

2. The Definition of "International" in International Commercial Arbitration

As the UNCITRAL Model Law has been adopted as the international standard arbitration legislation by a large number of countries, it would be appropriate for Indonesia to consider adopting the Model Law as part of the national law to deal with any issues of international commercial arbitration. This would not be incompatible with Indonesia as a Civil Law jurisdiction as the Model Law has been designed to be used by both Civil and Common Law countries. It would be important to set out how the Model Law defines international commercial arbitration. Section 1(3) of the Model Law provides as follows:

Arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

  (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

  (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of thedispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

The most important aspect of Section 1(3) of the Model Law is the fact that if any one of the above circumstances is present, the arbitration will be considered as "international" and will therefore automatically fall within the ambit of the Model Law. It is important to define the term "international" properly as the applicability of the Model Law itself depends on this issue. It was agreed by the UNCITRAL Working Group

[3] For a full list of the countries that have adopted the UNCITRAL Model Law as their national arbitration legislation, see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

[4] An example of some of the Asia-Pacific countries that have adopted various provisions of the 2006 Amendments include (in order of date of adoption of the 2006 amendments to the Model Law) Brunei, Hong Kong, Australia and Singapore.

that "*the definition of 'international' was of utmost importance for the practical effects of a Model Law on international commercial arbitration and crucial for its acceptability. It was recognized that to find a satisfactory solution was one of the most difficult tasks in the preparation of the model law*" [5].

At the earlier working stage, a majority of the Working Group[6] had agreed that the term "international" should be given a wide interpretation but they were not ready to make a decision as to the various suggestions given by various countries as to how to define "international." The Working Group then requested the UNCITRAL Secretariat to work on a draft provision that would contain a "*wider and more general definition, possibly with an enumeration of objective criteria*" [7].

3. Parties places of business are in different states

One would note that the main connecting factors for the definition of the term "international" would be the parties to the arbitration themselves and their respective place of business. Article 1(3)(a) of the Model Law requires that the place of business of the parties to be in different states at the time of entering in the arbitration agreement.

In the event that a party has more than one place of business, Article 1(4)(a) of the Model law stipulates that the place of business is that which has the closest relationship to the arbitration agreement. In the event that one or more parties have no place of business, Article 1(4)(b) of the Model Law provides that one should focus on their habitual residencies.

Finally Article 1(3)(c) of the Model Law gives the parties the right to expressly agree that their arbitration should be deemed to be an international one by stipulating that their arbitration refers to more than one country.

4. Important to use the term "commercial" in the context of international commercial arbitration

It is also important to add in the word "commercial" after International and before Arbitration. This is because from a historical perspective, the unqualified term "*international arbitration*" has generally been used to describe public international law arbitration where one or more states have participated in the arbitration. Due to the participation of states and the added complexities surrounding sovereignty implications, public international law arbitration is generally subject to different rules and considerations. It is therefore more useful and accurate to describe arbitration as "*commercial arbitration*" as commercial laws are generally subject to a different set of characteristics and have more flexible rules than from public international arbitration.

Like other Civil law countries that have a codified set of laws for commercial law or commercial law code, Indonesia has its own Indonesian Civil Code ("ICC"). Whilst at times the 160 year old ICC may not be too clear as to the definition of what is commercial, Indonesian lawyers can still easily point out and identify a commercial transaction[8].

Although the Model Law itself does not devote a sentence to the term "commercial" and has in fact only referred to the term by way of a footnote, it is important that arbitral tribunals and courts do accord the term "commercial" as widely as possible so as to encompass all matters that may arise from any dealings of parties in a commercial context.

5. Additional Proposals to Augment the provisions of Article 1 of Model Law

Some countries in the Asia-Pacific region who have adopted the Model Law as part of their

[5] A/CN.9/245 at paragraph 164.
[6] A/CN.9/233, at paragraphs 58-59.
[7] A/CN.9/233, at paragraph 60.
[8] The procedural rules as set out in the Algemene Bepalingen van wetgeving voor Indonesie and the Het Herziene Indonesisch Reglement also do not appear to be too clear as to the specific definition of "commercial".

own arbitration laws have also inserted additional sections into their international arbitration legislation to further protect the sanctity of the parties' agreement to international arbitration. Taking the example of the how the Brunei arbitration legislation was updated in 2008, when the drafters looked at all the arbitration statutes from other Commonwealth countries including Malaysia; Hong Kong, India, New Zealand and Singapore, we noted that whilst all those countries shared the same legal heritage based on English Common Law, these countries departed away from adopting the English Arbitration Act 1996 as the basis of their respective updated arbitration statutes. England had in 1996 departed away from the UNCITRAL Model Law and this had meant that the new English court judgments based on the English 1996 Act were not longer a good benchmark with which lawyers, arbitrators and judiciary from the Commonwealth could continue to refer to for guidance.

Whilst, it was felt that the UNCITRAL Model Law was more Civil law in nature and substance, the drafters fortunately believed that it was the correct model to adopt. The drafters took into account the concerns of the legal community that it may be too difficult for lawyers who are not arbitration practitioners to be familiar with international jurisprudence and concepts and that it may be too difficult for them to access and locate academic materials when dealing with the Model Law.

Unlike the other countries who took a decision to have a single arbitration statute that could deal with both domestic and international arbitration, the Brunei drafters decided to implement two separate arbitration legislation, one to deal with each type of arbitration. Whilst the new domestic arbitration statute is also based on the Model Law, it is clear from comparing the two statutes that all of the Model Law provisions were adopted in the International Arbitration Order.

In order to prevent confusion by parties and counsel, it was essential that the statute dealing with "international arbitration" had to be further insulated from parties and judiciary who might implement principles based on domestic arbitration into the international arbitration order. Section 5 of the Brunei International Arbitration Order, 2009 ("BIAO") was drafted in the following manner[9] to distinguish and insulate the two arbitration statutes and to make it clear that nothing from the domestic Brunei Arbitration Order would affect "international" arbitrations:

"(1) This Part and the Model Law shall not apply to an arbitration which is not an international arbitration unless the parties agree in writing that this Part or the Model Law shall apply to that arbitration.

(2) Notwithstanding Article l(3) of the Model Law, an arbitration is international if-

(a) at least one of the parties to an arbitration agreement, at the time of the conclusion of the agreement, has its place of business in any State other than Brunei Darussalam;

(b) one of the following places is situated outside the State in which the parties have their places of business -

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

[9] The arbitration legislation of all of the other Commonwealth countries has similar provisions to Section 5 of the Brunei IAA. For example, see Section 1(3) of the New Zealand Arbitration Act 1996; Section 2(1) Malaysian Arbitration Act 2005; Section 2(1)(f) India Arbitration and Conciliation Act 1996; Section 5 of the Singapore International Arbitration Act.

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country or territory.

(3) For the purposes of subsection (2)(a) if a party has more than one place of business, the place of business shall be that which has the closest relationship to the arbitration agreement; (b) if a party does not have a place of business, a reference to his place of business shall be construed as a reference to his habitual residence.

(4) Notwithstanding any provision to the contrary in the ***Arbitration Order, 2009, that Order shall not apply to any arbitration to which this Part applies****."*

[My Emphasis]

The definition of "international arbitration" under Section5(2)(A) of the Brunei IAO is clearly based on the definition set out in Article 1(3) of the Model Law. The BIAC is however wider than the Model Law as an arbitration is considered international when "*at least one of the parties to an arbitration agreement, at the time of the conclusion of the agreement, has its place of business in any State other than Brunei Darussalam*."

This means that it is immaterial if all the parties to the arbitration come from the same State. The important factor is that at least one of the parties to the arbitration has its place of business outside Brunei. The corresponding Article 1(3)(b) of the Model Law provides that an arbitration is considered international if "th*e parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States*".

The significance of this fine distinction means under the Model Law, an arbitration taking place between two parties from the same State other than Brunei would not be regarded as an international arbitration. However, it would be treated as an "international arbitration" under the Brunei IAO.

Parties from the same foreign country may be tempted to select Brunei as the seat of arbitration as arbitral awards granted in Brunei would be deemed to be a foreign international arbitration award. This means that it is likely to be even easier to enforce such foreign awards in their own country under their own arbitration legislation that gives effect to the New York Convention. It would be harder for them to enforce a domestic award made in their own country.

It is respectfully suggested that perhaps Indonesia may also wish to adopt a similar position by having two different statutes which could respectfully deal with domestic and international arbitration. Such a move to introduce the UNCITRAL Model Law as the law for international arbitrations would certainly reassure foreign investors who have to arbitrate in Indonesian seated arbitrations and would also please the international arbitration community as well as the local Indonesian legal community who may end up with having more foreign arbitrations in Indonesia.

Secondly, by segregating and distinguishing between domestic and international arbitration, it would not cause too much confusion to Indonesian lawyers who are advising on purely domestic arbitration matters if there were a separate domestic arbitration legislation to deal with domestic arbitrations. As a matter of practicality, it would also be important for BANI to be stipulated as the default statutory arbitration appointing under both the domestic and international arbitration statutes.

6. Examples of judgments from other Model Law jurisdictions in relation to Article 1 of the Model Law

It is useful to take a look at how some of the other countries who have adopted the Model Law have dealt with cases on interpreting the term "international" arbitration. UNCITRAL's CLOUT information storage has case law dealing with Article 1(3) of the Model Law. The Hong Kong court decision of Triple v Star (Universal)[10] had to deal with a situation where the plaintiff's place of business was in Russia; the goods were to be delivered to Russia and, the place of business of both defendants were in Hong Kong. The Court came to the decision that any arbitration between the parties was to be considered an "international arbitration" under Article 1(3) of the Model Law[11].

Another Hong Kong High Court in the case of Vibroflotation AG v Express Builders[12] upheld the provisions of Article 1(3)(a) of the Model Law and deemed that the arbitration should be considered as an international arbitration as the plaintiff and the defendant both have their places of business in different states.

The Singapore High Court in the case of Vanol v Hin Leong[13] upheld the provisions of Article 1(3)(b) of the Model Law. Both parties to the dispute had their place of business in Singapore and the governing law of the contract was Singapore law. Several parts of the contract including ones dealing with the provision of the cargo; transfer of risk and loading operations were all to be performed in Korea. The Singapore High Court held that the place of substantial performance of the contract was more closely connected with Korea and therefore the arbitration was deemed to be an "international" one.

The Singapore judgment of Mitsui Engineering v PSA Corp[14] held that the fact that the governing law was Singapore law and the place of arbitration was Singapore was irrelevant. The question was not which place had the closest relationship to the consortium agreements but which place of business had the closer relationship to the consortium agreements. The Singapore court there held that even if it had been concluded that Mitsui's place of business was Singapore, Mitsui's substantial performance of its obligations was in Japan. The court concluded by ruling that the arbitration between Mitsui and Keppel was an international one and not a domestic Singapore arbitration.

The Singapore Court of Appeal in Navigator Investment v Acclaim Insurance[15] held that the agreement to adopt SIAC Rules meant that the arbitration was to be regarded as an "international" arbitration[16]. The Court of Appeal reasoned that if the parties had agreed that the *lex arbitrii* was to be the IAA, it was difficult to see how the parties could be said not to have agreed that the IAA was to apply within the meaning of s 5(1) of the IAA.

One can therefore see that many of the courts of the jurisdictions that had adopted the UNCITRAL Model Law had faithfully applied both the spirit and the interpretation behind the Model Law in an arbitration friendly manner.

7. The Definition of "International" under in Indonesian Law No. 30 of 1999

Article 1(9) of Indonesian Arbitration Law No 30 of 1999 adopts a completely different meaning of the tern "international" to Article 1 of the Model Law. Article 1(9) of the Indonesian Law provides that :-

"*International Arbitration Awards shall mean awards handed down by an arbitration institution or individual arbitrator(s) outside the*

[10] See Triple V Inc Ltd v Star (Universal) Co Ltd and Sky Jade Enterprises Group Ltd (27 Jan 1995) at A/CN.9/SER.C/ABSTRACTS/7.
[11] For another similar Hong Kong decision, see China National Electronic Import & Export Shenzen Co v Choi Chuk Ming (trading as ERWO Enterprise Co (9 March 1993) - A/CN.9/SER.C/ABSTRACTS/66.
[12] See Vibroflotation AG v Express Builders Co Ltd [1994] HKCFI 205.
[13] See Vanol Far East Marketing v Hin Leong Trading Pte Ltd [1996] 2 SLR(R) 172.
[14] See Mitsui Engineering & Shipbuilding Co Ltd v PSA Corp Ltd and another [2003] 1 SLR(R) 446 at 447.
[15] See Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd [2010] 1 SLR 25.
[16] Rule 32 of the SIAC Rules 2007 stated that the "law of the arbitration shall be the [IAA]".

jurisdiction of the Republic of Indonesia, or an award by an arbitration institution or individual arbitrators(s) which under the provisions of Indonesian law are deemed to be International arbitration awards".[17]

One can see that the definition of the term "international" under the current Indonesian Law is not only significantly narrower in scope than Article 1(3) of the Model Law but it is also focuses on the identity and location of the arbitral tribunal rather than the parties to the arbitration. It is humbly suggested that this narrow definition can give scope to abuse by court judges who may not be friendly or understanding to the international arbitration process.

In the event that Indonesia decides to adopt a new single arbitration act to replace Law No. 30 of 1999, and decide to adopt the Model Law for both domestic and international commercial arbitration, she would not need to define this term unless the intention is for Indonesian law to make a distinction between domestic and international commercial arbitration.

However it is more likely that Indonesia may well find it more practical to decide to adopt two separate arbitration legislation and adopt the Model Law as its international arbitration legislation whilst keeping a domestic arbitration act. More elaboration will be provided as to the suitability of adopting either a single arbitration act or a dual arbitration system.

In the event that Indonesia does decide to update its arbitration statute and adopt the UNCITRAL Model Law, it is important that it does not try to amend the provisions of the Model Law and in particular that it leaves the definition of Article 1 intact.

Any international arbitration law must be drafted in a clear and precise manner so that there is no avenue for state courts or other parties to interfere in the arbitration process. If parties have agreed to adopt the process of international commercial arbitration as the exclusive means of resolving their disputes, the national courts of any country should also respect the intent and decision of the parties in entering into an arbitration agreement[18].

8. The need for Indonesian courts to be friendlier and more supportive to the international arbitration process

In the event that Indonesia does adopt the Model Law as part of its international arbitration regime[19], the other very important article of the Model Law that it needs to adopt in full is that of Article 5 which has been clearly worded as follows: "*In matters governed by this Law, no court shall intervene except where so provided in this Law.*"

However, one accepts that at the end of the day it is not enough to simply amend and update the international arbitration law in any country. There needs to be total cooperation from the national courts not to interfere in the arbitration process and to only get involved if called upon by the arbitral tribunal to assist the arbitration process in instances where the arbitral tribunal may not have any powers to act[20].

The co operation of the national courts is truly required in supporting the arbitration process. Such court assistance could include friendly judicial actions such as staying court proceedings in favor of arbitration, referring parties to arbitration, compelling arbitration, reviewing and enforcing awards. Further to the possible parallel actions taking place between arbitral tribunals and courts, that will

[17] For further reading see Professor Dr. H. Priyatna Abdurrasyid, "*Arbitrase & Altrernatif Penyelesaian Sengketa" (Published by Fikahati)*

[18] The principle of *pacta sunt servanda* is adopted in Indonesian law by virtue of Article 1338 of the Indonesian Civil Code which clearly states that all legally executed agreements shall bind the individuals who have concluded them by law.

[19] See Colin Ong, "*Closing the Gaps*", The Indonesia Report 2013 at 160 for a suggestion of how Indonesia could adopt the Model Law and the current advantage of Jakarta already being designated as the permanent seat of arbitration under the Rules of Arbitration in the 2010 Protocol to the ASEAN Charter in Dispute Settlement Mechanism.

[20] For example in issuing a subpoena against a third party to order attendance or provision of documents or in issuing an emergency freezing order.

take place in situation where there is an application to court to challenge an arbitrator or a particular process in the arbitral hearing, national courts should avoid any temptation in applying any nationalistic protective tendencies towards its own nationals or towards its own jurisdiction.

The one certain conclusion that is a constant in all jurisdictions is that, at the end of the day, there will continue to be interplay between national courts and arbitral tribunals and this is a complicated process Even the most arbitration friendly national courts cannot always be taken for granted as their treatment towards arbitral tribunals vary across time and the needs of the state as whole.

One can roughly break down the role of the national courts into three separate junctures of interaction, namely (a) Interaction between courts and tribunals at the outset of the arbitration process; (b) Interaction between courts and tribunals during the course of the arbitration process and (c) Interaction during the enforcement of award process[21].

The adoption of the UNCITRAL Model Law as part of the national legislation in many arbitration friendly seats have influenced and changed the general attitude of national courts of deferring to arbitral tribunals where there is a possibility of both national courts and arbitral tribunals meeting. Where the interaction takes place at the outset of the arbitration process, Article 16(1) of the Model Law[22] which forms the basis of the doctrine of Kompetenz-Kompetenz[23], sets down the right of the arbitral tribunal to decide and rule definitively on its own jurisdiction.

Countries who have adopted the Model law as part of their own national legislation have in fact sanctioned the Kompetenz-Kompetenz principle and courts are expected to not intervene in arbitrations which are already in progress. Kompetenz-Kompetenz has developed into a universally well established practice, amongst Model Law countries, that the arbitral autonomy gives the arbitral tribunal the right to rule as to its own jurisdiction and also to the existence of the arbitration agreement[24].

Article 16 of the Model Law[25] also states that a tribunal "may" rule and decide rather than a tribunal "shall" decide and this distinction is important since its serves to emphasise that the tribunal has a power, but is not obliged to exercise it.

Hopefully, Indonesia will be able to adopt new arbitration statutes that can regulate the conduct of international arbitration and domestic arbitration. It is hoped also that the local national courts will also become friendlier to and more supportive of the practice of both classes of arbitration and will adopt the spirit of Article 5 of the Model Law by refraining from getting involved or interfering with international arbitrations.

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[21] For a detailed discussion on these issues, see Colin Ong, "*Interaction between National Courts and Arbitral Tribunals*", Austrian Yearbook of International Arbitration 2012 at 207.

[22] Article 16(1) of the Model law provides that "*The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*"

[23] The literal meaning of Kompetenz-Kompetenz in German is "*jurisdiction on jurisdiction*".

[24] Dimolitsa, "*Separability and Kompetenz-Kompetenz*", ICCA Congress Series no. 9 (Paris/1999) at pages 217 to 256.

[25] Article 16(1) of the Model Law provides that "*The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*"

At present, Dr. Winarta is the Founder & Managing Partner of Frans Winarta & Partners Law Firm. In his practice, he handles all aspects of civil, commercial and criminal litigation. He is also experienced in international and national arbitration and alternative dispute resolution. He has experience in various kinds of disputes ranging from general corporate matters, joint venture, construction issue, oil and gas issue, mining issue, cross-border investment issue, taxation, and many more.

He has been awarded as a Fellow Certified BANI Arbitrator (FCBArb.), given under the seal of the Indonesian National Board of Arbitration (BANI). He functions as the Co-Chairman and Founder of the Indonesian Chapter of the Chartered Institute of Arbitrators (CIArb). He is also an Associate of the Chartered Institute of Arbitrators (ACIArb.) and Co-Founder of the Indonesian Chapter of the International Chamber of Commerce (ICC). He is currently serving in as the Chairman of the ICC Indonesia Court of Arbitration as well as arbitrator in various international arbitration institutions.

UNCITRAL ARBITRATION RULES AS PROCEDURES FOR AD HOC ARBITRATION

Dr. Frans H. Winarta, S.H., M.H., FCBArb.[1]

At this moment arbitration as an alternative business dispute resolution has developed to become a method to resolve business disputes outside the courts that is most liked by business actors, either arbitration under the management of a permanent arbitration institution or ad hoc arbitration.

Arbitration Rules of the United Nations Commission on International Trade Law ("**UNCITRAL Arbitration Rules**") which contains the procedures for ad hoc arbitrations drafted by the United Nations Commission on International Trade Law ("**UNCITRAL**") has developed to become the rules of arbitration that are most often used by business actors in holding ad hoc arbitration.

I. DEFINITION OF AD-HOC ARBITRATION

Different from permanent arbitration or institutional arbitration, ad hoc arbitration is 'incidental' arbitration that will only be formed after an arbitration dispute occurs, and after such arbitration dispute is decided, this arbitration will be automatically dissolved.

Regarding the meaning of ad hoc arbitration, Prof. Sudargo Gautama in his book entitled *Arbitrase Perdagangan Internasional* explains as follows:

> *This arbitration by ad hoc is arbitration that is not held by or through a certain Arbitration Institution*[2].

II. IMPLEMENTATION OF AD HOC ARBITRATION UNDER UNCITRAL RULES 2010.

A. HISTORY OF UNCITRAL ARBITRATION RULES

UNCITRAL Arbitration Rules have been drafted by UNCITRAL which is a commission established by the United Nations ("**UN**") for the purpose

[1] The author is listed as an arbitrator in the panels of arbitrators of the SIAC, BANI and KLRCA. The author is also a member of the ICC Court of Arbitration and also the founder and Chairman of the Arbitration Commission for ICC Indonesia.

[2] Sudargo Gautama, *Arbitrase Perdagangan Internasional*, (Bandung: Publisher: Alumni, 1979), pg. 19.

of harmonizing and unifying the law by focusing on international trade[3]. These UNCITRAL Arbitration Rules were adopted and ratified by the General Assembly of the United Nations on 15 December 1976[4].

In its development, a revision was made to the UNCITRAL Arbitration Rules 1976 which was later known as the UNCITRAL Arbitration Rules 2010. In such revision there are several new concepts, among others, separation between the Notice of Arbitration and Statement of Claim and between the Reply to Notice of Arbitration and Statement of Defence, introduction and regulation on multiparty arbitration, new regulation on the submission of the challenge of arbitrator, and several other new concepts. These UNCITRAL Arbitration Rules 2010 have been in effect since 15 August 2010.

Regarding these UNCITRAL Arbitration Rules, many people still do not understand that the UNCITRAL Arbitration Rules are different from the UNCITRAL Model Law. Different from the UNCITRAL Arbitration Rules which contain procedures by using ad hoc arbitration according to UNCITRAL, UNCITRAL Model Law is an arbitration rule that is drafted to be the reference or ground for the formation of an arbitration law or regulation in a country. For example, Singapore combines the provisions in the UNCITRAL Model Law and New York Convention into the Singapore International Arbitration Act[5].

B. PROCEDURES FOR USING UNCITRAL ARBITRATION RULES IN IMPLEMENTATION OF AD HOC ARBITRATION

In ad hoc arbitration the parties can control every dispute resolution aspect and procedure that is going to be carried out. In ad hoc arbitration the appointment of the arbitrator or arbitrators with all of their competence is also the authority of the parties in the dispute. The arbitration venue can also be determined based on the parties' wishes.

However, the UNCITRAL Arbitration Rules have determined several basic provisions which stipulate the procedures for ad hoc arbitration that must be followed by the parties and the arbitral tribunal in implementing ad hoc arbitration under the UNCITRAL Arbitration Rules.

To be able to use the UNCITRAL Arbitration Rules as the procedures for an ad hoc arbitration hearing, the agreement of both parties in the dispute is an element that must be fulfilled, either by including an arbitration clause in the contract previously, or by agreeing on it after the dispute occurs. In the UNCITRAL Arbitration Rules 1976, the agreement to choose the UNCITRAL Arbitration Rules must be declared in writing, but in the UNCITRAL Arbitration Rules 2010 such provision has been eliminated, so such agreement no longer has to be declared in writing.

C. ROLE OF APPOINTING AUTHORITY IN IMPLEMENTATION OF AD HOC ARBITRATION UNDER UNCITRAL RULES 2010

In the implementation of an ad hoc arbitration proceeding under the UNCITRAL Rules, there is an authority referred to as the Appointing Authority. The Appointing Authority is an institution that has the authority to appoint the arbitrator, if the parties fail to choose the arbitrator pursuant to the time limit determined in the Rules of Arbitration[6].

In the UNCITRAL Arbitration Rules 2010, the authority of the Appointing Authority to

[3] Frans Hendra Winarta, *Hukum Penyelesaian Sengketa Arbitrase Nasional Indonesia dan Internasional*, Jakarta: Sinar Grafika, 2012, pg. 178-179
[4] Resolution of UN General Assembly 31/98 dated 15 December 1976.
[5] Chan Leng Sun, "*The Arbitration Law of Singapore*", can be accessed through: http://www.siac.org.sg/index.php?option=com_content&view=article&id=192:the-arbitration
[5] Ramlan Ginting, *Transaksi Bisnis dan Perbankan Internasional*, Jakarta: Publisher: Salemba Empat, 2007, pg. 155

appoint the arbitrator or arbitral tribunal that has jurisdiction to hear and rule on a case is stipulated in Article 8 paragraph (2) of the UNCITRAL Arbitration Rules 2010 which states that:

> *"The appointing authority shall appoint the sole arbitrator as promptly as possible. In making the appointment, the appointing authority shall use the following list-procedure, unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case."*

And Article 10 paragraph (3) of the UNCITRAL Arbitration Rules 2010 which states that:

> *"In the event of any failure to constitute the arbitral tribunal under these Rules, the appointing authority shall, at the request of any party, constitute the arbitral tribunal and, in doing so, may revoke any appointment already made and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator."*

In the UNCITRAL Arbitration Rules 2010 in addition to the authority to appoint or form the arbitrator/arbitral tribunal as previously explained, the Appointing Authority also has 3 (three) other authorities:

1. To decide on a request regarding a challenge of arbitrator as stipulated in Article 13 paragraph (4) of the UNCITRAL Arbitration Rules 2010:
2. To appoint a substitute arbitrator (in relation to the challenge of arbitrator), as stipulated in Article 14 paragraph (2) of the UNCITRAL Arbitration Rules 2010:
3. Authority with regard to the determination of arbitration fees, as stipulated in Article 41 paragraph (3) of the UNCITRAL Arbitration Rules 2013:

The Appointing Authority is basically formed based on the agreement of the parties in the dispute, but if the parties have difficulties agreeing on the appointment of the appointing authority, Article 6 paragraph (2) UNCITRAL Arbitration Rules 2010 stipulates as follows:

> *"If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance with paragraph 1 has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority."*

Based on such provision, if the parties have difficulties agreeing on the appointment of the Appointing Authority, based on Article 6 paragraph (1) of the UNCITRAL Arbitration Rules 2010, the parties can request assistance from the Secretary-General of the Permanent Court of Arbitration in Den Haag, the Netherlands to appoint such Appointing Authority.

It should be noted that the appointment of a permanent institution, such as the SIAC or Permanent Court of Arbitration, it does not mean that the ad hoc arbitration will be under such permanent institution because their role as the Appointing Authority will immediately terminate when the entire Arbitral Tribunal is formed. Thus, it is very important to be understood that the parties using the UNCITRAL Rules that administrative matters in relation to the arbitration hearing will no longer be handled by such permanent institution after the Arbitral Tribunal is formed. The Appointing Authority can only be involved again if there is a submission of a challenge of arbitrator, and if the arbitral tribunal/arbitrator refuses to withdraw, the Appointing Authority has the authority to decide.

D. REGULATION ON CHALLENGE OF ARBITRATOR IN UNCITRAL RULES 2010

Sometimes in the process to resolve a dispute through arbitration, the parties object to the

arbitrator or arbitral tribunal that has been appointed and based on the matter, every arbitration rule provides an opportunity for the party to submit a challenge of arbitrator. Margareth L. Moses in her book states as follows:

> *"A Party can challenge the appointment of an arbitrator and seek his removal at the time the tribunal constituted, or later, if new facts come to light".*[7]

In relation to such challenge of arbitrator, Article 12 paragraph (1) of the UNCITRAL Arbitration Rules 2010 states as follows:

> *"Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence".*

By observing Article 12 paragraph (1) of the UNCITRAL Arbitration Rules 2010, an arbitrator can be subject to a challenge if there is any doubt from the parties as to such arbitrator's independence or impartiality.

> Regarding impartiality, Black's Law Dictionary defines such matter as follows: *"unbiased; disinterested"*[8]

Referring to the definition from Black's Law Dictionary, it can be concluded that impartiality is an attitude of an arbitrator who does not favor one party, respects the presumption of innocence and is fair. David D. Caron in his book in relation to impartiality states as follows:

> *"In general, impartiality means that an arbitrator will not favour one party more than another"*[9]

Different from impartiality, according to David. D. Caron, independence is as follows:

> *"Independence requires that the arbitrator remains free from the control of either party"*[10]

Such definition explains that basically an independent arbitrator is an arbitrator who is not under the influence of either of the parties. David D. Caron also distinguishes between impartiality and independence as follows:

> *"Impartiality thus refers to the arbitrator's internal disposition, while independence refers to external control over the arbitrator. Impartiality is a state of mind and thus somewhat elusive, while independence involves some relationship and is thus more a question of fact"*[11]

From such explanation, it is clear that impartiality refers to an internal condition or comes from the arbitrator, while independence refers to a condition that comes from an external factor that could influence such arbitrator.

In addition to the above independence or impartiality, one of the grounds for the submission of a challenge of arbitrator in an arbitration proceeding is an indication of a conflict of interest as stated by Margareth L. Moses in her book, as follows:

> *"The primary ground for challenging an arbitrator is a conflict of interest"*[12]

One of the universal indicators to be applied in relation to this conflict of interest is the guidelines from the International Bar Association, i.e. the IBA Guidelines on Conflict of Interests in International Arbitration which divide the definition of conflict of interest into 3 classifications, i.e. the red list, orange list, and green list.

In relation to this challenge of arbitrator, the UNCITRAL Arbitration Rules 2010 provide the following procedures:

1.Providing a notice of challenge not later than 15 (fifteen) days after the appointment of such arbitrator or after finding the alleged lack of independence or impartiality of such arbitrator (Article 13 paragraph (1) of the

[7] Margareth L. Moses, *The Principle and Practice of International Commercial Arbitration*, (New York: Cambridge University Press, 2008), pg. 140
[8] Bryan A. Garner, Black's Law Dictionary Ninth Edition, USA: A Thomson Reuters Business, 2009, pg. 820.
[9] David D. Caron, *The Uncitral Arbitration Rules: A Commentary,* England: Oxford University Press, 2006, pg. 242
[10] *ibid*
[11] *ibid*
[12] Margareth L. Moses, *op.cit,* pg. 140

UNCITRAL Arbitration Rules 2010);

2. Such notice of challenge must be served to the other party in the dispute, the arbitrator to whom the challenge is addressed, and the other arbitrators. Such notice must state the reason for submitting such challenge of arbitrator (Article 13 paragraph (2) of the UNCITRAL Arbitration Rules 2010);
3. If the parties agree on such challenge, the arbitrator to whom the challenge is addressed must withdraw from his position as an arbitrator in an arbitration proceeding (Article 13 paragraph (3) of the UNCITRAL Arbitration Rules 2010);
4. If 15 days after the submission of the notice of challenge, the parties do not agree on such challenge, within 30 days after the submission of such notice, the Appointing Authority must render a decision in relation to such challenge of arbitrator (Article 13 paragraph (4) of the UNCITRAL Arbitration Rules 2010).

Although in Indonesia a challenge of arbitrator is rarely submitted, it is different in international arbitration where a challenge of arbitrator is more commonly submitted. It is because in the common law concept which largely affects international arbitration proceedings, the submission of a challenge of arbitrator has been recognized and applied.

In ad hoc arbitration, there is no arbitration institution that is involved if there is a submission of a challenge of arbitrator, so the arbitrator tribunal must arrange the submission of the challenge of arbitrator and the submission of arguments from the parties in relation to such challenge, and eventually decide whether the arbitral tribunal and/or arbitrator concerned will withdraw or not, and if the arbitral tribunal and/or arbitrator refuses to withdraw, the Appointing Authority will be further involved to decide whether based on the ground for the submission of the challenge, the arbitral tribunal and/or arbitrator concerned must withdraw or not.

Thus, it is very important for an arbitral tribunal to be prudent in their action during the ad hoc arbitration proceeding, either within or outside the hearing, because actions outside the hearing can often be used as the ground for submitting a challenge.

The Arbitral Tribunal's prudence to avoid the possibility of a challenge can be done by sending any correspondence, documents, and other matters related to the arbitration hearing to the party that does not attend the arbitration hearing. This is done so that the absent party cannot use the lack of a fair trial because it does not involve such party as a reason for submitting a challenge.

E. SUPERVISORY FUNCTION IN IMPLEMENTATION OF AD HOC ARBITRATION UNDER UNCITRAL RULES 2010

Basically the implementation of ad hoc arbitration is different from a dispute resolution through Institutional Arbitration. One of the differences between the two is the existence of a supervisory function over the hearing. Dr. Ramlan Ginting states in his book entitled *Transaksi Bisnis dan Perbankan Internasional* as follows[13]:

> *"From the aspect of quality of the award, it can be said that an arbitral award rendered by an arbitration institution is more prudent compared with an arbitral award rendered by ad hoc Arbitration, considering that an ad hoc arbitration's award does not receive any supervision whatsoever."*

The absence of involvement of any institution whatsoever in the supervisory function is further explained by Gary B. Born in his book entitled *International Arbitration Cases And Materials* which can be quoted as follows:

[13] Dr.Ramlan Ginting, *op.cit*, pg. 153.

"Ad hoc arbitrations are not conducted under the auspices or supervision of an arbitral institution. Instead, parties simply agree to arbitrate, without designating any institution to administer their arbitration. Ad hoc arbitration agreements will often choose an arbitrator (or arbitrators) who is (or are) to resolve the dispute without institutional supervision or assistance. The parties will sometimes also select a pre-existing set of procedural rules designed to govern ad hoc arbitrations".[14]

Different from the opinion of Dr. Ramlan Ginting, Born sees the positive side of the absence of any supervision over the arbitral tribunal. Without such supervision, ad hoc arbitration is more flexible, cost effective, and better in keeping the parties' confidentiality[15]. Such advantages become an attraction and can keep strengthening the existence of the dispute resolution through ad hoc arbitration.

III. SEVERAL OBSTACLES IN IMPLEMENTATION OF AD HOC ARBITRATION

A. Absence of Time Limitation to Render Arbitral Award

Institutional Arbitration usually specifically stipulates the time limit to render an arbitral award, so the proceeding is more certain. For example, in BANI's Procedures, it is stipulated that the time limit to render an award is only 30 (thirty) days from the closing of the hearing, and the time limit for the hearing is 180 (one hundred and eighty) days from the appointment of the Arbitral Tribunal. Similar to BANI's Procedures that have a provision on the time limit to decide on an arbitration case, the ICC Rules also stipulate that an arbitral award must be rendered not later than 6 (six) months from the signing/ratification of the Terms of Reference.

Different from institutional arbitration's procedures which usually limit the time to render an arbitral award, UNCITRAL Arbitration Rules 2010, which are the procedures ad hoc arbitration, do not stipulate the time limit to render an arbitral award.

Article 17 paragraph (2) of the UNCITRAL Arbitration Rules 2010 provide an explanation on the time limit for a hearing in ad hoc arbitration, where the time limit for a hearing that has been stipulated in the UNCITRAL Arbitration Rules 2010 can basically be determined again by the arbitral tribunal or based on the agreement of the parties in the dispute[16]. Thus, the determination of the time limit, including the time limit to render an award in ad hoc arbitration tends to be more free and flexible. However, the absence of any limitation on rendering an arbitral award in this ad hoc arbitration can result in quite a long time for the hearing because there is no obligation for the arbitral tribunal or the parties to follow any time limitation. The absence of any time limitation is often abused by the parties in arbitration to delay the hearing.

Thus, in the implementation of ad hoc arbitration, the arbitral tribunal should schedule the hearing accordingly, so that the arbitration proceeding can be held efficiently.

B. Administrative duties as burden of Arbitral Tribunal

Administrative functions become one of the differences between institutional arbitration and ad hoc arbitration. One of the advantages if the parties choose a dispute resolution through institutional arbitration is the clarity on who will perform the administrative functions. We quote an opinion of Margaret L Moses in her book entitled *The Principles and*

[14] Gary B. Born, *International Arbitration Cases and Materials*, (Netherlands: Kluwer Law International BV, 2011), pg. 66
[15] *Ibid., p. 67.*
[16] *The UNCITRAL Arbitration Rules 2010, at Article 17 (2),* which states as follows, *"As soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties."*

Practice of International Commercial Arbitration, as follows[17]:

> *"There are advantages and disadvantages for each choice. With an institutional arbitration, the advantages are that the institution performs important administrative functions. It makes sure the arbitrators are appointed in a timely way, that the arbitration moves along in a reasonable manner, and that fees and expenses are paid in advance."*

Based on the explanation above, in the dispute resolution forum through institutional arbitration, the administrative functions are performed by the arbitration institution. It is called an advantage because administrative functions facilitate the dispute resolution process. The said administrative functions are, among others, to ensure the timely appointment of the arbitrator/arbitral tribunal or to make sure that the hearing is arranged accordingly and timely. From the aspect of the arbitrator, because administrative functions are performed by the arbitration institution, it will reduce the burden of work of the arbitrator. For example, because administrative functions are performed by the arbitration institution, the arbitrator/arbitral tribunal does not have to arrange the payment, among others, to make sure whether there are sufficient funds to hold the arbitration hearing.

On the contrary, a different condition applies in the dispute resolution process through ad hoc arbitration. According to Gary B. Born, the parties who choose a dispute resolution through ad hoc arbitration agree to hold a hearing without appointing a certain institution to perform administrative functions[18].

From the clauses in the UNCITRAL Arbitration Rules 2010 it is clear that the arbitrator/arbitral tribunal also performs administrative functions. For example, the arbitral tribunal determines the amount of arbitration fees and the procedures for the payment[19]. Thus, in ad hoc arbitration, the arbitral tribunal plays a much more complex role outside their duty to decide on an arbitration dispute.

In practice, the arbitral tribunal in ad hoc arbitration must handle all administrative matters which, in permanent arbitration, are handled by the secretariat of the arbitration institution. These administrative matters include the determination of the arbitrator's fee arbiter, security deposit, disbursements whose payment will eventually be requested from the parties, and the procedures for the payment, the deposit and distribution of funds, management and storage of hearing documents, letters and orders, and other housekeeping arrangements such as arranging the hearing venue and stenographer services.

IV. CONCLUSION

The determination of the UNCITRAL Arbitration Rules by UNCITRAL is a breakthrough to accommodate the needs of international business actors for a procedure that can be used as a reference to hold a more effective dispute resolution. With the continued development of arbitration rules according to the times, hopefully the UNCITTRAL Arbitration Rules can still be used in the future as a rule that can meet the needs of business actors.

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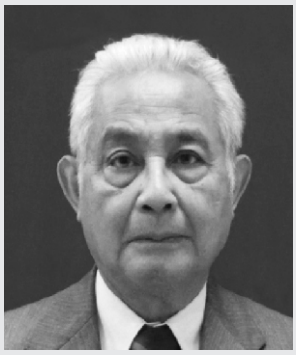
[17] Margaret L. Moses, *The principles and Practice of International Commercial Arbitration*, (New York: Cambridge University Press, 2008), pg. 9.
[18] Gary B. Born, *Op. Cit* pg. 66; Margaret L. Moses, *Op. Cit.*, pg. 9.
[19] *The UNCITRAL Arbitration Rules 2010, at Article 40-43.*

BANI
Versus
UNCITRAL Rules

Madjedi Hasan



Experience in petroleum upstream activities and engineering education, including pioneering in establishment of the first School of Petroleum Engineering in Indonesia (1962). Fields of expertise include oil production operation, petroleum reservoir management, petroleum property valuation, and assessment of project proposal for financing and due diligence, oil and gas laws and contracts, geothermal development project and training development. Clients include oil and power companies, banks and financial institutions. Also had provided statement in court and arbitration forum regarding Oil and Gas Law and contract.

Introduction

In generic terms, arbitration is a method for resolving disputes arising from commercial agreements. It arises from an agreement between parties to submit their disputes to binding resolution by one or more arbitrators selected by or on behalf of the parties. That agreement is usually struck in a dispute resolution clause in a contract or treaty in which the parties agree to arbitrate future disputes.

The arbitration may be classified is as either ad hoc or institutional, or either as national and international. In institutional or administered arbitration there is a supervising institution which may exert a high level of administrative control of the arbitral process, the intention of which is to achieve a suitable procedure and maintain quality control rather than to obstruct or intrude upon the dispute resolution by the arbitrator(s). This is the case with BANI arbitrations which is the biggest dispute resolution institution in Indonesia.

An institutional arbitration is one in which a specialized institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as provided by the rules of that institution. It is pertinent to note that these institutions do not arbitrate the dispute, it is the arbitrators who arbitrate, and so the term arbitration institution is inappropriate and only the rules of the institution apply.

An ad hoc arbitration is one which is not administered by an institution and therefore, the parties are required to determine all aspects of the arbitration like the number of arbitrators, manner of their appointment, procedure for conducting the arbitration and administrative support. Provided the parties approach the arbitration in a spirit of cooperation, ad hoc proceedings can be more flexible, cheaper and faster than an administered proceeding. The absence of administrative fees alone makes this a popular choice. The arbitration agreement, whether arrived at before or after the dispute arises,

might simply state that "disputes between the parties will be arbitrated", and if the place of arbitration is designated, that will suffice.

In ad hoc arbitrations the parties execute their own particular arrangement without reference to institutional rules on supervision. The most popular rules for ad hoc arbitrations are the United Nations Commission on Trading Law (UNCITRAL). The rules were first adopted by the United Nations General Assembly on December 15, 1976. It has been amended and the revised United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules came into force on August 15 2010

The UNCITRAL Rules are used in ad hoc arbitrations and were designed with international disputes in mind. It should however be noted that it is possible to have the BANI as an appointing authority when using any ad hoc arbitration rules such as the UNCITRAL Rules. This paper summarizes the differences in the arbitration rules between BANI and UNCITRAL.

Main Characteristics

Under the BANI arbitrations the BANI's Governing Board administers and ensures the BANI Rules are applied. Assisted by the Secretariat, the Board approves the main steps in the process, including nomination of arbitrators and determines the cost of the arbitration. This will ensure proper administration by institutions and can significantly help the arbitration proceedings to keep moving along and if one of the parties is failing to co-operate an institution may be able to influence a difficult party or an arbitrator who is dragging its feet.

Ad hoc arbitrations such as under the UNCITRAL Rules are often considered to be cheaper. This is because the proceedings are administered by the Tribunal rather than having the additional services (and costs) of an institution. Ad hoc arbitrations can be much more flexible than institutional arbitration in terms of how the arbitration is conducted but this flexibility is dependent on co-operation between the parties and their lawyers. However, if problems arise, for example in respect of the initiation of the proceedings, it may be necessary for the intervention of a court of law, which could be significantly more than the cost of employing an institution.

Commencement and Place of Arbitration

Under Article 6 of the BANI Rules the arbitration is deemed to have commenced on the date the Secretariat receives a written Request for Arbitration from one of the parties whereas under the UNCITRAL Rules the proceedings are deemed to have commenced on the date the respondent receives from the claimant a written notice of arbitration.

The BANI Rules provide that unless the parties have agreed otherwise the place of the arbitration shall be decided by BANI Tribunal and mutual agreement by the Parties while under the UNCITRAL Rules the place shall be determined by the Tribunal. It should be noted that the place of arbitration is of relevance to the determination and influence of procedural rules and also for the recognition and enforcement of the award in the case of international arbitration. The place of arbitration is frequently not the place where the parties, the witnesses, or the documents are located. It is also the case that regardless of the place of arbitration the Tribunal may convene anywhere and as long as the parties agree, it may arrange hearings anywhere.

Arbitrators

Arbitration is built around the idea that parties select at least one of the arbitrators and both the BANI Rules and the UNCITRAL Rules conform to this principle. What often happens with arbitrations is there will be three arbitrators and both parties will select 'their' arbitrator and both arbitrators will then appoint the chairman or the presiding arbitrator. Under the BANI Rules but unlike the UNCITRAL Rules the request for arbitration must contain the nomination of an arbitrator which undoubtedly is a time saving device.

The UNCITRAL Rules provide that if the parties have not agreed on the number of arbitrator no later than 15 days following the respondent receiving the notice of arbitration, three arbitrators will be appointed. This will have immediate consequences on cost as three arbitrators will obviously cost more than one arbitrator. It is also more difficult for one arbitrator to find time for the hearing.

The BANI Rules are more flexible and specify that the dispute will be decided by either a sole arbitrator or by three arbitrators. If the parties do not agree on the number of arbitrators BANI Chairman will decide on whether it is necessary to appoint either one or three arbitrators depending on what they believe the dispute requires.

The BANI Rules also deals with how the arbitrator is appointed where the parties have agreed to just one arbitrator. If they do not agree on a nomination then the BANI will appoint somebody. The BANI Rules dictates how three arbitrators should be appointed. This could be by means of each party nominating one arbitrator and the third arbitrator, who would act as chairman, being nominated by the BANI unless the parties have agreed on some other procedure. However, if a party fails to nominate any arbitrator the appointment will be made by the BANI. It is therefore possible that the BANI will be responsible for nominating either none, one, two or all three arbitrators.

Unlike BANI, UNCITRAL does not appoint arbitrators. If the parties have not agreed on who is to be appointed arbitrator(s) and on who would act as appointing authority the UNCITRAL Rules state that either party can request the Secretary-General of the Permanent Court of Arbitration at The Hague will decide on an appointing authority. The fact that the Secretary-General himself does not appoint the arbitrator(s) but designates an appointing authority to do so could itself result in delay. Some commentators consider this mechanism in the rules to be cumbersome and recommend that when using the UNCITRAL Rules an appointing authority be expressly provided for. Under the UNCITRAL Rules, if each party chooses one arbitrator, the two appointed arbitrators will select the third arbitrator who will act as the presiding arbitrator. Webster (2002) observes that the UNCITRAL Rules do not require consultation with the parties as to the chairman, but they do not exclude it either.

Furthermore, under both sets of rules a party to arbitration may challenge an arbitrator for alleged lack of independence or impartiality. Under the BANI Rules the challenge must be submitted to the Secretariat within 30 days from receipt of notification of the arbitrator's appointment whilst under the UNCITRAL Rules the party has 14 days from the date the arbitrator's identity is given by enclosing the facts that have been proven. Both sets of rules also allow for an arbitrator to be replaced upon his death, resignation or if is prevented *de jure* or *de facto* from fulfilling his functions.

Party Autonomy

The principle of the party autonomy rule is based on the parties to a dispute having the autonomy to control the arbitration. Both the BANI Rules and the UNCITRAL Rules seem to recognize this rule in relation to appointing the arbitrators, the choice of forum and the applicable law, paper arbitrations, appointing experts and choosing the language of the arbitration.

Whilst the BANI Rules also allow party autonomy when determining the timetable, the UNCITRAL Rules provide greater control in this respect. However, when it comes to the place of arbitration the BANI Rules provide greater autonomy and one commentator believes that the application of the party autonomy rule is at its fullest when the parties determine the forum and the regime of institutional arbitration.

Statements of Case

Under the BANI Rules the claimant sets out the details of his claim when sending his request for Arbitration to the Secretariat and the respondent then has 30 days from when he receives the request from the Secretariat to file an Answer. Also, under the UNCITRAL Rules the statement of claim is either sent with the notice of arbitration or it is sent in writing to the respondent and to each arbitrator within a period of time set by the tribunal. The respondent then sends in writing to the claimant and to each arbitrator his statement of defense. Amendments or supplements to the claim and defense may be included at any time during the arbitration unless the tribunal considers it appropriate. This means that the parties' initial pleadings should not be considered as final or definitive.

Both BANI and UNICITRAL Rules require that the claimant must file a *'statement of claim including…a statement of facts supporting the claim, the points at issue, and the relief and remedy sought'*.

Rules of Procedure and Applicable Law

The rules that govern the arbitration is in the first place the agreed arbitration rules (in this case either those of the BANI or of UNCITRAL). Where the rules are silent the parties agree (or the Tribunal decides upon) more detailed rules of procedure. This may be done by reference to a national law.

Both the ICC Rules and the UNCITRAL Rules provide that the tribunal will assume the powers of an *amiable compositeur* or decide *ex aequo et bono* only if the parties have agreed to give it such powers and in the case of the UNCITRAL Rules, if the law applicable to the arbitral procedure permits such arbitration.

Languages

BANI Rules simply states that if the parties have not agreed otherwise, the process of case examination shall be conducted in the Indonesian language, unless the Arbitral Tribunal, taking into consideration the situation deems it appropriate to use English or another language. Subject to an agreement by the parties the UNCITRAL Rules also expressly allows that the Arbitral Tribunal issues order that any documents annexed to the statements of claim or defense to be accompanied by a translation into the language(s) decided upon for the tribunal. If the parties agree on one or two languages for the arbitration on the basis of what is convenient to them and if language is a factor when appointing the arbitrators the number of translations can be limited.

Confidentiality

Under the BANI Rules, the proceedings shall be conducted closed to the public, and all matters related to the arbitral reference, including documents, reports/notes on sessions, testimony of witness and awards, shall be kept in strict confidentiality among the parties, the arbitrators and BANI, except to the extent required by the law or otherwise as may be agreed by all parties to the dispute. In this respect the BANI Rules are slightly better than the UNICITRAL Rules, as the UNCITRAL Rules provide solely for the confidentiality of the award and the privacy of the hearing. The hearings are held *in camera* unless the parties agree otherwise and the award is made public only with the consent of the parties.

Non-Participation

Under both sets of rules if one of the parties refuses or fails to appear at a hearing without a valid excuse the tribunal has the power to proceeding with the arbitration. The UNCITRAL Rules deal with the event of a claimant failing, without showing sufficient cause, to communicate his statement of claim. In such cases the tribunal may terminate the arbitration. If the respondent fails to communicate his statement of defense without showing sufficient cause the tribunal will order the arbitration to continue.

Under the UNCITRAL Rules if one of the parties fails to produce documentary evidence the tribunal may make the award on the evidence before it. The BANI Rules states that if the respondent fails to respond for the second time without any valid reason, the tribunal may decide and make its award based upon the documents and evidence which have been submitted by claimant.

Evidence

Both sets of rules are silent about how evidence should be gathered, presented and received. This may suggest that this gap is intentionally left in arbitration rules to allow the parties and the tribunal flexibility in formulating the most appropriate procedures for the arbitration. Both the BANI Rules and the UNCITRAL Rules have provisions which allow the tribunal to summon the parties to provide evidence.

Multi-Party Disputes

The UNCITRAL Rules have no provision for multi-party disputes whereas the BANI Rules provide for multiple parties whether as claimant or as respondent. However there is no provision for more than two groups of parties to a dispute. Where there are multiple parties and where the dispute is to be referred to three arbitrators, the multiple claimants, jointly and/or the multiple respondents jointly should nominate an arbitrator. Where there is no nomination or the parties cannot agree the BANI will appoint each member of the tribunal.

Hearing

Both sets of rules require the arbitral tribunal to give the parties adequate/reasonable notice of when a hearing is to be held and if either of the parties fails to appear without a good reason the tribunal can proceed with the hearing. The BANI Rules allow the parties involved to appear in person or through their representatives. They may also bring their advisors into the hearing but persons not involved with the arbitration are not allowed in. The UNCITRAL Rules do not specifically deal with who can appear.

At least 15 days prior to any hearing the UNCITRAL Rules requires each party to notify details of witnesses to be called including on what subject and the language(s) of the testimony and it is for the tribunal to make arrangements for the translation of oral statements.

Under both the BANI Rules and the UNCITRAL Rules unless any of the parties request a hearing, the tribunal may decide the case solely on the documents submitted.

Interim Relief

BANI Rules (Article 26) states that the tribunal may *'order any interim, conservatory measure or partial award as it deems appropriate', while a* revised UNCITRAL Rules also allow the tribunal to order a party to *'provide security for the enforcement of an eventual award, including an award of costs'*. The requesting party would need to demonstrate (a) an urgent need, (b) irreparable harm will result if not ordered and (c) there is a substantial possibility that the requesting party would succeed on the merits of the dispute.

Awards

The UNCITRAL Rules do not set any time limit but under the BANI Rules the tribunal is given a period of six months for the final award to be rendered. However the BANI's Tribunal may extend this period upon agreement by the parties. Both the BANI Rules and the UNCITRAL Rules provide that where there are three arbitrators the decision can be made by the majority.

Under the BANI Rules the award must state reasons whereas under the UNCITRAL Rules the award has to state reasons unless the parties have agreed otherwise. Under the BANI and UNICITRAL Rules the award is to be communicated to the parties by the tribunal at the place of arbitration. Under both the BANI Rules and the UNCITRAL Rules the parties undertake to carry out the award without delay.

BANI ICC Rules allow the tribunal to correct certain errors in their award, it has been observed that they do not expressly provide for remedying an omission whereas the UNCITRAL Rules allow the tribunal to *'make an additional award as to claims presented in the arbitral proceedings but omitted from the award'*. BANI and UNCITRAL Rules state that the award is *'final and binding on the parties'* and are otherwise silent on any rights to appeal.

Costs

The costs of BANI arbitrations may be higher than in UNCITRAL arbitrations, but they are generally also more predictable. Ad hoc arbitration has the apparent attraction of avoiding the payment of the administrative fees which institutions charge but parties considering arbitration should be mindful of the lack of control with ad hoc arbitration especially with regard to arbitrators' fees.

The cost of BANI arbitration is fixed by the Secretary and is carried out in accordance with the Scales of Administrative Expenses and Arbitrator's Fees. Under the UNCITRAL Rules the Tribunal must fix the arbitration costs in its award. However, under both sets of rules the parties may have been requested to deposit advances at the outset and these figures might have increased at any time during the proceedings.

In principle, the costs of the arbitration under the UNCITRAL and BANI Rules are to be borne by the unsuccessful party but are subject to the Tribunal's discretion.

Conclusions

The similarities between the BANI Rules and the UNCITRAL Rules are many and it is suggested that they outweigh the differences. Their substantial differences can often be traced to the fact that one is an institutional arbitration and one is an ad hoc arbitration. It would also seem that BANI Rules and other institutional arbitration rules get used significantly more often than ad-hoc rules, because it is their institutional aspects.

Pendapat tentang Rencana Pembentukan Badan Arbitrase Barang dan Jasa Pemerintah

Agus G. Kartasasmita

Agus G. Kartasasmita experience in engineering, construction & coal mining company. He is a commissioner of PT Catur Yasa, Director of PT Baradinamika Mudasukses and as President Commissioner of PT Sintas Kurama Perdana. He also as Chairman Council of Governors of Indonesian Chamber of Commerce & Industry (KADIN), chairman of GAPENRI, Arbitrators at BANI Arbitration Center since 1996 and also vice chairman of Indonesian Arbitrators Institute (IArbI). He also received several awards from the Indonesian government, namely for completing the law of the construction service in 1999, award from the National Construction Development Service in 2009, the Anugrah Bhakti Pratama an award from the Board of Leaders of GAPENSI in 2009, a certification of skills-manship from the 2010 Association of Indonesian Project Management Professionals, a certification as Fellow Certified BANI Arbitration Center (FCBArb) from BANI Arbitration Center in 2008, a certification as mediator from the National Mediation Center in 2011.

ABSTRACT

This article is of the opinion that initiative to create the so called Board of Arbitration for Government Goods and Services is considered as unnecessary, since BANI has long history of taking care on such matters. Duplication is inefficient, however, if the effort to create one is there to stay, Basic Fundamental Principles of Arbitration Principles should be uphold strongly, that is : the Institution should be Autonomous, and indepenent from by Government Body.

Setelah membaca rencana pembentukan suatu badan arbitrase seperti dikemukakan dalam draft Peraturan Presiden tentang **Badan Arbitrase Pengadaan Barang/Jasa Pemerintah (BAPBJP)**, seperti yang disampaikan kepada saya. Bersama ini saya sampaikan pendapat sebagai berikut:

Pembentukan badan arbitrase mengenai pengadaan barang/jasa pemerintah secara khusus tidaklah diperlukan. Alasan–alasannya adalah sebagai berikut:

1. APBN/APBD (sebagai sumber keuangan pengadaan barang/jasa Pemerintah yang dijadikan sebagai dasar titik tolak/alasan untuk mendirikan suatu badan khusus arbitrase-BAPBJP tersebut), pada hakekatnya adalah sekedar merupakan sumber pembiayaan, yang penyaluran penggunaannya diserahkan kepada dan atau dilakukan melalui lembaga–lembaga/instansi-instansi Pemerintah, yaitu Kementerian–Kementerian, Pemerintah–Pemerintah Daerah (Pemda), Instansi-Instansi Pemerintah lainnya dan atau Perusahaan-Perusahaan Negara (BUMN)/ Daerah (BUMD).
2. Kementerian-Kementerian, Pemda-Pemda, Instansi-Instansi Pemerintah dan BUMN/BUMD tersebut merupakan badan yang secara umum mempunyai kedudukan sebagai lembaga atau badan hukum ataupun *administrative entities* sesuai berbagai ketentuan peraturan-peraturan perundang-un-dangan yang berlaku, dapat melakukan transaksi dan tindakan–tindakan hukum sendiri antara lain membuat kontrak–kontrak pengadaan barang/jasa ataupun penye-lenggaraan proyek-proyek.

3. Berbagai lembaga seperti dikemukakan diatas selama ini mempunyai berbagai kontrak pengadaan barang/ jasa dengan berbagai Pihak Ketiga baik dalam maupun luar negeri (antara lain: Suppliers, Kontraktor, dan lain–lain) dan berada di bawah lingkup pengawasan lembaga masing–masing dan Badan Pengawasan Keuangan (BPK).

   Selama ini sejak bertahun–tahun penyelesaian sengketa yang tidak dapat diselesaikan secara musyawarah dilakukan berdasarkan kesepakatan pilihan Para Pihak (yang melakukan perikatan perjanjian) diselesaikan melalui Pengadilan atau melalui Lembaga Arbitrase, baik di dalam negeri (melalui antara lain: BANI Arbitration Centre) atau di luar negeri (antara lain: SIAC, HKIAC, ICC, dan lain–lain).

   BANI Arbitration Centre sendiri sejak bertahun–tahun, telah banyak menyelesaikan sengketa mengenai pengadaan barang/jasa yang diantaranya cukup banyak dari sengketa yang timbul dari pelaksanaan kontrak pengadaan barang/jasa Pemerintah yang sumber dananya dari APBN/APBD (langsung ataupun tidak langsung), baik antara Pemerintah/Instansi Pemerintah dengan BUMN/BUMD, antara BUMN/BUMD dengan BUMN/BUMD, antara Pemerintah/Instansi Pemerintah dengan Swasta maupun antara BUMN/BUMD dengan Swasta (dalam dan luar negeri).

4. Dengan demikian mendirikan suatu lembaga baru lagi, apalagi sebagai Lembaga Pemerintah Non Kementrian dengan komposisi dan struktur organisasi yang mirip instansi pemerintahan (birokratis) seperti terlihat pada draft Peraturan Presiden yang bersangkutan, akan merupakan suatu hal atau tindakan yang berlebihan dan pemborosan uang negara, dimana sumber pendanaan dibebankan kepada APBN (Gaji : Arbiter, Badan Pengurus dan Staf Pendukung organisasi dan biaya operasional).

Disamping itu pembentukan badan arbitrase khusus tersebut, mencerminkan struktur Pemerintahan yang birokratis, juga akan bertentangan dengan konsep dan asas–asas/prinsip–prinsip arbitrase yang bersifat universal diseluruh dunia, antara lain sebagai berikut :

a. Adanya otonomi Para Pihak untuk melakukan kebebasan berkontrak termasuk didalamnya memilih cara menyelesaikan sengketa. Dalam hal penyelesaian sengketa yang dipilih adalah arbitrase, lazim diwujudkan dalam suatu perjanjian klausula arbitrase (*arbitration agreement/clause*) terlebih dahulu yang dibuat sebelum terjadinya sengketa biasanya merupakan bagian dari kontrak transaksi yang bersengketa) atau dibuat/disepakati setelah sengketa terjadi. Dengan kata lain para pihak berhak bebas melakukan pilihan arbitrase sebagai forum penyelesaian sengketa, venue/tempat penyelenggaraannya, hukum yang berlaku dan arbiter yang akan bertugas sebagai wasit/hakim yang memeriksa dan memutus perkara yang bersangkutan.

b. Lembaga Arbitrase yang di pilih/disepakati adalah bersifat otonom dan independen (tidak terkait) atau bebas dari pengaruh baik langsung ataupun tidak langsung dari lembaga atau pihak mana pun termasuk oleh Pemerintah.

c. Kedudukan atau dasar kesamaan hak di hadapan hukum (*equality before the law*).

d. Bahwa Arbitrase memperhatikan berlakunya berbagai *doctrine*, seperti *doctrine universalism / internationalism*, seperti antara lain :

   - Asas separability
   - Asas absolute competence dari Arbitrase
   - Asas competenz – competenz

- Asas independensi arbiter
- Asas putusan Arbitrase bersifat final dan mengikat (tidak mengenal hak banding).

Di Indonesia, asas–asas atau prinsip–prinsip tersebut diatas umumnya tercantum dalam peraturan perundang–undangan tentang (*lex arbitri*) dalam Undang–Undang No. 30 Tahun 1999 (tentang Arbitrase dan Penyelesaian Sengketa), peraturan prosedur Arbitrase, kode etik dan diterapkan dalam pelaksanaannya.

5. Berdasarkan alasan–alasan dan fakta–fakta sebagaimana dikemukakan diatas, maka saya berpendapat tidaklah diperlukan adanya suatu lembaga/badan khusus untuk menyelesaikan sengketa–sengketa mengenai Pengadaan Barang/Jasa yang didanai dari APBN/APBD karena permasalahan yang timbul dalam persengketaan dan ingin diselesaikan oleh Para Pihak yang bersengketa, bukan masalah dari mana sumber dana pengadaan barang/jasa berasal, melainkan pelaksanaan atas kesepakatan yang tertuang dalam perjanjian. Selama ini hal tersebut (penyelesaian sengketa) berdasarkan asas kebebasan berkontrak telah dilakukan melalui lembaga/badan Arbitrase seperti dikemukakan dalam butir 3 di atas.
6. Namun, seandainya Lembaga Kebijakan Pengadaan Barang/Jasa Pemerintah (LKPP) tetap menghendaki (hal mana sebenarnya tidak perlu) adanya suatu Lembaga/Badan Arbitase lain disamping Badan Arbitrase yang sudah ada, untuk memperluas pilihan Para Pihak memilih forum arbitrase yang disediakan untuk penyelesaian sengketa yang khusus menyangkut pengadaan barang/jasa yang didanai APBN/APBD, maka Lembaga Kajian LKPP tersebut melakukannya hanya semata–mata sebagai pembentuk lembaga arbitrase baru belaka, yang tidak campur tangan dalam penyelenggaraan arbitrase itu sendiri, termasuk tidak campur tangan dalam organisasinya.

   Lembaga/Badan Arbitrase yang akan dibentuk itu sendiri harus merupakan suatu badan yang otonom dan independen, dimana :

   otonom dalam arti mandiri, mampu memenuhi dan menyelenggarakan kegiatan sendiri.

   independen dalam arti bukan merupakan organisasi Pemerintah maupun organisasi politik dan atau tidak merupakan bagiannya.

   Dengan demikian BAPBJP tidaklah dibentuk dengan statuta Lembaga Pemerintah, sehingga struktur organisasinya tidak harus seperti birokrasi Pemerintah dan juga sumber pendanaannya tidak digantungkan kepada APBN, seperti yang tercermin dalam draft Peraturan Presiden. Dengan demikian dapat diterapkan sepenuhnya asas–asas/prinsip–prinsip umum yang berlaku bagi Arbitrase. Selain itu yang terpenting BAPBJP bukan merupakan satu-satunya lembaga yang berwewenang dan bertugas untuk memeriksa dan memutuskan sengketa atas kontrak pengadaan barang/jasa Pemerintah, karena sesuai Pasal 1337 KUHPerdata, Para Pihak harus menghormati kebebasan berkontrak (*freedom of contract*) termasuk didalamnya pengertian bahwa Para Pihak yang bersengketa bebas memilih forum (Badan Arbitrase) yang disepakatinya dalam menyelesaikan sengketa yang timbul.

Demikian pendapat saya yang kiranya perlu diperhatikan.

News & Events

1. Asia Arbitration Summit in Europe – Featuring BANI

Asia Arbitration Summit – Arbitration Options for European Companies

(Frankfurt, Munich, Paris, Vienna in the week of March 17 to 21 2014)

Beiten Burkhardt (www.bblaw.com) and **Respondek & Fan** (www.rflegal.com; www.rf-arbitration.com) will organize an arbitration seminar in Germany (Frankfurt, Munich), France (Paris) and Austria (Vienna) in the week of **March 17 to 21 2014.**

The goal of the seminar is to introduce European companies and legal practitioners to the institutional arbitration landscape in Asia, presenting BANI in detail and also selected other arbitration institutions in Asia. Practitioners and arbitration experts from the various jurisdictions featured will give a summary of the relevant arbitration regulations in each country and currently faced arbitration issues on a regional level.

2. APRAG 10th Anniversary Conference

Melbourne 26 – 28 March 2014

The 10th Anniversary Asia Pacific Regional Arbitration Group (APRAG) Conference to be held in Melbourne, Australia on 26-28 March 2014, hosted by the Australian Centre for International Commercial Arbitration (ACICA). The conference will be held in Melbourne, an international business destination of 19th century grandeur and 21st century innovation, a city renowned for its vibrant art and cultural life, leading sports events, high fashion and fine dining and world renowned wineries and iconic national sightseeing destinations.

More information about the conference can be found at http://apragmelbourne2014.org/

3. ICCA Miami 2014: "Legitimacy: Myths, Realities, Challenges"

ICCA
INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

Legitimacy:
Myths, Realities, Challenges

6 - 9 April 2014

ICCA is the foremost international arbitration organization and its biennial Congress continues to be the highlight of the international arbitration calendar. The Miami Program offers a variety of topics based on the theme of "Legitimacy: Myths, Realities, Challenges" of international arbitration, all of which will be addressed by preeminent practitioners, scholars and judges. As Congress participants, you will have the opportunity during interactive sessions to give your views on how arbitrators make decisions. The empirical findings, based on your input, will be presented at the closing plenary. There will be ample time to network and socialize with over 1000 fellow participants, and to browse the many exhibitors.

More information about the conference can be found at http://www.iccamiami2014.com