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# EX AQUO ET BONO IN ARBITRATION

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## In this edition:



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**BADAN ARBITRASE NASIONAL INDONESIA**

JAKARTA 2024

# From The Editor

Greetings of health and prosperity to the loyal readers of the BANI Newsletter!

We would like to extend our gratitude to the authors of the BANI Newsletter for their invaluable contributions, sharing insightful scholarly perspectives on arbitration. Additionally, we are thankful for the continued dedication of our readers, who persistently strive to explore and understand arbitration accurately and thoroughly.

In this June 2024 edition, the BANI Newsletter features three articles addressing critical issues in arbitration. These articles have been crafted by both academics and practitioners who are experts in the field. We hope that this edition serves as a useful, critical, and solution-oriented reference for the development of arbitration in Indonesia.

The first article, entitled "Ex Aequo et Bono in Arbitration: Positivism vs. Natural Law in Arbitral Awards," is authored by academic, **Fatma Muthia Kinanti**. This article delves into the dialectics surrounding the application of the concept of ex aequo et bono (according to the right and good) by arbitrators, exploring the debate between positivism and natural law. Before entering into the discussion, Fatma posits that this concept should only be applied by arbitrators when explicitly agreed upon by the parties and incorporated into their contract under the principle of freedom of contract. Despite this agreement, some jurists remain opposed to its application, as they argue it introduces the possibility of arbitrator subjectivity and creates uncertainty in arbitral awards. On the other hand, proponents of *ex aequo et bono*, including both academics and practitioners, view arbitration as a dispute resolution process that seeks to find justice, and this concept allows arbitrators to uncover truths and fairness that may not always be captured by positive law.

Next, **Adithya Lesmana**, an arbitration practitioner from a prominent Indonesian law firm, presents an article titled "Witness Examination in International Commercial Arbitration." In arbitration, witnesses are a key element that can assist arbitrators in understanding the core of the dispute and clarifying submitted evidence. Through this article, Adithya highlights the essential characteristics that must be considered in witness testimony, particularly in relation to witness preparation in international arbitration. Given the diversity of legal traditions across countries, witness preparation in international arbitration should avoid practices that coach or unduly influence the witness, such as witness coaching. This is a point of consideration for Indonesian legal counsel, as traditionally there are no strict limits on how far they can assist in preparing witnesses. Objectivity and truth must remain the guiding principles for legal counsel representing parties in international arbitration.

Last but not least, this edition of the BANI Newsletter concludes with an article by **Huala Adolf**, a Professor of Law at Padjadjaran University and Vice Chairman of the BANI Arbitration Centre. His article, titled "On International Arbitral Awards," focuses on the question: why does the Arbitration Law use the term "international arbitral awards" rather than "international arbitration," as defined in the UNCITRAL Model Law 1985? Essentially, Prof. Huala argues that Indonesia's Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution should adopt the term "international arbitration" as the defining criterion to determine whether an arbitral award can be considered an international or foreign arbitral award.

In conclusion, this is a brief preview of the three articles featured in this edition of the BANI Newsletter. We encourage contributions from academics and/or practitioners to submit articles on the development of arbitration, which will enrich the scholarly and practical understanding of arbitration law in Indonesia.

This concludes a brief preview of the three articles published in this edition of the BANI Newsletter. We encourage contributions from academics and/or practitioners to submit articles related to the development of arbitration as reading material that can enrich both the scholarship and practice of arbitration law in Indonesia.

**Anangga W. Roosdiono**
**Editor in Chief**
June 2024

INDONESIA ARBITRATION QUARTERLY NEWSLETTER
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# Ex Aequo Et Bono In Arbitration: Positivism Vs Natural Law In Arbitral Award

Fatma Muthia Kinanti

*Abstract*

*This article explores the application of the ex aequo et bono principle in arbitration, examining its relationship to both positivist and natural law perspectives. It analyzes the concept of ex aequo et bono, its application in Indonesian law and international arbitration, and the underlying philosophical debates. The article compares the ex aequo et bono principle to traditional legal approaches, highlighting its potential advantages and challenges. Key findings include: The ex aequo et bono principle offers a flexible approach to arbitration, allowing arbitrators to depart from strict legal rules and consider broader principles of fairness and equity. The application of ex aequo et bono is subject to various legal frameworks, including Indonesian law, international arbitration rules, and the UNCITRAL Model Law. The debate between positivism and natural law underlies the application of ex aequo et bono, with proponents emphasizing its role in achieving justice and opponents raising concerns about its potential for subjectivity and unpredictability.*

*keywords: ex aequo et bono; arbitral award; positivism; natural law*

*Abstrak*

*Artikel ini membahas penerapan prinsip ex aequo et bono dalam arbitrase, memeriksa hubungannya dengan perspektif positivisme dan hukum alam. Artikel ini menganalisis konsep ex aequo et bono, penerapannya dalam hukum Indonesia dan arbitrase internasional, serta perdebatan filosofis yang mendasarinya. Artikel ini membandingkan prinsip ex aequo et bono dengan pendekatan hukum tradisional, menyoroti potensi keuntungan dan tantangannya. Temuan utama meliputi: Prinsip ex aequo et bono menawarkan pendekatan fleksibel terhadap arbitrase, memungkinkan arbiter untuk menyimpang dari aturan hukum yang ketat dan mempertimbangkan prinsip-prinsip keadilan dan keadilan yang lebih luas. Penerapan ex aequo et bono tunduk pada berbagai kerangka hukum, termasuk hukum Indonesia, aturan arbitrase internasional, dan Model Hukum UNCITRAL. Perdebatan antara positivisme dan hukum alam mendasari penerapan ex aequo et bono, dengan pendukung menekankan perannya dalam mencapai keadilan dan lawan mengemukakan kekhawatiran tentang potensi subjektivitas dan ketidakpastiannya.*

*kata kunci: ex aequo et bono; putusan arbitrase; positivisme; hukum alam*

## A. Foreword

Various empirical studies have proven how globalization has a positive impact on economic growth. However, this kind of research often ruled out the legal factor. A question arise, is there a relationship between law and economic globalization? Given the nature of the law itself is binding and rigid, what is its impact and role in the globalization process? Several studies exploring this question have found that law has both positive and negative impacts on economic growth. It was found that countries with efficient legal systems, effective legal regulations, established procedural laws, and efficient judicial systems will feel the impact of significant economic growth. From these results there is a close relationship between law and economic growth. Evidently, despite the complexity and somewhat fragile system of the global economy, it needs a strong foundation and a reliable legal system which produces a legal certainty it needs to flourish.

The problem is, what kind of law can meet these needs. The global economy needs a balance between legal certainty and flexible space to be able to innovate and develop in a relatively short time. Legal academics, especially in the scope of transnational disputes, seek to answer this challenge by taking a more flexible approach to the use of courts on the basis of party autonomy, namely: 1) the choice to enforce substantive laws chosen by the parties to regulate their legal relations (Convention on the Law Applicable to Contractual Obligations 1980); 2) freedom to choose

the competent court to resolve legal issues. However, because these two solutions still rely on the institution of the court, a state institution which applies a formal legal system and tends to be positivist, in the end these two solutions are rendered obsolete, especially in international/transnational business cases. For this reason, the business world needs a more flexible but precise mechanism based on the rule of law.

In the era of globalization, the complexity of international business transactions has created a growing demand for flexible and efficient dispute resolution mechanisms. One of the articles published on the Asian Legal Business website entitled "Arbitration in Asia: the Next Generation" by Kanishk Verghese describes how in the increasingly connected world of global business transactions, through increased investment and international trading, it also has an impact on increasing disputes. Business involving entities of different nationalities. In cross-border business transactions, most business actors prefer dispute resolution through arbitration and alternative dispute resolution rather than through courts.

The increase in dispute resolution through arbitration, is motivated by the dissatisfaction of economic actors with the dispute resolution method in the Court which takes a long time, is not private and is subject to "rigid" domestic formal law. It should be noted that this description of the court is by no means a bad thing. For a long time, courts have had the main function of enforcing domestic procedural law. In addition, judges as state officials have an obligation to enforce positive laws that apply in their country. The procedural law established and enforced in court is made to ensure legal certainty in carrying out the dispute resolution process. Thus, this dispute resolution model is often not compatible with the needs of the business world, which is sometimes very dynamic. This is where Arbitration offers solutions to resolve disputes privately, effectively, quickly and oriented to the interests of the parties.

The arbitration process depends on the agreement of the parties. In this process, all applicable rules/procedural laws are fully the choice of the parties. In fact, the arbitrator's authority to settle a legal dispute is actually born from the agreement of the parties to delegate the authority. It should be remembered that the arbitrator is not a state official mandated by the state to resolve legal disputes, instead the arbitrator has the absolute authority because the parties "permit" the action.

In drafting its decision, the arbitrator has more or less the same functions and duties as judges in court. The arbitration award will be drawn up from the arbitrator's considerations based on 1) facts gathered from the trial; and 2) law. The process of preparing an arbitral award mainly lies in the decision-making process, which in essence considers what needs to be cited in the decision and answers the main issues in the arbitration process. In resolving substantive issues, arbitrators need to first consider the basis of their considerations which can be based on law, the concept of justice (justice and fairness) or a combination of both. If the judge is based on the concept of justice (justice and fairness), he does not have to apply the applicable positive law. He could look beyond the positive law in order to achieve what they thought to be the true justice and fairness in deciding the case. This concept is known as ex aequo et bono.

The arbitrator's authority to apply the ex aequo et bono concept in deciding cases has long been a matter of debate within the scope of arbitration. The application of ex aequo et bono presents a unique balance between positivist legal principles and the flexibility afforded by equitable considerations, offering a valuable alternative to traditional dispute resolution. In this article, the author will explore the application of ex aequo et bono in arbitral awards in Indonesia. The concept and definition of arbitration as a commercial dispute resolution mechanism will be discussed in the first part of the presentation. Furthermore, in the second part, the concept of ex aequo et bono will be discussed. Finally, it will be described how the application of ex aequo et bono in arbitral awards. The debates that arise between the parties who are pro and contra on the application of the ex aequo et bono decision in arbitration. It can be seen that the core of the controversy is basically the classic debate between the views of positivism vs natural law in resolving a legal dispute.

## B. Arbitration As An Alternative To Commercial Dispute Settlement

Dispute resolution models can be divided into two, namely litigation and non-litigation models:

1. Settlement through a litigation forum is what we know as a trial before a court. The characteristic of this settlement model is to place the parties against each other. The outcome of the trial is generally a win-lose (some lose and some win).

2. Settlement through non-litigation forums is no more formal than litigation. Settlement through this method is further divided into two categories where settlements that do not involve third parties outside

the parties concerned are referred to as negotiations, and settlements involving neutral third parties are called conciliation, mediation, and arbitration.

Arbitration is "a way of settling a civil dispute outside the general court based on an arbitration agreement made in writing by the disputing parties". Law 30/1999 distinguishes between arbitration and alternative dispute resolution. In contrast to other alternative dispute resolutions, in the arbitration mechanism, a third party or arbitrator has full authority in formulating dispute resolution. When the dispute has been brought before arbitration, the parties no longer have power over the outcome of the settlement which in arbitration is referred to as an "award".

As a form of out-of-court dispute resolution, arbitration has several advantages. First, the parties have complete freedom in choosing a judge or arbitrator. This freedom includes the determination of the number of arbitrators (single arbitrator or panel of arbitrators (3 arbitrators)) and who is appointed as arbitrator. The parties are free to choose experts from various backgrounds to sit as arbitrators, can choose legal experts or experts in other fields who are considered to have mastered the substance of the case. The parties are also free to choose the place of arbitration, the law of procedure and the law of substance that applies in the trial as long as it is in accordance with the agreement. The parties may choose to use the UNCITRAL arbitration procedure and conduct the arbitration in the territory of Indonesia but choose to use Singapore's substance law. In addition, the parties are free to determine the purpose or task of the arbitration. This means that the arbitrator's decision must not exceed the claims of the parties (ultra petita).

The period of time for the enforcement of the arbitration is limited by the law and the procedure for conducting the arbitration. Law No. 30/1999 limits the examination of disputes to be resolved within a maximum of 180 (one hundred and eighty) days after the arbitrator or arbitral tribunal is formed (article 48 paragraph 1). The BANI Rules and Procedures require the arbitral tribunal to make a final decision within 30 days of the closing of the trial. Setting a time limit like this results in a fast and efficient dispute resolution and of course the cost will be cheaper than settlement through litigation.

Some of the weaknesses of arbitration are that its implementation must be based on the agreement of the parties. Therefore, arbitration is also referred to as the "creature of contract", it will not exist without an agreement/agreement. Secondly, although the law has stipulates that the arbitral award is final and binding, it is not uncommon for the losing party to be reluctant to implement the decision. This is because the arbitral award does not have the executive power as a court decision. To obtain these characteristics, the arbitral award must first be submitted to the District Court for execution. Finally, the arbitral award can be overturned by the court. This is also regulated in the Arbitration Law. Not infrequently, the right of the parties to file an annulment becomes a tactic to delay the implementation of the decision.

## C. Definition And Concept Of Ex Aequo Et Bono

*Etymologically, Ex Aequo et bono is a Latin expression which means what is fair and reasonable or in accordance with a sense of justice and conscience. In Black's Law Dictionary, the principle ex aequo et bono is defined as "in justice and fairness; according to what is just and good; according to equity and conscience". In Indonesia, this principle is translated as justice and propriety. Ex aequo et bono in principle is a legal term that refers to the authority of arbitrators to make decisions not based on law, but based on what they consider fair or in short the phrase "according to justice".*

Fadiafitriyanti in her dissertation entitled "Harmonization of the Application of the Ex Aequo Et Bono Principle in Business Disputes in National Arbitration and Sharia Arbitration" argues that the application of the ex aequo et bono principle is what distinguishes arbitration from judicial institutions which in examining, adjudicating and deciding disputes are based on legal provisions that apply. This situation has consequences for the parties themselves. That is, giving a decision based on the law will only result in a loser and a winner (win-lose).[1] Meanwhile, arbitral award based on the principles of justice and propriety and looking at the interests of the disputing parties will produce a win-win solution.[2] Decision-making in arbitration, apart from being based on justice and propriety, must also be based on the situation and condition of the disputing parties (compromising). Leon Trakman in his article entitled Ex Aequo et Bono: Demystifying an Ancient Concept states that ex aequo et bono as

1 Fadiafitriyanti, Harmonisasi Penerapan Asas Ex Aequo Et Bono Dalam Sengketa Bisnis Pada Arbitrase Nasional Dan Arbitrase Syariah, Disertasi pada Program Doktor Universitas Muhammadiyah Yogyakarta

2 Suleman Batubara dan Orinton Purba, 2013, Arbitrase Internasional Penyelesaian Sengketa Investasi Asing Melalui ICSID, UNCITRAL dan SIAC, Raih Asa Sukses, Jakarta, Hlm25

a classic concept concludes that adjudicators must resolve disputes based on the principles of "fair" and "in good conscience". The authority to make decisions based on the principle of justice can be delegated by the parties to the arbitrator/tribunal, directly in the arbitration agreement (arbitration clause) or based on an agreement reached by the parties at any time during the arbitration process before the arbitration award is determined.

Matter that must be decided ex aqueo et bono is something that is decided on the principles of what is fair and reasonable. A decision maker who is authorized to make decisions based on ex aqueo et bono is not bound by rigid legal regulations but may consider what is fair and reasonable or be free to give general considerations of fairness to the decisions made so that the decisions are fair and bona fide.

## D. Application Of Ex Aequo Et Bono In Arbitration Awards

The application of ex aequo et bono in arbitral awards in Indonesia has been regulated in Article 56 paragraph (1) of Law no. 30/1999: "The arbitrator or arbitral tribunal makes decisions based on legal provisions, or based on justice and propriety". Furthermore, in a further explanation, it stipulates: "Basically the parties can enter into an agreement to determine that the arbitrator in deciding the case must be based on legal provisions or in accordance with a sense of justice and propriety (ex aequo et bono)". In the event that the arbitrator is given the freedom to give a decision based on justice and propriety, the statutory regulations can be set aside.

The BANI rules and procedures are also regulated in Article 16 paragraph (3) of the BANI Procedural Rules:

The Tribunal may exercise an amicable compositeur authority and/or decide ex aequo et bono, if the parties have expressed agreement on this matter.

The ex aequo et bono principle is also regulated in Article 631 RV (Regulation of Civil Procedure/Civil Procedural Law applicable in Indonesia. Articles 631 – 650 regulates the arbitration mechanism): the referees make decisions according to the rules of law, unless according to a compromise, they given the authority to decide as good human beings based on justice. It can be seen that the agreement of the parties is indeed an absolute requirement in applying the principles of justice and propriety in the settlement of arbitration disputes. Failure to fulfill these conditions will have a fatal impact: the possibility of an arbitration award being overturned by the Court. Article 643 of the RV which regulates the basis for the annulment of the arbitral award, one of which is when the decision exceeds the limits of the arbitration agreement.

Ex aequo et bono provisions are also regulated in various lex arbitrations in countries, rules and procedures of international arbitration institutions and model law. The Arbitration Law in Norway, for example, stipulates in Article 31 Art 3: The arbitral tribunal shall decide on the basis of fairness only if the parties have expressly authorized it to do so. The ICSID R&P provides ex aequo et bono in Article 42 art (3): "The provision of paragraph (1) and (2) shall not prejudice the power of the Tribunal to decide Ex aequo et bono if the parties so agree." The UNCITRAL Model Law stipulates this principle in Article 28 Art 3: the arbitral tribunal may decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

Although the application of the principle of ex aequo et bono, by and large, has been recognized in various countries and arbitration institutions, there are some negative views in the application of ex aequo et bono. Leon Trakman states that ex aequo et bono is often negatively stereotyped, misunderstood, or both. Often, in using this principle, the arbitrator is considered to have acted "outside of the law," or more pejoratively, "acts notwithstanding the law". In addition, some may also argue that the application of ex aequo et bono makes the arbitration award unpredictable and subjective.

Stereotypes like this make the parties, especially in transnational disputes, reluctant to include ex aequo et bono in their submissions and answers to arbitration, which is an absolute requirement for arbitrators to enforce this principle. Whereas the possibility of applying this principle in the arbitration process is nothing but the application of the needs of the parties in a commercial dispute. Parties are faced with increasing with little or no law in the applicable field, or a situation where one or both parties mistrust the law or its application to their dispute. Coupled with this is a growing interest in the expeditious resolution of disputes in emerging areas of law, particularly the law as it relates to the internet, intellectual property, and state-investor disputes.

The views of pros and cons in the application of the ex aequo et bono principle in arbitration dispute resolution reflect how the flow of positivism and natural law interact in viewing the law. The view that supports the application of this principle focuses on the fact

that philosophically, arbitration must prioritize the principles of justice and propriety.[3] and should look beyond written law to ensure the fulfillment of justice and propriety for the parties. Decisions ex aequo et bono go beyond the law, are based on morals, social and reality.[4] This view goes way back to the Aristotle era who argues: it is fair to choose arbitration over a general court, because the arbitrator's view always rests on justice, while the judge only focuses on the law.

However, the application of ex aequo et bono is in some respects limited by positive law. In fact, the agreement of the parties that must be stated in the form of a written agreement to give authority to the arbitrator to draw up a decision ex aequo et bono itself is a manifestation of the application of positive law (the principle of pacta sunt servanda: the agreement applies as law (positive law) for those who agree). In addition, Prof. Priyatna Aburrasyid stated that the application of ex aequo et bono could not conflict with the public interest (public order) or morals. The problem is, the concept of prohibition to violate public orders is contained in the Arbitration Law and APS (Law No. 30/1999) as positive law, especially against international arbitration decisions.[5] Violation of the public order has the potential to make decisions that cannot be enforced in Indonesia.

In the end, the Arbitrator's common sense and conscience in making decisions based on ex aequo et bono of course do not have to be purely subjective, but must be based on the Arbitrator's objectivity which is based on the principles of fairness and honesty as well as the integrity of an Arbitrator.[6] According to Mochtar Kusumaatmadja, the main purpose of law is order and justice, even though the size varies from one community to another and according to the era. The arbitral award considers substantive justice more than procedural (formal) justice. Substantive justice considers the elements of justice contained in the substance of truth and error. Procedural justice only considers justice based on the provisions formulated in formal law.

## E. Conclusion

In conclusion, the application of ex aequo et bono in arbitration offers a valuable alternative to traditional legal approaches, particularly in the context of international disputes. By allowing arbitrators to depart from strict legal rules and consider broader principles of fairness and equity, ex aequo et bono can help to resolve disputes in a just and efficient manner.

However, it is important to note that the use of ex aequo et bono is not without its challenges. The principle can be subject to differing interpretations, and its application may raise questions about the predictability and consistency of arbitration awards. To ensure that ex aequo et bono is used effectively, it is essential that arbitrators exercise careful judgment and strive to balance the need for flexibility with the importance of legal certainty.

3 Abraham Matthew, The Philosophy of Arbitration, International Journal of Business, Economics and Law, Vol 8, Issue 4, 2015

4 Tan Kamelo, "Ex Aequo Et Bono" Dalam Penyelesaian Kontrak Bisnis : Perspektif Kuh Perdata, Disampaikan Dalam Webinar Nasional "Penerapan Prinsip Ex Aequo Et Bono Dalam Mengadili Perkara Arbitrase Di Indonesia, Medan, Selasa 24 November 2020

5 Article 66 regarding the conditions for the recognition of international arbitral awards points c: the International Arbitration Awards contemplated in item (a), which may only be enforced in Indonesia, are limited to those which do not conflict with public order.

6 Nindyo Pramono, Asas Ex Aequo Et Bono Dalam Arbitrase, disampaikan Dalam Short Talk Event Iarbl , 12 Des 2019, Jakarta

## AUTHOR'S BIOGRAPHY

*Fatma Muthia Kinanti pursued her postgraduate degree in the Faculty of Law of Universitas Indonesia and graduated summa cum laude in 2015. By then, she had started working as the managing editor of the Indonesian Journal of International Law and as the executive secretary and junior researcher of the Center for International Law Studies at Universitas Indonesia. The IMAC-certified mediator is now the secretary of BANI Pontianak. She works as a law lecturer in Facilty of Law, Universitas Tanjungpura. She is an editorial member Tanjungpura Law Journal at Universitas Tanjungpura and become editor and reviewer at several academic journal in Indonesia.*

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# Witness Examination in International Commercial Arbitration

Adithya Lesmana

*Abstrak*

*Artikel ini memberikan gambaran singkat terhadap proses pemeriksaan saksi dalam persidangan arbitrase internasional komersial. Secara umum, artikel ini menyoroti berbagai hal dalam proses pemeriksaan saksi, mulai dari proses persiapan saksi sebelum memberikan kesaksian di depan arbitrase, pemberian pernyataan kesaksian secara tertulis, serta tipe pemeriksaan saksi yang mungkin akan terjadi selama pemeriksaan. Secara umum, artikel ini memberikan gambaran tentang hal-hal yang muncul dari pemeriksaan saksi dalam arbitrase internasional, di mana diharapkan dengan adanya artikel ini dapat memberikan tambahan wawasan khususnya bagi advokat-advokat Indonesia terhadap proses arbitrase internasional.*

*Keywords:*

In a dispute resolution, the importance of witness testimony cannot be understated. Witness statement can provide an invaluable information which can be decisive in determining the result of the dispute. In a complex cross-border commercial dispute, witness testimony may become essential in providing clarity to the dispute as they offer context, background, explain ambiguities, and provide insights into the intentions or conduct of the parties involved that might be missing from the plain wording of the agreement.

Unlike domestic arbitrations, international cases frequently involve parties from different legal traditions—such as common law and civil law—each with its own approach to witness testimony. In common law jurisdictions, for example, witness cross-examination is a central feature, allowing parties to challenge the credibility of the opposing side's witnesses. In contrast, civil law jurisdictions typically place greater emphasis on documentary evidence, with witness testimony playing a more supplementary role. These differing approaches can lead to varying expectations and strategies when preparing for the witness examination.

This article aims to provide a brief description on the witness examination process in an international commercial arbitration. When preparing for a witness examination in an international commercial arbitration, a lawyer may need to assist the witness to familiarize themselves with the arbitration process. This assistance may also extend with the preparation of the witness statements. The lawyer will also need to pay attention to the type of witness examination that will be employed during the arbitration process. In comparison, Indonesian law does not have stringent set of rules on how the witness examination process is conducted.

## Witness Preparation

Witnesses in arbitration are expected to provide factual testimony that aids the arbitrators in understanding the dispute before them. However, more often than not, witnesses are not familiar with the arbitration process and their role in it. They may possess valuable information pertinent to the case, but their ability to convey this information effectively is not guaranteed. Some witnesses may give a long and winded answer to a close ended questions believing that it would help the case. Therein lies the importance of witness preparation.

During preparation, the lawyer could assist the witnesses in understanding their role in the arbitration, and the specific issues on which they are expected

to testify. The lawyer could also assist the witnesses to recount the facts of the dispute based on their recollection and discuss the things that they should avoid. Preparation can also help a witness to anticipate what is expected of him during the examination. Additionally, the witness could learn not to answer a question that he or she does not understand, and not to volunteer information beyond the scope of the question.

In the IBA Rules of on the Taking of Evidence in International Arbitration (IBA Rules), one of the most widely used soft law instruments in international arbitration practice, also stipulates that 'It shall not be improper for a Party, its officers, employees or legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them'.

However, in some jurisdictions, excessive witness preparation (known as witness coaching) may be seen as 'tainting' a witness's evidence that it is skewed and no longer represents the witness's own genuine account. This unethical practice involves advising or encouraging a witness to testify in a particular way that may distort the truth or align their testimony with the legal strategy of the party, rather than their actual recollection of events.

In Singapore, the Singapore Court of Appeal held that the solicitor in preparing (not *coaching* or *training*) the witness must not allow other persons – including the solicitor – to *actually supplant or supplement* the witness's own evidence [Ernest Ferdinand Perez De La Sala v. Compania De Navegacion Palomar, SA and others [2018] SGCA 16 at [138]]. The Hong Kong Court of Appeal in HKSRAR v. Tse Tat Fung [2010] HKCA 156 at [73] opines that a judge may give the witness' evidence no weigh for "*repetitive "drilling" of a witness to a degree where his true recollection of events is supplanted by another version suggested to him by an interviewer or other party may be of a sort* ".

In England, the Court of Appeal in *R v Momodou* [2005] EWCA Crim 177 held that witness coaching is impermissible because it risks 'adversely affect[ing] the accuracy of the evidence'. The Court explained that the rule against witness coaching applied even to one-on-one sessions between a witness and someone completely removed from the facts of the case. This is because 'the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him'.

In these cases, the testimony of the witnesses is deemed by the court to bear little weight. If the witness is expected to provide key evidence supporting a party's position, the reduced weight of their testimony might undermine the arguments presented. Consequently, this could lead to a decision that is less favorable to the party relying on that testimony.

## Witness Statement

Like in a court litigation, in a commercial arbitration, a witness typically will be examined orally by the disputing parties and also members of the tribunal which may have questions pertaining to the facts to the case. However, there is a notable difference between a witness examination in a court litigation and in commercial arbitration. In a commercial arbitration, typically it is a common practice to have an initial testimony to be made in written form through witness statements. These statements then will be presented to the tribunal and also to the opposing party to be exchanged with the statement made by the witness that will be presented by opposing party.

Pursuant to Article 4.5 of the IBA Rules on the Taking of Evidence in International Arbitration, witness statements must contain:

(1). the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the statement;

(2). a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided;

(3). a statement as to the language in which the Witness Statement was originally prepared and the language in which the witness anticipates giving testimony at the Evidentiary Hearing;

(4). an affirmation of the truth of the Witness Statement; and

(5). the signature of the witness and its date and place

One of the reasons on why witness statements are proposed by the parties is to anticipate the state-

ment made by the witness and to avoid surprises at the hearing.[1] The tribunal may also have questions to the witnesses and therefore it would be preferable that the witnesses could reveal that he or she will testify beforehand. It is also advisable for the lawyer to assist the preparation of the witness statement to help the the witness to focus on the relevant issues, which in turn proves a useful tool for the arbitrators.[2]

The IBA Guidelines on Party Representation in International Arbitration also provides the following:

> "A Party Representative may assist Witnesses in the preparation of Witness Statements and Experts in the preparation of Expert Reports." (Guideline 20)
>
> "A Party Representative should seek to ensure that a Witness Statement reflects the Witness's own account of relevant facts, events and circumstances." (Guideline 21)

Nevertheless, the use of witness statement highly depends on the necessity of the parties in dispute. In simple and straightforward cases, it may be more efficient and effective to conduct oral examination of witnesses directly.

## Cross-examination and direct examination

In commercial arbitration which follows common law system, witness examination is usually divided into Direct Examination and Cross-Examination. A direct examination is a series of questions asked by the lawyer who presents the witness to elicit witness's recollection of the facts.[3] Typically, the questions asked are open ended questions or non-leading questions. After direct examination, the witness is then cross-examined by the opposing party's lawyer, aiming to challenge the witness's statements, expose inconsistencies, and uncover any biases or inaccuracies. The effectiveness of cross-examination lies in its ability to probe the details of the witness's testimony, often revealing contradictions or weaknesses that might not be evident during direct examination. This time, the lawyer is allowed to ask "leading questions" (questions that suggested an answer) or questions that elicits "Yes" or "No" answer from the witness.[4]

In arbitration, typically direct testimony is already covered in the witness statement. Therefore, when given the opportunity to ask questions, the direct examination usually only aims to provide a general overview of the accounts provided in the witness statement. If deemed necessary, the lawyer could ask for a re-direct examination to clarify the statement made by the witnesses during the cross-examination.

During the examination, the lawyers of both parties could ask the witnesses pertaining to the evidence or exhibits that have been submitted by the parties beforehand. If a document is not submitted before, then it may be difficult to be used during examination.

## Examination of Witnesses under Indonesian Law

In comparison, Indonesian rules on examination of witnesses follows the provisions of the Indonesian Civil Procedural Law.[5] The arbitrators can decide to summon witnesses either factual or expert at their own initiative or at the request of the parties.

All witnesses are required to take an oath based on his/her religious affinity that they will only speak the truth and nothing but the truth.[6] Further, pursuant to Article 1910 and 1912 of the Indonesian Civil Code stipulates the following party are prohibited to testify:

a. *Spouse including ex-spouse;*
b. *Blood relatives;*
c. *Minor < 15 years ;*
d. *Mentally challenged person*

In general, in Indonesia there is no legal provision that particularly regulates how far a lawyer could assist the witness to prepare. Witness preparation falls within the ambit of ethic codes rather than law itself. Ethically, a lawyer must refrain from formulating an answer or putting words in a witness mouth. Nevertheless, a lawyer must not instruct the witness to tell lies/fabricate a story. If proven, the lawyer could be charged with criminal offence.

Pursuant to Art. 1907 of Indonesian Civil Code, a factual witness is prohibited from giving opinion or

1 Michał Kocur, *Witness Statements in International Commercial Arbitration*, in Prof. Jerzy Rajski, *The Challenges and the Future of commercial and Investment Arbitration*, 2015, p. 175

2 L. Lévy, *Testimonies in the Contemporary Practice: Witness Statements and Cross Examination*, in: *Arbitral Procedure at the Dawn of the New Millennium: Reports of the International Colloquium of CEPANI*, October 15, 2004, Brussels: Bruylant 2005, p. 115.

3 Timothy G. Nelson, *The Common Law Roots of Cross-Examination, Why They Matter in International Arbitration (Even when the Rules Do Not Apply),* in *Take the Witness: Cross-Examination in International Arbitration,* 2019, p. 34

4 Ben H. Sheppard Jr., *Taking Charge, Proven Tactics for Effective Witness Control*¸ in *Take the Witness: Cross-Examination in International Arbitration,* 2019, p. 20

5 Pursuant to Article 37(3) of the Law No. 30 of 1999 on Arbitration, it is stipulated that "examination of witnesses and expert witnesses before the arbitrator or arbitration tribunal shall be carried out in accordance with the provisions of the Code of Civil Procedure."

6 Article 1911 of Indonesian Civil Code

speculation. Furthermore, witness testimony without any other evidence does not carry weight.[7] Nevertheless, Indonesian judges have a high level of discretion in weighing the weight of the evidence provided by the witness.

In conclusion, witness examination in international commercial arbitration is a nuanced process that requires careful consideration of various legal traditions, cultural contexts, and ethical boundaries. The role of the witness in providing crucial testimony that can influence the outcome of a dispute is undeniable. However, the preparation and presentation of witness testimony must be handled with care to avoid crossing into prohibited territory, such as witness coaching. The balance between effective witness preparation and maintaining the integrity of the testimony is delicate but essential for ensuring that the arbitration process remains fair and just. Whether through direct examination, cross-examination, or the use of witness statements, the testimony provided by witnesses serves as a cornerstone in the resolution of complex commercial disputes, offering the tribunal the clarity and insight needed to render an informed decision. The procedural differences between jurisdictions, such as those between common law and civil law systems, further highlight the importance of understanding and respecting the various approaches to witness examination in international arbitration. Ultimately, the success of witness examination hinges on the ability of counsel to navigate these complexities while upholding the principles of truth and fairness that are central to the arbitration process.

7 Article 1905 of Indonesian Civil Code

## AUTHOR'S BIOGRAPHY

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INDONESIA ARBITRATION QUARTERLY NEWSLETTER
Vol. 16 No. 2, June 2024

# Tentang Putusan Arbitrase Internasional

Huala Adolf

*Abstrak*

*Tulisan ini menganalisis latar belakang ketentuan bunyi Pasal 1 angka 9 UU Arbitrase mengenai batasan putusan arbitrase internasional. Batasan putusan arbitrase internasional menimbulkan masalah dalam praktik. Dalam putusan arbitrase ICC tentang gugatan PT Lirik Petroleum melawan Pertamina, terungkap putusan arbitrase ICC yang dikeluarkan di Jakarta adalah putusan arbitrase nasional. Pertanyaan tulisan ini adalah, mengapa UU Arbitrase menggunakan kriteria 'putusan arbitrase internasional' dan bukan 'arbitrase internasional' sebagaimana batasan yang dikenal dalam UNCITRAL* ***Model Law*** *1985. Tulisan ini menyimpulkan, pencantuman batasan 'putusan arbitrase internasional' perlu direvisi dengan batasan 'arbitrase internasional'.*

**Kata kunci**: *Putusan arbitrase internasional, UU Arbitrase.*

*Abstract*

*This article analysed the background of Article 1 (9) Arbitration Law on the definition of international arbitration decision. The definition led to difficulties in practice. In the ICC Arbitration Award on PT Lirik Petroleum v. Pertamina, it was revealed that the ICC Arbitraiton Decision rendered in Jakarta was a domestic award. The problem raised in this article was, why the Arbitration Law used the said definition (above), not the 'international arbitration' as the criteria for (international) arbitration under the UNCITRAL* ***Model Law*** *of 1985. The article concluded, the definition under the present Arbitration Law should be revised by the definition of International Arbitration (instead of International Arbitration Decision).*

***Keywords***: *International arbitration decision, Arbitration Law.*

## A. Pendahuluan

Salah satu ketentuan yang termuat dalam UU Nomor 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa ("UU Arbitrase") adalah definisi putusan arbitrase internasional. Pasal 1 angka 9 UU Arbitrase memberi batasan sebagai berikut:

> "Putusan Arbitrase Internasional adalah putusan yang dijatuhkan oleh suatu lembaga arbitrase atau arbiter perorangan *di luar* wilayah hukum Republik Indonesia, atau putusan suatu lembaga arbitrase atau arbiter perorangan yang menurut ketentuan hukum Republik Indonesia dianggap sebagai suatu putusan arbitrase internasional." (Cetak miring oleh penulis).

Pengertian putusan arbitrase internasional dalam UU Arbitrase diperkuat kembali dalam Pasal 1 angka 14 Perma No. 3 Tahun 2023 tentang Tata Cara Penunjukan Arbiter oleh Pengadilan, Hak Ingkar, Pemeriksaan Permohonan Pelaksanaan dan Pembatalan Putusan Arbitrase.

Pengertian ini menimbulkan masalah di dalam praktik arbitrase di tanah air, terutama apabila putusan arbitrase dikeluarkan oleh lembaga arbitrase internasional. Dalam sengketa PT Lirik Petroleum melawan Pertamina yang diputus oleh lembaga arbitrase ICC Paris yang dikeluarkan di Jakarta, salah satu permasalahan yang timbul di hadapan Pengadilan Negeri Jakarta adalah status putusan arbitrase ICC: Apakah putusan arbitrase ICC adalah putusan arbitrase nasional?[1]

## B. Perma No 1 Tahun 1990

Pengertian putusan arbitrase internasional dalam Pasal 1 angka 9 UU Arbitrase berasal dari batasan yang diangkat dalam Pasal 2 Perma No. 1 Tahun 1990

1 Putusan MA No. 144 K/Pdt/2012 (dapat diunduh dari laman Mahkamah Agung (https://putusan3.mahkamahagung.go.id/direktori/putusan/52941792e1a89a18de0af19273355e1b.html), diakses 16 September 2024.

tentang Tata Cara Pelaksanaan Putusan Arbitrase Asing. Perma tahun 1990 ini adalah terobosan MA dalam menghadapi kekosongan pengaturan mengenai tata cara pelaksanaan putusan arbitrase asing di tanah air paska Keppres Nomor 34 Tahun 1981 tentang Mengesahkan 'Convention on the Recognition and Enforcement of Foreign Arbital Awards' yang Telah Ditandatangani di New York Pada Tanggal 10 Juni 1958 dan Telah Mulai Berlaku Pada Tanggal 7 Juni 1959.

Sewaktu pemerintah meratifikasi Konvensi New York tahun 1981, ketentuan mengenai arbitrase masih menggunakan terutama ketentuan Rv Pasal 615 – 651. Ketentuan Rv ini mengatur perwasitan yang di dalamnya hanya mengatur arbitrase nasional. Sebagian besar pengaturannya masih memuat aturan-aturan perwasitan (arbitrase) yang sudah tidak sesuai dengan perkembangan zaman. Di dalamnya antara lain tidak mengatur arbitrase asing apalagi mengatur tata cara pelaksanaan putusannya.

Kekosongan pengaturan paska ratifikasi Konvensi New York berakibat cukup fatal. Terdapat putusan arbitrase asing yang ingin dimohonkan pelaksanaan putusannya di Indonesia paska Keppres 1981, tidak dapat dilaksanakan. Masalahnya, tidak ada pengaturan bagaimana atau tata cara putusan arbitrase asing dilaksanakan di Indonesia.[2]

Salah satu materi pengaturan dalam Perma 1990 adalah pengertian putusan arbitrase asing. Pasal 2 Perma 1990 berbunyi sebagai berikut:

> "Yang dimaksud dengan putusan Arbitrase Asing *adalah putusan yang dijatuhkan oleh suatu Badan Arbitrase ataupun Arbiter perorangan di luar wilayah hukum Republik Indonesia, ataupun putusan suatu Badan Arbitrase ataupun Arbiter perorangan yang menurut ketentuan hukum Republik Indonesia dianggap sebagai suatu putusan Arbitrase Asing, yang berkekuatan hukum tetap sesuai dengan Keppres No. 34 Tahun 1981 Lembaran Negara Tahun 1981 No. 40 tanggal 5 Agustus 1981*." (Cetak miring oleh penulis).

Batasan di atas diadopsi oleh Pasal 1 (9) UU Arbitrase dan dalam Perma No. 3 Tahun 2023. Pasal 1 (14) Perma No. 3 Tahun 2023 berbunyi:

> "Putusan Arbitrase Internasional/Putusan Arbitrase Syariah Internasional adalah putusan yang dijatuhkan oleh suatu Lembaga Arbitrase/ Lembaga Arbitrase Syariah atau Arbiter perorangan *di luar* wilayah hukum Republik Indonesia, *atau* putusan suatu Lembaga Arbitrase/ Lembaga Arbitrase Syariah atau Arbiter perorangan yang menurut ketentuan hukum Republik Indonesia dianggap sebagai suatu Putusan Arbitrase Internasional."

Terdapat sedikit perbedaan di antara Perma 1990 dan UU Arbitrase. *Pertama*, Perma 1990 menggunakan istilah badan arbitrase namun UU Arbitrase menggunakan lembaga arbitrase. Sedikit perubahan ini mungkin karena pada tahun 1990, 'badan' arbitrase yang ada dan dikenal waktu itu adalah Badan Arbitrase Nasional Indonesia. Karena itu, wajarlah bila istilah badan digunakan dalam teks UU. Dengan perkembangan yang lebih luas tentang arbitrase yang salah satunya dikenal adanya istilah *institutional arbitration* (lembaga arbitrase) dan *ad-hoc arbitration (*arbitrase *ad-hoc)*, penggunaan lembaga digunakan untuk menggantikan kata 'badan' ini.

*Kedua*, dalam batasan tentang putusan arbitrase internasional, Perma No. 1 Tahun 1990 dapat dipandang sebagai peraturan yang inklusif. Meskipun tarafnya peraturan Mahkamah Agung, Perma 1990 telah memasukkan ketentuan Keppres No. 34 Tahun 1981 tentang dasar hukum pemerintah Indonesia memberlakukan Konvensi New York 1958 ke dalam sistem hukum Indonesia.

Pengacuan kepada Keppres No 34 Tahun 1981 menjadi penting dalam tulisan ini karena esensinya Perma Nomor 1 Tahun 1990 berupaya mengatur di dalam Perma tersebut norma-norma yang termuat di dalam Konvensi New York 1958 sebagai konsekuensi dari penyebutan kepada Keppres. Lagi pula, pencantuman Konvensi New York 1958 dipandang sebagai konsekuensi logis dari ratifikasi terhadap Konvensi New York 1958.

## C. Kekeliruan Batasan?

Batasan putusan arbitrase asing dalam Perma 1990 di atas tampaknya terdapat kekeliruan. Pasal 2 Perma 1990 menyebutkan bahwa batasan putusan arbitrase asing adalah sesuai dengan Keppres No 34 Tahun

2 Sengketa PT Nizwar melawan Navigation Maritime Bulgare , Varna, Blvd., (Putusan MA Reg. No. 2944 K/Pdt/1983). Pertimbangan MA dalam putusannya menyatakan: "… Bahwa selanjutnya mengenai keputusan Presiden Republik Indonesia No. 34 tahun 1981 tanggal 5 Agustus 1981 dan lampirannya tentang mengesahkan "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" sesuai dengan praktek hukum yang berlaku masih harus ada peraturan pelaksanaannya tentang apakah permohonan eksekusi putusan Hakim Arbitrase apat diajukan langsung pada Pengadilan Negeri, kepada Pengadilan Negeri yang mana ataukah permohonan eksekusi diajukan melalui Mahkamah Agung dengan maksud untuk dipertimbangkan apakah putusan tersebut tidak mengandung hal-hal yang bertenangan dengan ketertiban hokum di Indonesia."

1981. Keppres 1981 hanya memuat dua paragraf yang berbunyi sebagai berikut:

> PERTAMA: Mengesahkan "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" yang telah ditandatangani di New York pada tanggal 10 Juni 1958 dan telah mulai berlaku pada tanggal 7 Juni 1959, disertai suatu pernyataan, yang naskah-naskahnya terlampir pada Keputusan Presiden ini.
>
> KEDUA: Keputusan Presiden ini mulai berlaku pada tanggal ditetapkan.
>
> Agar supaya setiap orang mengetahuinya, memerintahkan pengundangan Keputusan Presiden ini dengan penempatannya dalam Lembaran Negara Republik Indonesia.

Sayangnya Keppres 1981 tidak menyebut lebih lanjut mengenai ketentuan Konvensi New York 1958, terutama tentang bagaimana atau lembaga apa yang berwenang melaksanakan aturan-aturan Konvensi New York 1958 di tanah air. Keppres hanya melampirkan teks Konvensi sebagai lampiran dari Keppres.

Konvensi New York 1958 sendiri tidak memuat pengertian putusan arbitrase asing. Pasal I ayat 1 Konvensi hanya memuat "lingkup" (*scope*) putusan arbitrase asing. Lingkup putusan mencakup 2 (dua) pengertian lingkup (yang ternyata kemudian diambil alih menjadi batasan putusan arbitrase asing dalam Perma No 1 Tahun 1990). Pasal I ayat 1 menggunakan kata berlakunya konvensi ("*shall apply to*") mengenai lingkup putusan arbitrase asing berbumyi sebagai berikut:

1. This Convention *shall apply to* the recognition and enforcement of *arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought*, and arising out of differences between persons, whether physical or legal. *It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought*. (Cetak miring oleh penulis).

Konvensi New York dalam Pasal I ayat 1 di atas hanya mengatur *lingkup* berlakunya aturan Konvensi. Lingkup yang dimaksud adalah pertama, konsep teritorial sebagai acuan untuk menentukan putusan arbitrase internasional. Pasal 1 ayat 1 Konvensi mengacu kepada konsep teritorial berikut:

1). Putusan arbitrase yang di buat di suatu wilayah suatu negara selain daripada (di luar wilayah) negara di mana putusan arbitrase asing dimintakan untuk mendapatkan pengakuan dan pelaksanaannya.

Kedua, Putusan arbitrase menurut hukum negara yang diminta pengakuan dan pelaksanaan putusan arbitrase asing bukan dianggap sebagai putusan dalam negeri.

Perma 1990 tampaknya benar bila membuat definisi berupa putusan arbitrase internasional dengan mengacu kepada 2 (dua) pengaturan putusan arbitrase asing dalam Konvensi New York. Tetapi yang menjadi tanda tanya adalah, mengapa batasan putusan arbitrase internasional ini tidak diadopsi ke dalam *UNCITRAL Model Law on International Commercial Arbitration* tahun 1985 ("*UNCITRAL Model Law*").

Ketika penulis menelusuri sejarah lahirnya ketentuan-ketentuan (norma hukum) dalam *Model Law* dalam pembahasan sidang-sidang UNCITRAL, terungkap bahwa para ahli di dalam pembahasan *Model Law* memilih digunakannya batasan 'arbitrase internasional' sebagai acuan untuk menentukan suatu ketentuan atau norma diklasifikasikan sebagai 'internasional.' Dalam menentukan istilah atau kata 'internasional' ini, para ahli ternyata dengan meminjam konsep, "*standard*" atau ukuran internasional sebagaimana yang termuat dalam *United Nations Convention on the Sale of Goods of 1980* (Konvensi PBB atau Konvensi Wina tentang Jual-Beli Barang Internasional tahun 1980).

Dokumen persidangan pembahasan teks-teks *Model Law* dalam paragraph 24 *Analytical Commentary on Draft Text of a Model law on International Commercial Arbitration: Report of the Secretary-General*, menyebutkan: [3]

> 24. *The basic criterion, laid down in sub-paragraph (a), is modeled on the test of internationality adopted in article 1 (1) of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980; 23/ hereinafter referred to as '1980 Vienna Sales Convention'). It uses as determining factor the location of the places of business of the parties to the arbitration agreement*. Accordingly, other characteristics of a party such as its nationality or place of incorporation or registration are not determinative." (Cetak miring oleh penulis).

3 A/CN. 9/264, 25 March 1985.

Konvensi Wina 1980 mengenai jual beli barang internaional mengadopsi prinsip hukum perdata internasional yang telah diterima umum. Konvensi Wina memberi batasan terkait 'internasional' sebagai berikut:

(1). This Convention applies to contracts of sale of goods between parties whose places of business *are in different States*:

when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

Batasan arbitrase internasional berdasarkan rumusan dalam Konvensi WIna 1980 di atas akhirnya diadopsi *UNCITRAL Model Law on International Commercial Arbitration tahun 1985 ("Model Law")*. *Model Law* dikeluarkan sebagai pelaksanaan amanat dari Resolusi Majelis Umum PBB ketika mengeluarkan Konvensi New York 1958.[4]

Pasal 1 ayat 3 *Model Law* memberi batasan berupa kriteria putusan arbitrase internasional sebagai berikut:

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

(ii) (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

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

4. For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

Batasan asing (internasional) dalam Perma No 1 Tahun 1990 mengacu kepada ketentuan dalam Konvensi New York yaitu mengguankan batasan putusan arbitrase internasional. Namun ketentuan yang menjadi norma yang disahkan oleh Majelis Umum PBB yang tercantum dalam UNCITRAL *Model Law* 1985 menggunakan batasan arbitrase internasional. Pendekatan terhadap batasan arbitrase internasional memberi kriteria apakah suatu arbitrase adalah internasional dengan diberikannya syarat-syarat yang ditentukan dalam Pasal 1 ayat 3 *Model Law*. Dengan ditentukannya suatu arbitrase adalah internasional, *ipso facto*, putusan arbitrase-nya pun menjadi putusan arbitrase internasional. Pendekatan inilah yang UNCITRAL *Model Law* gunakan.

Ketentuan Perma 1990 yang menggunakan pendekatan Konvensi New York juga menimbulkan pertanyaan kedua. Mengapa Perma 1990 tidak mengacu pada pendekatan atau batasan arbitrase internasional seperti tercantum dalam *Model Law* yang terbit 5 tahun sebelum Perma 1990 dikeluarkan, yaitu tahun 1985? Tentang pertanyaan kedua ini, penulis menemui kesulitan menelusuri ada tidaknya naskah akademik atau dokumen lainnya yang di dalamnya mencantumkan alasan pendekatan digunakannya putusan arbitrase asing dan bukan arbitrase internasionnal seperti termuat dalam UNCITRAL *Model Law*.

## C. Penutup

Karena menggunakan kriteria "putusan arbitrase internasional" ini dunia luar menganggap UU Arbitrase Indonesia tidak mengacu kepada *Model Law*. Sewaktu UU Arbitrase diterbitkan tahun 1990, cukup banyak pertanyaan yang menanyakan apakah UU Arbitrase kita mengacu kepada *Model Law*. Karena salah satunya tidak diikutinya batasan arbitrase inter-

4 Resolusi Majelis Umum No. 42/70 1958.

nasional ini Indonesia dicap sebagai negara yang tidak mengikuti *Model Law*.

Cap ini terdengar kurang bagus untuk negara kita sebagai negara yang dianggap tidak mengikuti standar internasional tentang arbitrase. Itulah sebabnya pengertian putusan arbitrase internasional ini perlu diperbaharui atau direvisi dengan batasan arbitrase internasional yang termuat dalam UNCITRAL Model Law.***

## AUTHOR'S BIOGRAPHY

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# NEWS & EVENTS

3-5 Maret 2024

## First APEC Economic Committee Meeting (EC1), Lima, Peru, 3-5 March 2024

BANI Arbitration Center represented by Prof. Huala Adolf, participated in the First APEC Economic Committee Meeting (EC1), in Lima, Peru, on 3-5 March 2024. In this event, The Indonesian Coordinating Ministry for the Economy was the coordinator of the Economic Committee (APEC-EC).

The aim of this meeting was to follow up on the 2023 APEC Economic Policy Report (AEPR), and the development of the 2024 AEPR. The discussion materials are the updates on the Competition Policy and Law Group (CPLG) and (Economic Committee (EC FotCs). At the Economic Committee, one of the agenda was the APEC Collaborative Framework for ODR of Cross Border B2B Disputes of 2019. In its presentation, Prof. Huala Adolf delivered a speech on BANI interest in joining the APEC ODR Framework in providing arbitration services to B2B disputes through ODR.

24 April 2024

## Silaturahmi BANI gathering

In celebrating Eid al-Fitr 1445 H. BANI held a Silaturahmi BANI gathering, which was attended by the BANI Management and Arbitrators on April 24, 2024 at the Financial Hall, Niaga Tower Building, Jakarta.


14 Mei 2024

## Australia arbitration experts visited BANI

HFW Australia visited BANI Arbitration Center to discuss the recent development of arbitration in Indonesia. Chris Cho, Nick Longley, Nick Watts and Helen Lee were welcomed by BANI Board.

5-8 Mei 2024

## ICCA Congress, Hong Kong

The 26th ICCA Congress was taking place in Hong Kong from 5 to 8 May 2024, focusing on the theme "International Arbitration: A Human Endeavour".

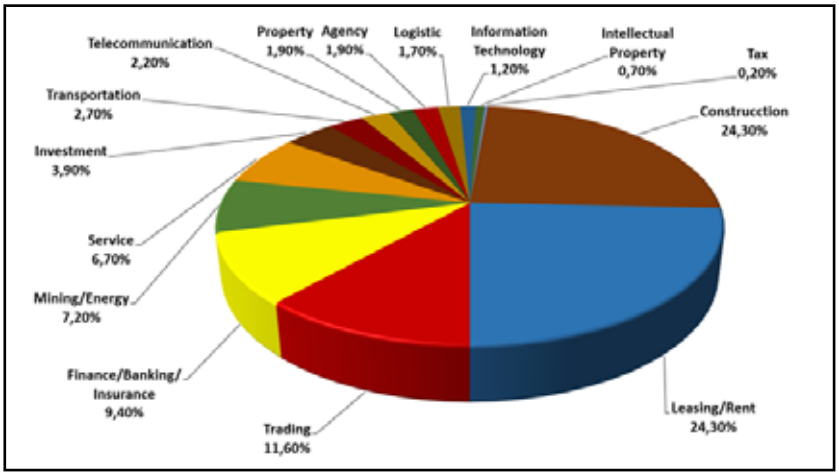
Anangga W. Roosdiono (Chairman of BANI) and N. Krisnawenda (Secretary General of BANI) attended the congress discussing the topics of the impact of human nature and behaviour on international arbitration and, conversely, arbitration's impact on people.


## Statistics of BANI

In the past 5 (five) years, approximately 77% of The registered cases in BANI Arbitration Center have involved disputes in the following sectors:

- Construction
- Leasing/Rent
- Trading
- Finance/Banking/Insurance
- Mining/Energy

The remaining 23% consists of dispute in 10 other sectors, as shown in the chart.




## BANI Standard Arbitration Clause

*BANI recommends all parties wishing to make reference to BANI Arbitration, to use the following standard clause in their contracts:*

*"All disputes arising from this contract shall be settled by arbitration under the Arbitration Rules of BANI whose decision shall be final and shall bind the parties in dispute."*

## Klausul Standar Arbitrase BANI

BANI menyarankan kepada para pihak yang ingin menggunakan arbitrase BANI, untuk mencantumkan dalam perjanjian-perjanjian mereka klausula standar sebagai berikut :

"Semua sengketa yang timbul dari perjanjian ini, akan diselesaikan dan diputus oleh arbitrase menurut peraturan dan prosedur arbitrase BANI yang putusannya mengikat kedua belah pihak yang bersengketa sebagai putusan tingkat pertama dan terakhir"

## Notes to contributors

*If you are interested in contributing an article about Arbitration & Alternative Dispute Resolution, please sent by email to bani-arb@indo.net.id. The writer's guidlines are as below:*

1. *Article can be written in Bahasa Indonesia or English, 12 pages maximum.*
2. *Provided by an abstract in one paragraph with Keywords (Bahasa Indonesia for English article & English for Bahasa Indonesia article)*
3. *The pages of article should be in A4 size with 25 mm/2.5 cm margin on all sides.*
4. *The article should be in Ms Word format, Times New Roman font 12 pt.*
5. *Reference / Footnote*
6. *Author Biography (100 words)*
7. *Recent Photograph.*

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