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STRENGTHENING THE BANI RULES :

INTERIM MEASURES AND EMERGENCY ARBITRATION

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BANI ARBITRATION CENTER

BADAN ARBITRASE NASIONAL INDONESIA

JAKARTA 2025

From The Editor

Assalamu'alaykum warohmatullahi wabarokatuh.

Shalom. Om swastiastu. Namo buddhaya.

Salam kebajikan, salam sehat, and sejahtera for all respected BANI Newsletter's readers!

In the middle of this 2025, we are grateful that the BANI Newsletter continues to rapidly grow become an intellectual forum for both academics and practitioners focusing on arbitration. The enthusiasm and loyalty of our readers in exploring and understanding arbitration in a proper and comprehensive manner through the BANI Newsletter serve as a source of motivation for us to remain consistent in publishing insights on developments in arbitration.

We hope that the articles published in the BANI Newsletter will become a collection of contemporary, enlightening, critical, and solution-oriented ideas that support the advancement of arbitration in Indonesia.

In this June 2025 edition, the BANI Newsletter features three articles addressing important insights of arbitration. Authored by outstanding academics and practitioners, each article presents the contemporary developments of arbitration and also contract law aimed at improving the arbitration process in Indonesia.

The first article, titled *" Commentaries on Interim Measures and Emergency Arbitration in The New Bani Rules 2025"*, is written by **Suar Sanubari and Mian Martalena Josephine Nababan**, two arbitration practitioners in Jakarta. This article examined Conservatory Attachment through the mechanism of Provisional Measures, as well as the Emergency Arbitration procedure, regulated in the BANI Rules 2025. It argued that, with regard to conservatory attachment through arbitral provisional measures, Indonesian regulations remain inadequate in ensuring legal certainty, especially in circumstances where the applicant must demonstrate urgency directly connected to the substance of the dispute, and where the possible involvement of third parties further complicates enforcement. Meanwhile, in respect of emergency arbitration procedures, Suar and Mian sugggested that the adoption of these procedural mechanisms still require much improvements and support from Indonesian national legislation relevant to arbitration.

The second article, authored by **Ahmad M. Ramli, Tasya Safiranita Ramli, Mohamad Irsyad Marwand, and I Made Wahyudi Prana Yoga** from the Faculty of Law at Universitas Padjadjaran, is titled *"Perkembangan Smart Contract dalam Transaksi Bisnis Digital [The Development of Smart Contracts in Digital Business Transactions]"*. It deeply dived into the comprehension of a smart contract, which is a digital agreement stored on a blockchain that executes automatically once the pre-conditions are fulfilled. Ramli *et al* suggested that Smart Contracts are capable of creating new efficiencies and legal certainty within the digital ecosystem by representing a revolutionary step that integrates technology and law within a single digital framework. However, they mentioned, in order to maximize their benefits, clear and adaptive regulation is required as a modern foundation of contracts in digital business that is transparent, efficient, and reliable.

Finally, this edition concludes with an article by **Mursal Maulana**, an academic, highly focusing on both arbitration and transnational business law, from Universitas Padjadjaran. His piece, titled *" The Urgency of Implementing the IBA Guidelines on Party Representation as an Ethical Standard for Legal Counsel in Arbitration Proceedings in Indonesia"* suggested that the absence of specific and comprehensive ethical standards in arbitration practice in Indonesia, particularly regarding party representation, has the potential to give rise to ethical dilemmas, conflicts of interest, and legal uncertainty. Mursal proposed the IBA guidelines to be adopted in Indonesia to build a credible and globally standardized national arbitration system. This adoption is hoped to strengthen Indonesia's position in international arbitration practice and increase the competitiveness of national arbitration institutions by preventing abuse of process, increasing user confidence, and strengthening the integrity of arbitration as an alternative dispute resolution forum.

Thus concludes a brief preview of the three articles featured in this edition of the BANI Newsletter. For our upcoming editions, we warmly invite contributions from both academics and practitioners to submit articles related to developments in arbitration, thereby enriching the legal and scholarly discourse on arbitration practice in Indonesia.

Anangga W. Roosdiono
Editor in Chief
June 2025

INDONESIA ARBITRATION QUARTERLY NEWSLETTER
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Commentaries on Interim Measures and Emergency Arbitration in the New BANI Rules 2025

Suar Sanubari
Mian Martalena Josephine Nababan

Abstract

This article examines important changes in the BANI Rules 2025, particularly regarding the regulation of Conservatory Attachment through the mechanism of Provisional Measures, as well as the Emergency Arbitration procedure. The main focus of discussion is how these changes interact with the provisions of Indonesian Civil Procedural Law, especially in terms of conservatory attachment. There is a need for certainty regarding the alignment of objective proof requirements for attachments applications between the District Court and BANI, and the potential existence of third parties in the process. In the context of Emergency Arbitration, the article highlights the position and legal strength of the emergency arbitrator's decision, which still requires adjustment to align with international arbitration standards and practices. This indicates the need for harmonization between BANI rules and the national legal framework, in order to enhance trust and legal certainty in dispute resolution through arbitration. The author conducts a comparative analysis of international regulations and Indonesian national law to identify potential improvements and further adjustments. Expedited Procedure, Streamlined Procedure, and Coordinated Proceeding are also discussed in this article as foundational considerations for regulatory reform in arbitration in Indonesia. This article emphasizes the importance of support from national policymakers and regulators to optimize the implementation of BANI's new rules in practice.

Keywords: Interim Measures, Emergency Arbitration, BANI Rules 2025

Abstrak

Artikel ini mengkaji perubahan penting dalam BANI Rules 2025, khususnya terkait pengaturan mengenai Sita Jaminan melalui mekanisme Putusan Sela, serta prosedur Arbitrase Emergensi. Fokus utama pembahasan adalah bagaimana perubahan ini berinteraksi dengan ketentuan Hukum Acara Perdata Indonesia, terutama dalam hal penyitaan jaminan (sita jaminan). Diperlukannya kepastian terkait keselarasan pembuktian objektifitas alasan permohonan sita antara Pengadilan Negeri dengan BANI, dan potensi keberadaan pihak ketiga dalam prosesnya. Dalam konteks Arbitrase Emergensi, artikel menyoroti posisi dan kekuatan hukum dari putusan arbitrator darurat yang masih memerlukan penyesuaian agar sejalan dengan standar dan praktik arbitrase internasional. Hal ini menunjukkan adanya kebutuhan harmonisasi antara aturan BANI dan kerangka hukum nasional, guna meningkatkan kepercayaan dan kepastian hukum dalam penyelesaian sengketa melalui arbitrase. Penulis melakukan analisis komparatif terhadap peraturan internasional dan ketentuan hukum nasional Indonesia untuk mengidentifikasi potensi perbaikan dan penyesuaian lebih lanjut. *Expedited Procedure, Streamlined Procedure,* dan *Coordinated Proceeding* juga dibahas dalam Artikel ini untuk menjadi dasar pertimbangan dalam pembaharuan regulasi tentang Arbitrase di Indonesia. Artikel ini menekankan pentingnya dukungan dari pembentuk kebijakan dan regulator nasional untuk mengoptimalkan implementasi aturan baru BANI dalam praktik.

Kata Kunci: Sita Jaminan, Arbitrase Emergensi, BANI

I. INTRODUCTION

Tracing the historical development of arbitration law in Indonesia, arbitration has been recognized as a method of dispute resolution since 1894. Indonesia first adopted this mechanism through the implementation of the *Reglement op de Rechtsvordering* (RV) and the *Herzien Inlandsch Reglement* (HIR), both of which were introduced during the Dutch colonial period.[1] The milestones of evolution in Indonesian arbitration continued with the establishment of the Indonesian National Board of Arbitration (BANI) in 1977 by the Indonesian Chamber of Commerce and Industry, the ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards through a Presidential Decree in 1981, and the enactment of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution ("Indonesia Arbitration Law"), which represents the first specific and original legal framework governing arbitration in Indonesia.[2]

However, since the enactment of the Arbitration Law in 1999, the regulation of arbitration in Indonesia has remained relatively stagnant. Amendments to the Indonesian Arbitration Law have thus far occurred only through two Constitutional Court decisions in response to judicial review petitions.[3] Other developments have been technical and internal in nature, limited to Supreme Court regulations and BANI Arbitration Rules and Procedures, which serve primarily to fill procedural gaps in arbitration practice.[4] A notable advancement only emerged with the issuance of the 2025 Arbitration Rules and Procedures ("BANI Rules 2025"), which marked a significant procedural update introduced by BANI.

The BANI Rules 2025 introduce significant changes, including: (i) the expansion of BANI's jurisdiction to cover not only domestic but also international disputes;[5] (ii) the authority granted to the Chairperson of BANI to appoint the composition and presiding arbitrator of the tribunal with the parties consent;[6] (iii) the authority to adjudicate non-contractual disputes;[7] (iv) the empowerment of arbitral tribunals to issue provisional measures, including orders for attachment (conservatory measures)[8]; and (v) the introduction of Emergency Arbitration procedures[9]. While the changes in BANI Rules 2025 do not introduce new concepts, the adoption showcase the current BANI administration's willingness to keep up with the development of arbitration practices at regional and international level.

One of the crucial (among others) changes introduced in the BANI Rules 2025 is the authority granted to arbitral tribunals to order conservatory attachment through an interlocutory decision. This marks a significant departure from the BANI Rules 2022, which under BANI rules 2025 stipulated that the imposition of attachment must comply with the applicable laws and regulations. The referenced provision pertains to the Supreme Court Regulation No. 3 of 2023 on Procedures for the Appointment of Arbitrators by the Court, Challenges to Arbitrators, and the Examination of Applications for the Enforcement and Annulment of Arbitral Awards ("2023 Supreme Court Regulation on Arbitration"), which governs that attachments shall be executed in accordance with the provisions and procedures for attachment as prescribed under the applicable civil procedural law[10].

Potential issues may arise from the fact that both the BANI Rules 2025 and the 2023 Supreme Court Regulation on Arbitration regulate the enforcement of conservatory attachment through provisional measures only in general terms within the arbitration process. Technically, under Indonesia's civil procedural law, a request for conservatory attachment submitted to the district court may open the possibility for third

1 Rani Apriani et al, *Alternative Dispute Resolution* (Deepublish 2024) <https://www.google.co.id/books/edition/Alternatif_Penyelesaian_Sengketa/yMY0EQAAQBAJ?hl=en&gbpv=1&dq=sejarah+arbitrase&pg=PA125&printsec=frontcover> accessed 6 June 2025, p.125.

2 J Lumbantobing, 'The 1958 New York Convention in Indonesia: History and Commentaries beyond Monism-Dualism' (2019) 9 *Indonesian Law Review* 222. <https://scholarhub.ui.ac.id/cgi/viewcontent.cgi?article=1027&context=ilrev> accessed 6 June 2025.

3 Constitutional Court Decision No. 15/PUU-XII/2014 and No. 100/PUU-XXII/2024 <https://www.mkri.id/index.php?page=web.Putusan&id=1&kat=5&cari=arbitrase> accessed 6 June 2025.

4 Law No 14 of 1985 on the Supreme Court of the Republic of Indonesia, art 79, and Law No 30 of 1999 on Arbitration and Alternative Dispute Resolution (Indonesian Arbitration Law) art 34 (2).

5 BANI Rules 2025, art 1 (b)

6 BANI Rules 2025, art 1 (e)

7 BANI Rules 2025, art 2 (1)

8 BANI Rules 2025, art 18 (5)

9 BANI Rules 2025, art 17 (5) and Attachment 1

10 Indonesia Supreme Court Regulation No. 3 of 2023 on Procedures for the Appointment of Arbitrators by the Court, Challenges to Arbitrators, and the Examination of Applications for the Enforcement and Annulment of Arbitral Awards, art 29 (5). See also BANI Rules 2025, Art 18 (5) b

parties to file objections (*derden verzet*)[11]. Moreover, third parties may also initiate civil claims concerning the assets which are subjected to the attachment.[12] In practice, this could lead to a satellite litigation before Indonesian courts—which hearings are public, hence compromises the confidentiality that would have been preserved in arbitration proceedings.

Furthermore, the BANI Rules 2025 raise concerns regarding the newly introduced provisions on Emergency Arbitration. While this development is commendable as a step toward modernizing arbitration procedures in Indonesia, the regulatory framework remains misaligned with international standards. The provisions governing Emergency Arbitration under the BANI Rules 2025 are relatively general and do not yet offer sufficient legal certainty. Although the Rules grant the Chairperson of BANI the authority to establish supplementary provisions for matters not explicitly regulated, normative clarity is still lacking when compared to established international arbitration institutions.

One of the key weaknesses is the absence of a clear explanation regarding the relationship between the Emergency Arbitration process and the main arbitral proceedings. Legal uncertainty also arises from the status of the Emergency Arbitrator's decision, which is described as "final and binding" under the BANI Rules 2025.[13] This characterization appears inconsistent, as such decisions are, by nature, provisional measures. This stands in contrast to the practice of prominent international arbitration institutions such as the International Court of Arbitration (ICC), the Singapore International Arbitration Centre (SIAC), and the Hong Kong International Arbitration Centre (HKIAC), all of which recognize that while Emergency Arbitrator decisions are binding and enforceable, they remain interim in nature and may be revisited by the arbitral tribunal.[14] The reasoning for "final and binding" status of BANI's emergency decision is to ensure that such award is enforceable by Indonesian courts. There are case precedents in which Indonesian courts interpret that only final and binding awards are enforceable (despite the Indonesian Arbitration Law regulates provisional/interim award).[15] However, the "final and binding" categorization creates unique systemic risks.

Accordingly, this article aims to analyze two key changes introduced in the BANI Rules 2025, employing a comparative approach that examines both international regulatory standards and the prevailing legal framework in Indonesia. It is hoped that this study can serve as a reference for BANI and Indonesian legal regulators in formulating future policies, thereby fostering the development of arbitration regulations that provide stronger legal certainty and align more closely with global best practices.

II. CONSERVATORY ATTACHMENT THROUGH ARBITRAL PROVISIONAL MEASURES IN INDONESIA

The mechanism for conservatory attachment in BANI arbitration proceedings has, in fact, been regulated since the enactment of the BANI Rules 2022, where applications for attachment were processed through a provisional award.[16] The tribunal's authority to issue conservatory attachment is reaffirmed under Articles 18 (5) as well as 1 (2) h and 25 BANI Rules 2025.

However, the BANI Rules 2025 introduce a significant change by stipulating that a provisional award ordering conservatory attachment must be issued "subject to the prevailing laws."[17] Under the BANI Rules 2025, the term "Law" is defined as "the Indonesian Arbitration Law".[18] Nevertheless, the Rules do not explicitly clarify whether the phrase "prevailing laws " refers to national laws, international laws, or both (and for "national laws", are they limited to legislation (*peraturan perundang-undangan*) or include policy rules

11 Bunga Agnita, 'Kewenangan Pengadilan Dalam Pelaksanaan Sita Jaminan Arbitrase: Studi Komparatif Regulasi Indonesia-United Kingdom'. (LLM Thesis, University of Indonesia 2025), p.62-63.

12 ibid 64

13 BANI Rules 2025, art 7. Under Indonesian arbitration legislation, no distinction is made between decisions rendered in the form of an 'order' and those rendered as an 'award'. Whether the decision is substantive or procedural in nature, Indonesian law refers to both simply as a "decision" (*putusan*), without differentiating between their legal form or effect. To know the differences of award and order See H Verbist and others, 'Drafting Awards in ICC Arbitrations' (2005) 16(2) *ICC International Court of Arbitration Bulletin* 19 <https://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/awards/Awards_ICC_Arb.pdf> accessed 9 June 2025

14 ICC Rules, Appendix V, art 6(8). SIAC Rules Schedule 1, art 21. HKIAC Rules, Art 23 (5) and Schedule 4, art 17

15 *Astro Nusantara International BV and others v. Ayunda Prima Mitra et al*, SIAC Arbitration Award No 062 of 2008 (ARB062/08/JL), 10 June 2009. See Also Grace Fan, *The Enforceability of International Arbitration Award on the Issue of Provisional Anti-Suit Injunction in Indonesia: Case Study Astro Nusantara Internasional BV v PT Ayunda Prima Mitra* (Undergraduate thesis, Faculty of Law, Universitas Indonesia 2012) <https://lib.ui.ac.id/file?file=digital/old29/20319156-S42440-Keberlakuan%20putusan.pdf> accesed 29 June 2025

16 BANI Rules 2022, art 18 (5)

17 BANI Rules 2025, art. 18 (5) b.

18 BANI Rules 2025, art 1 (2) i

(*beleidsregel*) such as Supreme Court Regulations and Circular Letters.[19]

This study seeks to comprehensively examine both dimensions in order to assess the clarity and effectiveness of the regulation of conservatory attachment within the BANI arbitration framework.

1. Indonesian Regulations on Conservatory Attachments in Arbitration Proceedings

Within the Indonesian legal framework, conservatory attachment originates from the civil procedural law governing various forms of seizure or attachment. Conservatory attachment (*sita Jaminan*) is one among several types of court-ordered attachments (other attachments are: revindication attachment (*sita revindikasi*), adjustment attachment (*sita penyesuaian*), marital attachment (*sita marital*), and execution/enforcement attachment (*sita eksekusi*)). What distinguishes conservatory attachments from other forms is the object of attachment, namely, the assets owned by the defendant or the disputed objects (i.e. in ownership disputes), which serves the purpose of securing the enforcement of a final and binding court decision (*inkracht van gewijsde*).

Attachment under Indonesian civil procedural law must be carried out in accordance with several fundamental principles. Attachment may only be requested through a formal application submitted to the court. Such application must clearly and specifically identify the object to be attached and be accompanied by a justification demonstrating the urgency of the attachment. A valid urgent ground typically involves a substantiated suspicion, presented by the plaintiff, that the defendant may attempt to transfer or conceal the object of attachment, and that this suspicion is directly relevant to the substantive issues of the case being adjudicated. The court will assess the request objectively, and a judge will then determine whether to grant the application through the issuance of an attachment order.[20]

The Indonesian Arbitration Law regulates arbitral tribunal's authority to issue a provisional award for attachment.[21] However, it does not specifically regulate the threshold to grant conservatory judgment and is enforcement. Regardless, since the Indonesian Arbitration Law is a specialist law to the Indonesian civil procedural law, in theory, BANI arbitration tribunal should use the similar litmus tests in granting or refusing applications for provisional award for attachment.

The Indonesian civil procedural law only provides the legal basis for the court to grant security attachment based on prejudice that the defendant as debtor would anticipate and circumvent enforcement of unfavorable final and binding judgment. The Supreme Court, through its Circular Letter, then require the proof of urgency and the relevance of the attached object to the substance of the dispute.[22] The plaintiff/applicant must submit evidence that the defendant is about to transfer its assets to a third party to circumvent future executorial attachment based on final and binding judgment. In practice, this is an onerous requirement for the applicant: transfer documents are most likely private documents. Therefore, it is a very rare case that a conservatory attachment is granted by the Indonesian courts.

BANI's official paradigm on arbitration is that it is a 'win-win' dispute resolution mechanism.[23] BANI claims its tribunals have issued provisional awards for security attachment and such awards are enforceable. However, BANI further claims that the petition for conservatory attachment are rarely necessary as parties in BANI arbitrations are generally expected to uphold the principle of good faith and engage in negotiations accordingly. A conservatory attachment becomes necessary when one of the parties involved disregards

19 Indonesia classifies its regulatory instruments into several formal categories: the 1945 Constitution (Undang-Undang Dasar), People's Consultative Assembly Decrees (Ketetapan Majelis Permusyawaratan Rakyat), Laws (Undang-Undang), Government Regulations (Peraturan Pemerintah), Presidential Regulations (Peraturan Presiden), and Regional Regulations (Peraturan Daerah). Policy rules (*beleidsregels*), such as Supreme Court Regulations and Circular Letters, although they possess regulatory authority, hold a different legal status from regulations enacted by the legislative body. See Law Number 12 of 2011 on the Formation of Laws and Regulations art 7-8, See also n (4).

20 HIR, art 227/RBG, art 261. The Indonesian civil procedural law still uses Dutch colonial era legislation, The *Herzien Indlandch Reglement* (HIR) is applicable in Java and Madura Islands. While the *Reglement Tot Regeling Van Het Rechtswezen In De Gewesten Buiten Java En Madura* (RBG) is applicable it other areas. and

21 Indonesian Arbitration Law, Art 32

22 Supreme Court Circular Letter No. 5 of 1975 concerning conservatory attachment (Conservatoir Beslag): See also M.YHarahap, Civil Procedure Law on Lawsuits, Trials, Seizure, Evidence, and Court Decisions (Sinar Grafika 2016), p. 344-345
The 2023 Supreme Court Regulation on Arbitration, still does not regulate on provisional award for security attachment.

23 A.W Roosdiono, 'Paradigma dalam Arbitrase di Indonesia: Win-Lose atau Win-Win/Lose-Lose?' (Hukumonlinecom, 3 march 2023) <https://www.hukumonline.com/berita/a/paradigma-dalam-arbitrase-di-indonesia--win-lose-atau-win-win-lose-lose-lt6401add2570ba/?page=4> accessed 25 July 2025.

a proper notice from BANI to attend arbitration proceedings or to comply with the arbitral award.[24]

In such cases, BANI arbitration tribunals exercised a different threshold to evaluate the urgency for granting a conservatory attachment from the Supreme Court's Circular Letter. BANI arbitration tribunals do not require evidence on the transfer of assets by the respondent; if the respondent fails to demonstrate good faith by, among other, engaging in negotiations or disregarding a proper notice. This adverse inference may be more sensible than the stringent requirements of the Supreme Court's. Furthermore, since circular letters are not legislation (only policy rules), legally they only have persuasive authority. Judges adoption of the policy rules depend on their willingness to give consistency in court practice and the fact their career is under Supreme Court's organizational structures.

Indonesian legislation provide a legal avenue for respondents or third parties to challenge a petition for conservatory attachment. If the object of attachment is under the control of, or otherwise connected to, a third party, that party may file a *derden verzet* (third-party challenge) before the court.[25] However, this legal remedy may only be pursued while the court proceedings are still ongoing and before a final and binding decision has been rendered. Once a decision has acquired final and binding status, any objections from third parties must be brought through a separate civil lawsuit.[26]

BANI Rules 2025 do not regulate the challenge procedures by third-party or non-signatory to the arbitration agreement. In the context of ordering conservatory attachment within arbitral proceedings, adapting the procedure to align with Indonesian civil procedural law gives rise to several potential issues, including:

1). Third-Party Challenge During Ongoing Arbitration Proceedings: A third party may file a *derden verzet* with the District Court during the pendency of a conservatory attachment application, even while the arbitration proceedings before BANI are still ongoing.

In BANI arbitration case Number 588/V/ARB-BANI/2014, the arbitral tribunal ordered an attachment. However, the attachment was challenged by a third party (the lawful owner of the attached property) through a separate civil lawsuit before the Central Jakarta District Court. The court ruled that the execution attachment over the entire object was null and void by operation of law, and declared that ownership of all such property rightfully belonged to the Challenger (a third party who had never been involved in the arbitration proceedings). As a result, the claimant in the arbitration did not obtain any of the attached assets.[27]

2). Separate Civil Claims with Attached Assets as the disputed object: third parties may also initiate separate civil lawsuits with the assets subjected to conservatory attachment by the arbitral tribunal as the disputed object.

If any or both situations arise during the arbitration proceedings, the satellite litigation will undermine the confidentiality[28] and expediency of dispute resolution, which are fundamental and desired features of arbitration, may not be optimally upheld. This condition creates an imbalance between the need for legal protection through provisional attachment and the inherently confidential nature of arbitration which have not yet analyzed in Indonesian legal literature.

The authors contends that, in order to ensure legal certainty in this context, adequate and explicit legislation is required. This necessity becomes even more pressing in light of the analysis of the Academic Manuscript of the Draft Bill on the Amendment to Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, which does not identify the issue of conservatory attachment as a matter warranting specific regulation. The absence of such regulation indicates a legal vacuum that may undermine the effectiveness of arbitration in Indonesia, particularly in relation to the enforcement of provisional attachment.

24 Sujayandi & Yuniarti, 'Pelaksanaan Sita Jaminan dalam Hukum Acara Arbitrase' (2010) 25(3) Yuridika 241

25 HIR Art 195 (6)//Rbg Art 206 (6)

26 M.Y Harahap (n 18) [356]. See also Supreme Court Decision No 3089K/Pdt/1991; and Supreme Court Decision No 996K/Pdt/1989

27 PT Koneksindo Jaya v. Elijon Corporation, Kim Hong Seok, and PT Digitalwave Indonesia (Central Jakarta District Court Judgment No 203/Pdt.G/2020/PN Jkt.Pst) ; see also A N Qoumy and I Haryanto, 'Konstruksi Hukum Eksekusi Atas Putusan Arbitrase Yang Memberikan Kepastian dan Keadilan (Studi Kasus Putusan Nomor 203/Pdt.G/2020/PN Jkt.Pst)' (2023) 5(1) National Conference on Law Studies (NCOLS) 829

28 Indonesian litigation proceedings, by default, must be open to public. See Law No 48 of 2009 on Judicial Power, art 13 (Indonesia).

2. International Practice on Conservatory Attachments in Arbitration Proceedings

In international practice, conservatory attachments are generally sought through the mechanism of interim measures, which have become an integral component of various international arbitration rules and procedures. Leading arbitral institutions such as the ICC, SIAC, and HKIAC generally adopt approaches consistent with the UNCITRAL Arbitration Rules in regulating interim measures. Within this framework, arbitral tribunals are required to assess whether there is a strong *prima facie* case that the subject matter sought to be attached is at risk and would not be adequately protected in the absence of interim relief.

Notably, HKIAC imposes a more stringent standard by requiring the applicant to disclose any material changes to the facts or grounds upon which the application for interim measures is based. Failure to comply with this obligation may result in legal liability for the applicant, including the obligation to compensate for costs and damages incurred if the tribunal subsequently determines that the interim measures ought not to have been granted in the first place.[29]

With respect to the enforcement of interim measures, all international arbitral institutions including the ICC, SIAC, and HKIAC, remain dependent on the national courts of the relevant jurisdiction. The efficiency of enforcing such measures ultimately depends on how each jurisdiction treats arbitral interim orders. Some jurisdictions regard arbitral interim measures as sufficiently binding and enforceable upon mere notification to the national court. In contrast, other states recognize only a "final award" as enforceable, including Indonesia, thereby limiting the effectiveness of interim relief granted by arbitral tribunals.[30]

By way of comparison, the UK Arbitration Act 1996 explicitly recognizes the principle of arbitral tribunal autonomy in adjudicating the merits of a dispute. Judicial intervention is only permitted where the tribunal lacks jurisdiction or is unable to discharge its functions effectively[31]. In non-emergency situations, the court may only act with the consent of the arbitral tribunal or pursuant to a written agreement between the parties. Even in the case of an interim injunction issued by the court, any appeal may only be pursued with "leave of the court".[32]

In contrast, the regulatory framework in Indonesia, whether through the 1999 Arbitration Act, the 2023 Supreme Court Regulation on BANI Rules 2025 (or other institutional rules), has yet to provide a clear delineation of authority regarding the issuance of provisional measures, particularly in relation to conservatory attachment. Existing regulations tend to defer to the Indonesian Civil Procedural Law. However, such references are overly general and risk creating legal uncertainty and multiple interpretations in practice.

Some legal scholars in Indonesia have expressed the view that it is no longer relevant to merely amend the existing arbitration law. This is because Indonesia combines provisions on arbitration and alternative dispute resolution within a single law, despite the differing characteristics of the two mechanisms. [33] In contrast to some other countries, legislation on arbitration and other forms of alternative dispute resolution are governed under separate legislative instruments.[34] However, considering Indonesia's current initiative - evidenced by the existence of the Academic Manuscript of the Draft Bill on the Amendment to Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution - it is apparent that Indonesia has begun taking steps toward amending the existing Arbitration Law.

The UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006 ("UNCITRAL Model Law"), has facilitated an ideal legislative framework concerning the recognition and enforcement of conservatory attachments or interim measures. To protect the rights of third parties, provisions may

29 HKIAC Rules, art 23(8)

30 See n (15), See Also A Prasad, 'Enforceability of Interim Measures Ordered by Arbitral Tribunals: The Issue and Possible Remedies in International Commercial Arbitration' (2020) SSRN <https://ssrn.com/abstract=3589286 accessed> accessed 9 June 2025

31 Bunga Agnita (n 11) [88-90]

32 UK Arbitration Act 1996, art 44 (7)

33 Hukumonline, 'Guru Besar FH Unair ini sebut UU Arbitrase dan APS perlu Diganti', (3 July 2024) https://www.hukumonline.com/berita/a/guru-besar-fh-unair-ini-sebut-uu-arbitrase-dan-aps-perlu-diganti-lt66843e0479cbd/?page=2> accessed 27 July 2025

34 For example, Singapore has the Arbitration Act 2001, which specifically governs arbitration proceedings, and separate legislation for other forms of alternative dispute resolution, such as the Mediation Act 2017.

be introduced regarding the authority of courts to require security from the applicant (if the arbitral tribunal has not already made such a determination).[35] Even so, in the Academic Manuscript of the Draft Bill on the Amendment to Law Number 30 of 1999, this UNCITRAL Model Law provisions, or even the conservatory attachments itself is not mentioned.

The author is of the opinion that, at the very least, the drafting process for the amendment of Indonesia's Arbitration Law should consider the legal issues surrounding the enforcement of conservatory attachments in Indonesian arbitration proceedings. Likewise, Indonesia may adopt in greater detail, the provisions set out in the UNCITRAL Model Law concerning the recognition and enforcement of interim measures through implementing government regulations under the Law.[36]

BANI's effort to adapt to the current legislative framework may improve the enforceability of interim relief but can undermine the principle of due process. Categorizing provisional award or interim relief as "final and binding" seems to be a practice of oxymoron; it may give the impression that the tribunal has already rendered its final decision before the proceedings are concluded.

III. EMERGENCY ARBITRATION PROCEDURES UNDER THE BANI RULES 2025

The concept of Emergency Arbitration was first introduced by the ICC in 1990 through a mechanism known as the ICC Pre-Arbitral Referee Procedure. This procedure was developed in response to the need of parties for swift interim relief without the necessity of first resorting to the competent state courts. Applications to state courts were considered insufficiently expeditious and posed a risk to the confidentiality of the dispute, an essential principle in arbitration[37]. A significant development occurred in 2006, when the International Centre for Dispute Resolution (ICDR) formally established an Emergency Arbitrator procedure. Since then, this mechanism has been widely adopted by various international arbitral institutions as part of a broader effort to enhance the effectiveness and efficiency of dispute resolution outside of national court systems[38].

Under the arbitration rules and procedures of the ICC, SIAC, and HKIAC, Emergency Arbitration is similarly defined as a mechanism for requesting emergency interim or conservatory relief prior to the constitution of the arbitral tribunal. A comparable provision is also adopted in the BANI Rules 2025, particularly in Article 17(5) and Annex i. However, a key difference lies in the legal status of emergency arbitration decisions within the broader arbitral process. Under the ICC, SIAC, and HKIAC Rules, emergency arbitration awards are interim and binding but remain subject to review by the arbitral tribunal. Should the tribunal determine that the emergency award is not final and binding, the tribunal's award will supersede and constitute the sole final and binding award between the parties.

Emergency arbitration procedures may only be initiated after the disputing party has filed its case with the secretariat of the international arbitration institution through the submission of a Notice or Request of Arbitration.[39] Once the required documents for the Notice of Arbitration are received by the secretariat, and before the constitution of the arbitral tribunal, the claimant may submit a request to initiate emergency arbitration. Upon receipt of the emergency arbitration application, the institution will appoint an emergency arbitrator. This emergency arbitrator will issue an order or interim award within a period of 14 to 15 days, depending on the applicable rules of the respective arbitration institution. This deadline may be extended under certain circumstances by the secretariat or the president of the institution. Once the emergency arbitration process is concluded, the main dispute will be examined by the arbitral tribunal subsequently constituted. The tribunal has the authority to confirm, modify, or set aside the decision rendered by the emergency arbitrator.[40]

35 UNCITRAL, Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, art 17H.

36 Government Regulations in Indonesia are characterized by their function of regulating the technical details necessary for the effective implementation of Laws. See Thahir Thahir and others, Buku Ajar Pengantar Hukum Indonesia (PT Sonpedia Publishing Indonesia 2024) 24. < https://www.google.co.id/books/edition/Buku_Ajar_Pengantar_Hukum_Indonesia/uzATEQAAQBAJ?hl=en&gbpv=1&dq=peraturan+pemerintah+sebagai+peraturan+pelaksana&pg=PA24&printsec=-frontcover> accessed 28 July 2025

37 K Falk, 'Emergency Arbitration – An Examination of the SCC Solution' (2011) <https://gupea.ub.gu.se/bitstream/handle/2077/24306/;jsessionid=D1D7AD-118F3AC2DE5E5EE6E3AE8879B2?sequence=1> Accesed 09 June 2025

38 HQ Thuan, 'Emergency Arbitrator – An Efficient Mechanism for Commercial Arbitration Development?' (2021) 5(02) Vietnamese Journal of Legal Sciences 54.

39 ICC Rules, art 4(1). SIAC Rules s 2, art 6. HKIAC Rules, s 2, art 4

40 Hong Kong International Arbitration Centre, 'Emergency Arbitrator Procedures' <https://hkiac.org/arbitration/process/emergency-arbitrator-procedures> accessed 9 June 2025.

Accordingly, when the parties agree to initiate emergency arbitration, the procedure and its outcome cannot be separated from the main arbitration proceedings. This aspect remains insufficiently addressed in the BANI Rules 2025. Annex I of the BANI Rules 2025 does not clarify the legal status of the emergency arbitrator's decision, whether it may be reconsidered by the arbitral tribunal or is intended to be final and unalterable. The BANI Rules 2025 merely state that the emergency arbitrator's decision is a binding provisional order[41], and that the parties agree to comply with it immediately and without delay. Furthermore, the Rules explicitly state that the parties waive their right to seek recourse before national courts against the emergency arbitrator's decision.

BANI Rules 2025 stipulate that emergency arbitration awards are final and binding. The reasoning is to enable enforcement under Indonesian Arbitration Act and Civil Procedural Law.[42] BANI understands that enforcement of provisional awards can be tricky in Indonesia.

In the case of *Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others*, SIAC arbitration tribunal issued a provisional award ordering PT Ayunda Prima Mitra to cease all ongoing proceedings at the South Jakarta District Court, taking into account the existence of an agreement between the parties containing an arbitration clause[43]. However, upon receiving the application for the enforcement (*exequatur*) of the Provisional Award, the Indonesian court declared that the application could not be granted on the grounds that the Provisional Award exceeded its authority by intervening a judicial proceedings within Indonesia. The court also took into consideration the status of the Provisional Award, noting that it was not final and binding (although no further elaboration was provided regarding the legal basis for this consideration).

The closest equivalent of emergency awards in Indonesian civil litigation is immediately enforceable judgment (*Uitvoorbar bij Voorad*). However, the Supreme Court Circular No. 3 of 2000 imposes strict requirements that are rarely met in practice, resulting in the infrequent issuance of immediate rulings.[44]

The authors are of the view that the inclusion of emergency arbitration procedures in the BANI Rules 2025 constitutes a positive procedural progress in Indonesia's arbitration landscape, albeit not a perfect one. The final and binding status of emergency award under BANI Rules 2025 can create a legal loophole: whether the arbitration tribunal of the main proceedings can overturn the emergency award or not. Unalterable emergency awards may compromise due process in the arbitration proceedings, undermining the legitimacy and possibility of challenges to the final award. While a non-final and binding status may render the emergency awards ineffective.

In this regard, BANI may enhance the framework further by aligning it with established international standards, through the adoption of widely recognized arbitral rules. However, at the national level, Indonesian lawmakers must also take active steps to keep pace with regulatory developments in arbitration. The Indonesian Arbitration Law is more than 25 years old, amendments to the act or issuance of a new arbitration act that specifically addresses the intersection between arbitration procedures and the provisions of general civil procedural law are much needed. This is particularly important considering Indonesia wants to promote arbitration to mitigate the backlog of caseload in the Supreme Court and to be recognized as arbitration friendly jurisdiction.[45]

As part of national regulatory reform, a comparison may be drawn with how India approaches emergency arbitration awards. Under the Arbitration and Conciliation Act 1996, India recognizes provisional or interim arbitral awards and allows for their enforcement through applications to the High Court. This approach was exemplified in the emergency arbitration case of *Plus Holdings Limited v Xeitgest Entertainment Group Ltd*, in which the High Court granted *ad interim* protection, while expressly acknowledging and considering that the order was of a provisional nature and would be subject to further review in light

41 See n (13) .

42 Sosialisasi Peraturan dan Prosedur BANI 2025, (BANI, Jakarta 27 Mei 2025).

43 See n (15), See Also Central Jakarta District Court Decision No 05/Pdt/ARBINT/2009, 07 May 2009: Recognition and Enforcement of International Arbitration Award under SIAC Rules No 062 of 2008 (ARB062/08/JL).

44 See Supreme Court Circular Letter Number 3 of 2000 concerning Provisional Decisions and Immediate Execution (Uitvoerbaar bij Voorraad) (Indonesia), art (4). See also R L Muttaqin, Dasar Hukum dan Pertimbangan Hakim dalam Memeriksa dan Memutus Tuntutan Putusan serta Merta (Uitvoerbaar Bij Voorraad) dalam Gugatan Perdata yang Diajukan di Pengadilan Negeri (2018) < https://digilib.uns.ac.id/dokumen/detail/63530/> accessed 25 june 2025

45 M Y A Baharuddin, 'Peran Hukum Arbitrase Dalam Penyelesaian Sengketa Bisnis Nasional: Hukum Arbitrase' (2024) 5(2) Jurnal Risalah Kenotariatan 310. < https://doi.org/10.29303/risalahkenotariatan.v5i2.209> accessed 23 June 2025

of the final arbitral award.[46] Indian courts, in *Amazon* Case, also acknowledge that the Emergency Arbitration award would be deemed to be orders of the court for all purposes and would be enforced under the Civil Procedure Code.[47]

Comparative reference may also be drawn to the UK's Arbitration Act, which underwent an amendment in 2025. The amended UK Arbitration Act 2025 specifically addresses emergency arbitration and confers express authority upon emergency arbitrators to issue peremptory orders in cases where a party fails to comply with any orders or directions issued by the emergency arbitrator[48]. A regulatory framework of this nature would be highly beneficial if adopted in Indonesia, as it would grant arbitral institutions conducting emergency arbitration a degree of enforcement power, align with the support of the national courts.

Accordingly, there are various measures Indonesia can take to further develop its arbitration legal framework in a more 'pro-arbitration' direction. However, it is essential that any regulation introduced is implementable and does not conflict with existing laws and legal principles. By doing so, Indonesia can position itself as an arbitration-friendly jurisdiction that supports alternative dispute resolution mechanisms, thereby enhancing confidentiality and efficiency in the resolution of commercial disputes. These reforms and developments may begin with a careful consideration of the provisions discussed in this article as part of the Draft Amendment to the Arbitration Law.

IV. THE NEEDS OF ADOPTING ADDITIONAL ARBITRATION PROCEDURES

With the introduction of emergency arbitration procedures under the BANI Rules 2025, BANI has arguably taken a step ahead compared to the Indonesian lawmakers. Despite the existence of an Academic Draft for the Amendment of the Arbitration and Alternative Dispute Resolution Law since 2024, this draft fails to consider several procedural mechanisms that have already been incorporated into arbitration regulations in other jurisdictions, one of which is emergency arbitration.

It is understandable that the development of national regulatory framework on arbitration regulations which ensure legal certainty from the dispute resolution process through to enforcement requires coherence between institutional rules and the legislative framework. However, as an independent institution, institutions such as BANI retain the flexibility to advance its procedural innovations in arbitration in order to remain on par with international arbitral institutions. The following are examples of procedures that could be adopted by BANI to strengthen its alignment with global standards:

1. Expedited Procedure

Expedited Procedures were first addressed by the Geneva Chamber of Commerce and Industry (CCIG) in 1992.[49] This procedure was later developed by other international arbitration institution on their respective rules. Initially, the purpose of establishing expedited procedures was to accelerate the resolution of disputes. However, reviewing the applicable rules under the ICC, it is regulated that the final award for cases conducted under expedited procedures may be issued within 6 months from the date of the case management conference[50], whereas this time frame is regulated the same as the time limit for issuing a final award under BANI Rules (even without expedited procedures). [51]

Expedited procedures refer to more as a simplification of arbitration procedures. In several rules, such as in the SIAC Rules 2025, hearings, document production, and witness evidence must be limited after the tribunal considering the views of the parties.[52] Or, as seen in the ICC Arbitration Rules 2021, the terms of reference process is non-mandatory in nature. Another simplified procedures can be seen in how, under expedited

46 Plus Holdings Ltd v Xeitgeist Entertainment Group Pte Ltd and others (Bombay High Court, Commercial Arbitration Petition No 339 of 2019, Kulkarni J, 7 March 2019) <https://indiankanoon.org/doc/86667417/>accesed 30 June 2025

47 See Amazon.Com NV Inv. Holdings LLC v. Future Retail Ltd., Civil Appeal Nos. 4492-4493 of 2021. See Also A Latheef and DA Sreekumar, Analysing the Requirement for Emergency Arbitration Law in the Indian Scenario (2024) <http://14.139.185.167:8080/jspui/bitstream/123456789/1510/1/LM0223003_AlfiyaLatheef.pdf>accessed 30 June 2025

48 K Tabiri and G Owusu, 'Enhancing Ghana's ADR Framework: Aligning Arbitration with International Best Practices' (2025) SSRN <https://papers.ssrn.com/sol3/Delivery.cfm?abstractid=5238792> accessed 9 June 2025.

49 K Voronov, 'Peculiarities of Expedited Arbitration Procedures in Different Jurisdictions' (2024) (38) The Journal of VN Karazin Kharkiv National University. Series Law 102 <https://periodicals.karazin.ua/law/article/view/24538> accessed 10 June 2025

50 ICC Arbitration Rules 2021, art 31

51 BANI Rules 2025, Art 4 (6)

52 SIAC Rules 2025, schedule 3 (3) d

procedures, the case is examined by sole arbitrators[53]. In accordance with the regulations, this procedure may be automatically applied in certain cases, based on the amount in dispute.

The Expedited Procedure constitutes a mechanism that may introduce significant changes to dispute resolution through arbitration in Indonesia. Based on existing surveys, users of arbitration services in Indonesia tend to favor institutions that offer efficient and effective processes[54]. Accordingly, the adoption of expedited procedures could be implemented to address certain cases categorized as 'small claims.' The application of this procedure would align with the Draft Amendment to the Arbitration and Alternative Dispute Resolution Law.

2. Streamlined Procedure

On 1 January 2025, SIAC implemented revisions to its Arbitration Rules. A significant amendment for international dispute resolution is the introduction of the Streamlined Procedure[55]. This procedure represents a notable innovation due to its emphasis on expediting and reducing the cost of dispute resolution. Under the Streamlined Procedure, the final award shall be rendered within three months from the date of the Tribunal's constitution, and both the Tribunal's and SIAC's fees are capped at 50% of the maximum limits calculated in accordance with SIAC's Schedule of Fees.

If adopted in Indonesia, the Streamlined Procedure would be highly relevant and beneficial within the proposed Indonesian Arbitration Law. It could provide a crucial avenue for Micro, Small, and Medium Enterprises to resolve disputes through arbitration at an affordable cost. Based on the SIAC Rules 2025, this procedure is specifically designed for disputes with an amount equivalent to or below S$1,000,000 (unless the SIAC President determines the procedures shall not apply)[56]. This distinguishes it from the Expedited Procedure, as the Streamlined Procedure is indeed intended for resolving low-value cases that do not require complex resolution.

A similar procedure is already adopted in Indonesian court practice through the mechanism of the Simple Claims (*Gugatan Sederhana*). A simple claim may be filed for claims arising from breach of contract or unlawful acts, provided that the material value of the claim does not exceed IDR 500,000,000 (five hundred million rupiah). Cases filed under the simple claims mechanism must be resolved within a maximum period of 25 (twenty-five) working days. One notable limitation of the Simple Claim procedures is the relatively strict restrictions on the types of cases that may be brought under this mechanism, namely that it may not be used for cases under the jurisdiction of special courts or for disputes concerning land rights.[57]

The limitations inherent in the Simple Claims procedures further highlight the relevance of adopting a Streamlined Procedure within arbitration practices in Indonesia. It is undeniable that certain cases, although substantively falling under the jurisdiction of special courts, may involve relatively low value of claims. The implementation of such a procedure would increase the number of disputes that can be resolved outside of court proceedings--thus improving public access to justice; easing up the Indonesian courts' backlog of cases; as well as potentially generate more revenues for arbitration institutions, arbitrators, and counsels. Manifesting the principles of expediency, simplicity, and cost-efficiency.

3. Coordinated Proceedings

Previously, the BANI Rules 2022 specifically regulated the concept of consolidation of arbitration proceedings, outlining the requirements and legal implications for the parties involved. In its revised form under the BANI Rules 2025, the regulation concerning consolidation has been simplified and is now addressed under Article 9(2) on "Request

53 SIAC Rules 2025, schedule 3 (1). It should be noted that BANI arbitration fees do not take into consideration the numbers of arbitrators seated in the tribunal in calculating the fees (unlike SIAC or ICC arbitration fees, which are calculated based on the disputed amount and numbers of arbitrators in the tribunal). However, for expediency purposes, in general it is easier to reach a decision with fewer arbitrators/

54 Based on a survey conducted by Hukum Online, the majority of respondents indicated a preference for resolving disputes through the SIAC. They regarded the institution as the most ideal arbitral body, citing its professionalism and effectiveness in handling arbitration proceedings. See Hukumonline, 'Hukumonline Luncurkan Hasil Survei Kebutuhan Lembaga Arbitrase di Indonesia' (10 June 2025) <,https://www.hukumonline.com/berita/a/hukumonline-luncurkan-hasil-survei-kebutuhan-lembaga-arbitrase-di-indonesia-lt64afbedb08d26/?page=2>. accessed 10 June 2025

55 SIAC Rules 2025, s.3, art 13

56 Debevoise & Plimpton, 'New Arbitration Rules of the Singapore International Arbitration Centre (SIAC) to Enter into Force' (Debevoise In Depth, 2024) <https://www.debevoise.com/-/media/files/insights/publications/2024/12/new-arbitration-rules-of-the-singapore-internation.pdf?rev=6c51fa6319f0458bbcb5e27d0574720f&hash=BDD3B84CB0C0CE0AB3F4D32A55C53BD9> accessed 10 June 2025

57 See Indonesia Supreme Court Regulation No 4 of 2019 concerning the Amendment to Supreme Court Regulation No 2 of 2015 on Procedures for the Settlement of Simple Claims

for Arbitration Involving Multiple Agreements." However, in the resolution of disputes through arbitration, there is a possibility of circumstances that require the involvement of parties in the proceedings beyond those arising solely from the existence of multiple agreements. In addition to such situations, circumstances may arise which require joining non signatories or third parties outside the contracting parties.[58] These circumstances may not necessarily stem from the existence of multiple agreements, but rather from the need to hold third parties accountable within the arbitral process. When the circumstances happen, a consolidation procedure may be requested by one of the parties.[59] The objectives of consolidation procedures in a case involving multiple parties or contracts is to ensure consistency in the arbitral awards rendered by the arbitrators concerning the same facts and issues.

In several cases, the parties do not perceive any advantage resolving a dispute through consolidation. They are not concerned with holding other potentially liable parties accountable, but rather prefer to focus solely on seeking liability from the party bound under the contract. Similarly, the parties to the agreement are unwilling to disclose the nature of their relationships or events between one another, and therefore prefer to keep confidential information private. As a result, they opt to proceed with separate arbitration proceedings.[60]

While in parallel developments, SIAC through its 2025 Arbitration Rules, has introduced a new mechanism known as "coordinated proceedings." This mechanism grants the arbitral tribunal authority to hear multiple arbitration proceedings that share common questions of law or fact. The key distinction between coordinated proceedings and consolidation lies in the degree of confidentiality: coordinated proceedings allow the parties to avoid disclosing or sharing documents with parties which have no direct legal relationships, yet the tribunal can be aware of legal facts in those separate proceedings which are relevant or integral in examining the cases. This will mitigate the risk of conflicting awards.

In light of the evolving landscape of international arbitration, Indonesia should consider adopting the concept of coordinated proceedings as introduced above. This mechanism offers a flexible and efficient approach for managing multiple related disputes without undermining the fundamental principle of party autonomy. By integrating this approach into its arbitration framework, Indonesia can enhance procedural efficiency, align more closely with international best practices, and offer parties a modern and adaptable dispute resolution environment that respects their contractual arrangements.

V. CONCLUSION AND RECOMMENDATION

BANI is trying to keep up with the development of arbitration practice. BANI Rules 2025 is a long overdue overhaul in Indonesian arbitration procedures. Among the various changes implemented, there remain certain aspects that must be carefully considered and harmonized with both Indonesian legislation and prevailing international legal standards.

With regard to conservatory attachment through arbitral provisional measures, the existing Indonesian regulations still fall short of providing legal certainty, particularly in situations where the applicant is required to prove the existence of urgency directly related to the merits of the case, and where the potential involvement of third parties complicates enforcement.

While the BANI Rules 2025 have adopted certain features of emergency arbitration procedures, there remains room for further development, particularly in clarifying the legal standing and enforceability of provisional measures issued under emergency arbitration proceedings.

Nonetheless, the adoption of these procedural mechanisms still require much improvements and support from Indonesian national legislation relevant to arbitration (and civil and commercial dispute resolution).

In conclusion, the Indonesian lawmakers need to align the ongoing revisions of the Draft Law on Arbitration and Alternative Dispute Resolution so Indonesian arbitration legislation can catch up with the standards of international arbitration practice. As for the institutional rules, BANI (and other Indonesian arbitration institutions) should design more robust provisions on conservatory attachments and emergency arbitration. The authors recommend to also adopt other internationally recognized arbitration mechanisms, such

58 B Hanotiau, Complex Arbitrations – Multiparty, Multicontract, Multi-issue and Class Actions (Kluwer Law International, 2005) p. 3

59 See n (58) p. 104-105

60 Ibid

as the Expedited Procedure, Streamlined Procedure, and Coordinated Proceedings to promote further the development of arbitration practice in Indonesia.

The stakeholders of Indonesian arbitration, from BANI as the most prominent arbitral institution in Indonesia, professional organizations and academics, arbitrators and counsels to the Indonesian Supreme Court and Government must work together with and push the Indonesian Parliament to enact a new Indonesian Arbitration Act that can make Indonesia as an arbitration friendly jurisdiction as part of its judicial reform efforts.

From academic and practitioner perspectives, the authors recommends that Indonesia should adopt the UNCITRAL Model Law on interim measures and enact ex-parte emergency relief in the Indonesian legislative framework. While BANI to issue supplemental procedural guidelines to clarify third-party objections which allow joinder of non-signatories and adoption of coordinated proceedings.

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Perkembangan Smart Contract dalam Transaksi Bisnis Digital

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Abstract

A smart contract is a digital agreement stored on a blockchain that executes automatically once the pre-conditions are fulfilled. Unlike traditional contracts that require intermediaries, smart contracts allow agreements to run independently through the blockchain system. This mechanism not only accelerates transactions but also reduces costs and builds trust, as it operates on transparent code. The rise of smart contracts will inevitably affect the role of public notary and other formal legal institutions. This study adopts a normative legal approach with a descriptive-analytical specification. The findings suggest that smart contracts represent a revolutionary step, merging technology and law within a single digital framework. However, more detailed regulatory provisions are required to ensure that smart contracts can serve as a modern foundation for contracts in the digital business landscape, transparent, efficient, and reliable.

Keywords: *Smart contract, blockchain, legal certainty.*

PENDAHULUAN

Smart contract adalah kontrak digital yang disimpan di blockchain dan secara otomatis dieksekusi ketika syarat dan ketentuan yang telah ditentukan sebelumnya terpenuhi. *Smart contract* umumnya digunakan untuk mengotomatiskan pelaksanaan suatu perjanjian sehingga semua pihak yang terlibat dapat langsung yakin dengan hasilnya tanpa keterlibatan perantara maupun kehilangan waktu. *Smart contract* juga dapat mengotomatiskan alur kerja, dengan memicu tindakan berikutnya ketika kondisi tertentu telah terpenuhi.[5]

Menurut National Institute of Standards and Technology Computer Security Resource Center (NIST CSRC), sebuah divisi keamanan komputer yang menyediakan berbagai standar keamanan informasi tentang keamanan siber, Smart Contract adalah *"A collection of code and data (sometimes referred to as functions and state) that is deployed using cryptographically signed transactions on the blockchain network. The smart contract is executed by nodes within the blockchain network; all nodes must derive the same results for the execution, and the results of execution are recorded on the blockchain."*[6] Pengertian ini menjelaskan bahwa Smart contract merupakan sebuah program terkomputerisasi atau protokol transaksi yang dieksekusi secara otomatis dan disimpan di dalam sebuah jaringan blockchain. Konsep ini menggabungkan kode dan data (disebut juga sebagai fungsi dan status) dalam satu kesatuan yang terdesentralisasi. Setelah diimplementasikan, *smart contract* beroperasi secara otonom dan tidak memerlukan intervensi pihak ketiga untuk memastikan keberlangsungan atau validitasnya.

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4 Sarjana Fakultas Hukum Universitas Padjadjaran

5 Bdgk. AWS Marketplace, "Smart Contract development Services | Smart Contract Development Company", diakses melalui https://aws.amazon.com/marketplace/pp/prodview-7nbsernhugsta, pada 09/09/2025.

6 NIST CSRC, "Smart Contract", diakses melalui https://csrc.nist.gov/glossary/term/smart_contract, pada 04/09/2025.

Istilah "kontrak pintar" pertama kali diperkenalkan oleh ilmuwan komputer dan kriptografer Nick Szabo sekitar 20 tahun yang lalu sebagai mahasiswa pascasarjana di University of Washington. Szabo menyebut bahwa kontrak-kontrak baru ini "cerdas", karena jauh lebih fungsional daripada pendahulunya yang berbasis kertas. Tidak tersirat penggunaan kecerdasan buatan.[7] Szabo, memberikan definisi Smart Contract yaitu *"computerized transaction protocols that execute the terms of a contract."* Esensi Smart Contract menurut ia adalah *"The general objectives of smart contract design are to satisfy common contractual conditions (such as payment terms, liens, confidentiality, and even enforcement), minimize exceptions both malicious and accidental, and minimize the need for rusted intermediaries. Related economic goals include lowering fraud loss, arbitration, and enforcement costs, and othe transaction costs."*[8]

Kontrak cerdas adalah bentuk-bentuk janji, yang ditentukan dalam bentuk digital, termasuk protokol-protokol yang digunakan para pihak untuk melaksanakan janji-janji tersebut. Penggunaan tanda kutip di sekitar kata "pintar" oleh Szabo ketika membandingkan kontrak pintar dengan kontrak berbasis kertas, dan penolakannya terhadap kecerdasan buatan, merupakan hal yang penting.[9] *Smart Contract* secara otomatis dapat menjalankan langkah-langkah terprogram tertentu, tetapi *smart contract* tidak boleh dianggap sebagai alat cerdas yang dapat mengurai persyaratan kontrak yang lebih subjektif. Contoh *smart contract* yang ditawarkan oleh Szabo adalah mesin penjual otomatis. Setelah pembeli memenuhi syarat "kontrak", yaitu memasukkan uang ke dalam mesin), mesin tersebut secara otomatis mematuhi ketentuan perjanjian tidak tertulis dan mengirimkan camilan.[10]

Smart Contract berawal dari konsep yang diterbitkan pada tahun 1996 oleh Ian Grigg dan Gary Howland sebagai bagian dari penelitian mereka tentang sistem pembayaran.[11] Nick Szabo mewujudkan konsep *smart contract* pada tahun 1996 sebelum konsep kriptografi blockchain yang krusial, yang dibutuhkan agar kontrak pintar berfungsi sebagaimana mestinya muncul. Szabo mendefinisikan *smart contract* sebagai kombinasi protokol dengan antarmuka pengguna yang memformalkan dan mengamankan hubungan melalui jaringan komputer.[12] Aplikasi *smart contract* yang dibahas meliputi sistem kontrak, kredit, dan pembayaran yang dimungkinkan oleh kriptografi dan mekanisme keamanan lainnya. Hubungan dapat diamankan secara algoritmik dari penyadapan pihak ketiga atau gangguan jahat, dan pelanggaran oleh prinsipal.

AWS dalam publikasinya mengatakan kontrak pintar secara efektif mengotomatisasi pelaksanaan kontrak bisnis yang melibatkan transaksi manual rutin antara berbagai pihak. Kontrak pintar mengotomatisasi pelaksanaan yang lancar dari kontrak mekanis yang berfokus pada aspek tertentu, dengan ketentuan yang sederhana hingga kompleks, dan hasil yang telah ditentukan dengan jelas.[13]

Dengan perkembangan blockchain ini, *smart contract* telah berevolusi. Misalnya, jaringan blockchain yang dioptimalkan untuk kontrak pintar seperti Ethereum digunakan sebagai buku besar kepemilikan aset seperti emas. Jaringan ini juga memfasilitasi perusahaan crowdfunding dan penerbitan saham secara andal dan transparan, menyediakan tanda terima yang tidak dapat diubah untuk semua transaksi. Werbach dan Cornell dalam entri jurnal Duke Law mereka menyatakan bahwa ada alasan untuk skeptis tentang apakah *smart contract* dapat memberikan

7 Nick Szabo, "Smart Contracts", diakses melalui https://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart.contracts.html, pada 04/09/2025.

8 Nick Szabo. "Smart Contracts". First Monday Technology Journal. (1994)

9 Shi-Yi Lin et.al., "Survei penelitian aplikasi berbasis kontrak pintar blockchain", Wireless Netw, Vol. 28, hlm. 635, 2022, https://doi.org/10.1007/s11276-021-02874-x.

10 Eka Purnama Harahap, et.al., "Pemanfaatan Teknologi Blockchain Pada Platform Crowdfunding," Technomedia Journal, Vol. 4, No. 2, 2020, hlm. 199–210

11 Stuart D. Levi, et al., "An Introduction to Smart Contracts and Their Potential and Inherent Limitations", Harvard Law School Forum on Corporate Governance, 2018, diakses melalui https://corpgov.law.harvard.edu/2018/05/26/an-introduction-to-smart-contracts-and-their-potential-and-inherent-limitations/, pada 04/09/2025.

12 Ibid.

13 AWS Marketplace, Op.cit.

keuntungan dibandingkan kontrak konvensional dalam hal efisiensi dan fleksibilitas kontrak.[14]

Kontrak seringkali merupakan manifestasi dari hubungan yang berkelanjutan dan seringkali lebih dari sekadar interaksi satu kali antara para pihak yang diikuti oleh penyelesaian sengketa melalui jalur hukum. Praktik bisnis seputar kontrak kerap tidak secara jelas mempertimbangkan semua kemungkinan skenario yang dapat terjadi pasca kontrak ditandatangani. Sementara itu, *smart contract* dilakukan melalui program perangkat lunak yang memungkinkan pelaksanaan perjanjian secara otomatis tanpa perlu interaksi formal antar pihak dalam jangka waktu tertentu. Teknologi ini membuat kontrak langsung mengikat berdasarkan kondisi yang telah diprogramkan.[15]

BLOCKCHAIN DAN *SMART CONTRACT*

Blockchain adalah teknologi basis data terdistribusi yang menyimpan informasi dalam blok-blok yang saling terhubung, tidak bisa diubah tanpa konsensus jaringan.[16] Salah satu inovasi terpentingnya adalah smart contract, yaitu kontrak digital yang berjalan otomatis ketika syarat tertentu terpenuhi. Misalnya, dalam industri logistik, *smart contract* dapat mengatur agar pembayaran otomatis dilakukan setelah barang tiba di pelabuhan dan diverifikasi melalui sistem blockchain. Integrasi blockchain dan *smart contract* menciptakan kombinasi ideal antara keamanan data dan otomatisasi transaksi, yang berpotensi menggantikan peran perantara tradisional seperti notaris, bank, atau lembaga escrow.

Sistem pencatatan tradisional seringkali menimbulkan masalah karena rawan manipulasi dan bergantung pada pihak ketiga yang justru menjadi titik kelemahan. Dalam transaksi properti, misalnya, blockchain dapat memastikan kepemilikan baru tercatat hanya setelah pembayaran benar-benar diverifikasi, sehingga catatan tidak bisa diubah sepihak.

Mekanisme ini memberikan kepastian hukum dan kepercayaan yang lebih kuat dalam transaksi, mengurangi potensi sengketa, serta membuka jalan bagi sistem hukum digital yang lebih efisien. Blockchain telah diadopsi secara luas di berbagai sektor. Di bidang energi, platform peer-to-peer memungkinkan pemilik panel surya menjual listrik ke tetangga dengan pencatatan otomatis di blockchain. Di sektor keuangan, Singapore Exchange Limited menggunakan blockchain untuk mempercepat pembayaran antar bank. Di bidang media, Sony Music Japan memanfaatkan *blockchain* untuk pengelolaan hak cipta dan distribusi royalti yang transparan.[17]

Penerapan ini menunjukkan bahwa blockchain bukan sekadar teknologi kripto, melainkan fondasi baru bagi model bisnis lintas industri yang lebih transparan dan berkeadilan.[18] Tiga fitur utama blockchain adalah desentralisasi, ketetapan (*immutability*), dan konsensus. Desentralisasi mengurangi risiko monopoli kontrol, ketetapan memastikan data tidak bisa dihapus atau diubah, sementara konsensus menjamin validitas transaksi melalui persetujuan mayoritas jaringan. Analisis fitur-fitur ini membuat blockchain unggul dibanding basis data konvensional, karena mampu menciptakan sistem yang aman, transparan, dan sulit dimanipulasi, cocok untuk kebutuhan ekonomi digital global.

Sejak kemunculannya bersama Bitcoin pada 2008, blockchain berkembang ke generasi kedua dengan hadirnya *smart contract* dan kini memasuki generasi ketiga dengan aplikasi lintas sektor. Keamanan, efisiensi transaksi, dan transparansi audit menjadi manfaat utamanya. Perkembangan terbaru mengarah ke integrasi

14 Kevin Werbach & Nicolas Cornell, "Contracts Ex Machina", Duke Law Journal, Vol. 67, No. 2, (2017), hlm. 313-382. Diakses melalui https://scholarship.law.duke.edu/dlj/vol67/iss2/2.

15 Bdgk. Imelda Martinelli, et.al., "Legalitas dan Efektivitas Penggunaan Teknologi Blockchain Terhadap Smart Contract Pada Perjanjian Bisnis di Masa Depan", UNES Law Review, Vol. 6, No. 4, 2024, hlm. 10766-10768. DOI: https://doi.org/10.31933/unesrev.v6i4.

16 AWS Amazon, "What is Blockchain?", diakses melalui https://aws.amazon.com/id/what-is/blockchain/?aws-products-all.sort-by=item.additionalFields.productNameLowercase&aws-products-all.sort-order=asc pada 04/09/2025.

17 Ibid.

18 Maulia Nurfadillah, "Hukum Kontrak di Era Digital: Adaptasi Teknik Pembuatan Kontrak dalam Transaksi Online", KAMPUS AKADEMIK PUBLISING Jurnal Ilmiah Nusantara (JINU), Vol. 2, No. 1, 2025, hlm. 185-193. DOI: https://doi.org/10.61722/jinu.v2i1.3185.

dengan layanan cloud melalui Blockchain as a Service (BaaS) seperti AWS.[19]

Arah perkembangan ini menunjukkan blockchain akan menjadi infrastruktur inti dalam transformasi digital, bukan hanya untuk aset kripto tetapi juga bagi tata kelola data, layanan publik, dan ekonomi digital. Dalam marketplace, blockchain menghadirkan transparansi rantai pasok dan perlindungan konsumen. Amazon, misalnya, mengajukan paten untuk verifikasi produk asli berbasis blockchain, sehingga setiap tahap distribusi bisa dilacak. *Smart Contract* juga memungkinkan pembayaran otomatis setelah barang diterima sesuai spesifikasi. Dalam pariwisata, marketplace hotel dan tiket pesawat bisa memanfaatkan blockchain agar reservasi hanya dikonfirmasi setelah pembayaran terverifikasi, sekaligus menekan biaya perantara. Analisis dari sisi hukum, penerapan *blockchain* dan *Smart Contract* perlu disejajarkan dengan UU ITE No. 11/2008 *jo*. UU 1/2024 yang mengakui keabsahan informasi dan transaksi elektronik, serta UU 27/2022 tentang Perlindungan Data Pribadi (UU PDP) yang melindungi data pengguna dalam sistem terdistribusi.

Sebagai pembanding, di level internasional terdapat *EU Blockchain Strategy* yang mendorong interoperabilitas lintas negara anggota Uni Eropa, serta *UNCITRAL Model Law on Electronic Commerce* yang menjadi acuan global terkait pengakuan hukum atas transaksi digital. Perbandingan ini menunjukkan bahwa Indonesia perlu segera memperkuat regulasi blockchain agar tidak tertinggal dari standar hukum internasional, sekaligus melindungi kepentingan konsumen dan pelaku usaha dalam transaksi lintas batas.

CARA KERJA

Smart Contract beroperasi berdasarkan prinsip logika kondisional yang fundamental dalam ilmu komputer, yaitu pernyataan "jika-maka" (if-then statement).[20] Logika ini menjadi inti dari setiap perjanjian yang dikodekan ke dalam blockchain, dimana serangkaian aturan telah ditetapkan untuk mengatur tindakan yang akan dieksekusi secara otomatis. Secara fundamental, *Smart Contract* adalah sekumpulan instruksi digital yang menetapkan bahwa suatu tindakan (misalnya, transfer dana atau eksekusi perintah) akan dilakukan jika dan hanya jika serangkaian prasyarat yang telah ditentukan terpenuhi.

Mekanisme ini tidak hanya terbatas pada logika pemrograman, tetapi juga diperkuat oleh fitur-fitur fundamental dari teknologi blockchain. Setelah kondisi "jika" terpenuhi, seluruh jaringan komputer yang berpartisipasi dalam blockchain akan secara serentak mengeksekusi tindakan yang telah ditetapkan dalam *Smart Contract*.[21] Hasil dari eksekusi ini kemudian dicatat dalam sebuah blok baru di blockchain. Berkat penggunaan teknologi kriptografi, data transaksi ini menjadi tidak dapat diubah (immutable) dan transparan, namun akses terhadap detail sensitif dapat dibatasi hanya untuk pihak yang berwenang.

Sifat desentralisasi dan konsensus jaringan memastikan bahwa eksekusi kontrak ini berjalan secara akurat dan tidak dapat dimanipulasi oleh satu pihak pun, karena semua node harus mencapai kesepakatan yang sama mengenai hasil transaksi. Semakin kompleks suatu perjanjian, semakin banyak kondisi "jika-maka" yang dapat dimasukkan, memungkinkan *Smart Contract* untuk mengotomatisasi proses bisnis yang rumit secara aman dan efisien.[22]

Meskipun *Smart Contract* menawarkan solusi yang revolusioner, keberhasilannya sangat bergantung pada kualitas implementasinya terkhusus pada ketepatan kode dan keamanan infrastruktur blockchain. Tata kelola sistem blockchain yang kuat dan keahlian tim pengembang yang kompeten adalah faktor krusial. Kekurangan atau kelalaian kecil pada sistem ini dapat mengakibatkan dampak serius

19 AWS Amazon, *Op.cit.*

20 Kaspersky, "Apa itu Smart Contract?", diakses melalui https://id.kaspersky.com/resource-center/definitions/what-are-smart-contracts, pada 04/09/2025.

21 IBM, "What are Smart Contracts on Blockchain?", diakses melalui https://www.ibm.com/think/topics/smart-contracts, pada 04/09/2025

22 Ibid.

seperti pengaksesan tanpa izin, penyalahgunaan dana, atau sengketa hukum yang tidak disengaja.[23]

Desain awal *Smart Contract* harus meminimalisasi kerentanan dan potensi bug, karena setiap kesalahan yang ada di dalam kode akan dieksekusi secara otomatis oleh jaringan dan sulit untuk diperbaiki setelah diimplementasikan.[24] Oleh karena itu, integritas dan keandalan *Smart Contract* bukan hanya ditentukan oleh logikanya, melainkan juga oleh ketelitian dalam pengkodean dan perencanaan arsitektur sistem secara menyeluruh. Selain itu, penerapan teknik enkripsi canggih dan kontrol akses yang ketat dapat melindungi data dan transaksi kontrak sensitif dari berbagai serangan berbahaya.

Ada tiga ciri utama dalam *Smart Contract*, yaitu otomatisasi (*automaticity*), dapat ditegakkan secara hukum, dan dijalankan pada *distributed ledger*.[25] Otomatisasi menjadi ciri paling khas, karena kewajiban kontrak bisa berjalan tanpa campur tangan manusia. Contohnya, pembayaran otomatis lewat *direct debit* atau transaksi belanja *online*. Walau begitu, tidak semua bentuk otomatisasi bisa langsung disebut *smart legal contract*. Saat ini, otomatisasi dipandang sebagai spektrum. Di satu sisi, ada bentuk sederhana seperti *direct debit* yang sudah lama dikenal dan tidak menimbulkan isu hukum baru. Di sisi lain, adanya kontrak yang hampir seluruhnya dibuat dalam bentuk kode dan dijalankan di sistem DLT. Pada level inilah kemungkinan muncul tantangan hukum baru, karena sifat otomatisasinya jauh lebih kompleks.

Smart Contract memenuhi syarat sebagai kontrak yang mengikat secara hukum menurut hukum Inggris dan Wales. Tidak ada kebutuhan tambahan dalam hukum untuk menegaskan sifat mengikatnya *Smart Contract*. Beberapa negara bagian di Amerika Serikat, termasuk Arizona, Illinois, dan Tennessee, telah mengeluarkan undang-undang yang mendefinisikan istilah "*Smart Contract*". Undang-undang tersebut menyatakan bahwa kontrak tidak boleh ditolak keabsahan atau keberlakuannya hanya karena kontrak itu merupakan *Smart Contract* (sebagaimana didefinisikan dalam undang-undang), atau karena kontrak itu memuat klausul *Smart Contract*.[26]

Asosiasi Pengacara Chancery dan Asosiasi Pengacara Komersial (tanggapan bersama) menyoroti pendekatan Arizona secara khusus. Arizona secara eksplisit menetapkan dalam bentuk undang-undang bahwa *Smart Contract* dapat berlaku dalam perdagangan, dan bahwa kontrak yang berkaitan dengan transaksi tidak boleh ditolak keabsahan, keberlakuan, atau kekuatan hukumnya hanya karena kontrak tersebut berisi klausul *Smart Contract*. Dalam undang-undang itu juga terdapat definisi *Smart Contract*, yaitu:

"*Arizona has expressly set out in legislative form that Smart Contracts may exist in commerce, and that a contract relating to a transaction may not be denied legal effect, validity, or enforceability solely because that contract contains a Smart Contract term. A definition for Smart Contracts is provided for in the legislation, being "an event-driven program, with state, that runs on a distributed, decentralized, shared and replicated ledger and that can take custody over and instruct transfer of assets on that ledger.*"[27]

Distributed Ledger Technology (DLT) merupakan teknologi yang digunakan untuk mengoperasikan dan memanfaatkan *distributed ledger*, yaitu sistem penyimpanan digital yang mencatat informasi atau data.[28] Setiap pengguna *Smart Contract* dalam teknologi tersebut dapat mengakses, memverifikasi, dan menyetujui penambahan data

23 Jerome Desbonnet dan Oded Vanunu, (2024), "The rise of Smart Contracts and strategies for mitigating cyber and legal risks", World Economic Forum, diakses melalui https://www.weforum.org/stories/2024/07/smart-contracts-technology-cybersecurity-legal-risks/https://www.weforum.org/stories/2024/07/smart-contracts-technology-cybersecurity-legal-risks/, pada 04/09/2025.

24 John Kolb, et.al., "Quartz: A Framework for Engineering Secure Smart Contracts", EECS Department, University of California, Berkeley, 2020, hlm. 1-2, diakses melalui http://www2.eecs.berkeley.edu/Pubs/TechRpts/2020/EECS-2020-178.pdf.

25 United Kingdom Law Comission, "Smart legal contracts Advice to Government", https://webarchive.nationalarchives.gov.uk/ukgwa/20250109100626mp_/https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2021/11/Smart-legal-contracts-accessible.pdf, pada 04/09/2025.

26 Ibid.

27 Arizona Revised Statutes Title 44. Trade and Commerce § 44-7061.

28 United Kingdom Law Commission, Op.Cit.

baru melalui mekanisme kesepakatan operator dan pengguna.

REGULASI INDONESIA

Smart Contract merupakan salah satu bentuk kemajuan dalam penggunaan teknologi blockchain setelah munculnya mata uang kripto. Sistem ini pada dasarnya merupakan program komputer yang beroperasi sebagai kontrak elektronik dalam sistem basis data blockchain sebagai protokol untuk melaksanakan perjanjian antar pihak dan memungkinkan pelaksanaan klausul perjanjian secara otomatis.[29] Keberadaan *Smart Contract* dimanfaatkan oleh berbagai industri, khususnya pada kegiatan transaksi *e-commerce*, untuk mempermudah dan mengotomatiskan transaksi antara konsumen dan pelaku usaha. Sistem ini menurut Nick Szabo dikatakan dapat meningkatkan rasa percaya antar manusia, khususnya terkait dengan transaksi keuangan.[30] Mengingat dalam *Smart Contract*, terdapat fitur otomatisasi yang bekerja ketika salah satu atau seluruh pihak dalam kontrak melakukan perbuatan yang memenuhi ketentuan ataupun prosedur tertentu dalam perjanjian tersebut. Misalnya "Jika A, maka B", maka apabila langkah A dilakukan, maka B akan tercapai.[31]

Di Indonesia, pengakuan terhadap *Smart Contract* diatur secara utama dalam Undang-Undang Nomor 11 Tahun 2008 tentang Informasi dan Transaksi Elektronik (UU ITE), yang telah diubah dengan Undang-Undang Nomor 1 Tahun 2024. UU ITE secara eksplisit dalam Pasal 1 angka 17 mendefinisikan "Kontrak Elektronik" sebagai perjanjian para pihak yang dibuat melalui sistem elektronik. Sistem elektronik dalam pasal ini berarti *Smart Contract*, yang dieksekusi melalui kode program yang terdesentralisasi di atas jaringan blockchain, secara esensial memenuhi definisi ini. Pasal 18 UU ITE memberikan kekuatan hukum dan akibat hukum yang sah bagi kontrak elektronik, selama memenuhi syarat sahnya perjanjian sebagaimana diatur dalam hukum perdata. Dengan demikian, *Smart Contract* dapat dianggap setara dengan kontrak konvensional, dan kekuatan pembuktiannya diakui secara hukum, asalkan integritas dan keasliannya dapat dipertanggungjawabkan.

Pemberlakuan *Smart Contract* dapat dikatakan sah secara hukum dan mengikat apabila telah memenuhi 4 unsur persetujuan berdasarkan ketentuan Pasal 1320 KUH Perdata yakni kesepakatan mereka yang mengikatkan dirinya, kecakapan untuk membuat suatu perikatan, suatu pokok persoalan tertentu, dan suatu sebab yang tidak terlarang. Dalam konteks *smart contract*, kesepakatan diwujudkan ketika para pihak berinteraksi dan mengotorisasi eksekusi kode program. Objek dari kontrak ditentukan oleh fungsi yang diprogram dalam kode, misalnya transfer aset digital. Selama *smart contract* tidak digunakan untuk tujuan yang melanggar hukum, maka kausa yang tidak terlarang pun terpenuhi. Analisis ini menunjukkan bahwa secara teoretis, *smart contract* dapat memenuhi semua prasyarat fundamental dari sebuah perjanjian yang sah, sehingga mengikat para pihak secara hukum.[32]

Sesuai dengan ketentuan Pasal 1313 KUHPerdata, *smart contract* hanya akan terjadi apabila terdapat satu orang atau lebih mengikatkan dirinya terhadap satu orang lain atau lebih. Dengan mengacu pada ketentuan tersebut, pembuatan perjanjian wajib memenuhi semua unsur yang telah diatur dalam KUHPerdata, baik secara subjektif maupun objektif. Jika pada syarat subjektif tersebut tidak dilengkapi, maka kemudian para pihak tersebut dapat membatalkan perjanjian. Dan apabila syarat objektif tersebut tidak terpenuhi, maka perjanjian yang dibuatnya tersebut secara otomatis atau dianggap batal demi hukum. Selain melihat pada KUH Perdata, unsur mengenai perjanjian yang terdapat pada transaksi elektronik juga termaktub pada Pasal 48 ayat (3)

29 Adhijoso, Bima Danubrata. "Legalitas Penerapan Smart Contract Dalam Asuransi Pertanian di Indonesia." Jurist Diction 2, no. 2 (2019), hlm. 395-414

30 Jefferson Hakim, (2024), "Cara Penegak Hukum Membuktikan Perikatan dalam Sebuah Smart Contract", Hukum Online, diakses melalui https://www.hukumonline.com/berita/a/cara-penegak-hukum-membuktikan-perikatan-dalam-sebuah-smart-contract-lt6764d0b3e309f/, pada 04/09/2025.

31 I Putu Gede Angga Wiliana Putra dan Dewa Ayu Dian Sawitri, "Legalitas Smart Contract Dalam Transaksi Elektronik Di E-Commerce Menurut Perspektif Hukum Perdata Di Indonesia", Jurnal Kertha Semaya, Vol. 12, No. 12, 2024, hlm. 3182-3193.

32 Korintus Wilson Horas Hutapea & Adi Sulistiyono, "Keabsahan Smart Contract Dengan Teknologi Blockchain Menurut Kitab Undang-Undang Hukum Perdata", Aliansi : Jurnal Hukum, Pendidikan dan Sosial Humaniora, Volume. 1, No. 3, 2024, hlm. 86-94. DOI: https://doi.org/10.62383/aliansi.v1i3.177.

PP 71/2019 tentang tentang Penyelenggaraan Sistem dan Transaksi Elektronik (PP PSTE).

Hadirnya teknologi *smart contract* menggeser sebagian tugas dan fungsi notaris, terutama dalam melegalisasi akta otentik seperti perjanjian jual beli dan perjanjian pinjaman. Selama ini, notaris membuat akta otentik yang memberikan kepastian hukum dan memiliki kekuatan pembuktian sempurna. Akan tetapi, *smart contract* yang berbasis blockchain memungkinkan para pihak membuat sekaligus mengeksekusi perjanjian secara otomatis begitu syarat tertentu terpenuhi, tanpa perlu melibatkan pihak ketiga. Dalam perjanjian jual beli, sistem dapat langsung memproses pembayaran dan perpindahan hak secara bersamaan. Begitu pula dalam perjanjian pinjaman, sistem dapat menagih dan mengeksekusi jaminan secara otomatis ketika debitur wanprestasi. Perkembangan ini mengurangi peran notaris dalam menjamin keaslian dan keberlakuan perjanjian. Oleh karena itu, notaris perlu menyesuaikan perannya dengan perkembangan teknologi, misalnya dengan bertindak sebagai validator hukum atas *smart contract* agar perjanjian digital tetap selaras dengan ketentuan hukum yang berlaku.

Smart Contract dapat dianggap sebagai suatu perjanjian yang sah secara hukum karena substansinya sejalan dengan ketentuan peraturan perundang-undangan. Pasal 1338 KUHPerdata menegaskan bahwa semua persetujuan yang dibuat sesuai dengan undang-undang berlaku sebagai undang-undang bagi para pihak yang membuatnya dan wajib dilaksanakan dengan itikad baik. *Smart Contract* pada hakikatnya merupakan bentuk persetujuan antara para pihak, dituangkan dalam kode program, dan mengikat layaknya kontrak konvensional karena kedua belah pihak secara sadar memberikan persetujuan atas syarat dan ketentuan yang telah diprogramkan.

Pasal 7 UU ITE menyatakan bahwa setiap orang yang menggunakan Informasi Elektronik dan/atau Dokumen Elektronik untuk menyatakan, memperkuat, atau menolak suatu hak, wajib memastikan bahwa informasi atau dokumen tersebut berasal dari sistem elektronik yang memenuhi syarat. *Smart Contract* memenuhi kriteria ini karena beroperasi dalam sistem blockchain yang secara inheren menjaga keaslian, integritas, dan keterlacakan data, sehingga hasil perjanjian digital yang dihasilkan dapat dijadikan dasar untuk menegaskan hak dan kewajiban para pihak.[33]

Sementara itu, Pasal 16 UU ITE mengatur bahwa Penyelenggara Sistem Elektronik wajib mengoperasikan sistem yang mampu menjamin keutuhan, keotentikan, ketersediaan, kerahasiaan, dan keteraksesan informasi elektronik. *Smart Contract* pada dasarnya berjalan dalam ekosistem blockchain yang bersifat transparan, terdistribusi, dan immutable, sehingga dapat menampilkan kembali perjanjian secara utuh, menjaga keotentikan data, sekaligus menjamin keterbukaan akses bagi pihak yang terlibat.[34] Dengan mekanisme tersebut, *Smart Contract* telah memenuhi standar minimum penyelenggaraan sistem elektronik sebagaimana ditentukan dalam UU ITE.

Berdasarkan ketentuan-ketentuan tersebut, *Smart Contract* mampu memenuhi unsur kesepakatan para pihak Pasal 1338 KUHPerdata, memiliki kekuatan pembuktian melalui informasi elektronik yang sah (Pasal 7 UU ITE), dan dapat dijalankan dalam sistem elektronik yang memenuhi standar yang sah (Pasal 16 UU ITE). Dengan demikian, kedudukannya dapat disejajarkan dengan kontrak konvensional sepanjang tidak bertentangan dengan undang-undang khusus yang mensyaratkan bentuk tertentu dari suatu perjanjian.

KESIMPULAN

Perkembangan teknologi *blockchain* melahirkan salah satu terobosan penting dalam dunia digital, yaitu *Smart Contract* atau kontrak pintar. Berbeda dari kontrak tradisional yang

33 SIP Law Firm, (2025), "Penggunaan Smart Contract dalam Perbankan dan Implikasinya Secara Hukum", diakses https://siplawfirm.id/penggunaan-smart-contract-dalam-perbankan-dan-implikasinya/?lang=id#:~:text=Smart%20contract%20merupakan%20program%20komputer,transparan%20dan%20tidak%20dapat%20diubah., pada 09/09/2025.

34 Adam Muko, "Kajian Smart Contract Dalam Perspektif Hukum Positif Di Indonesia", Doktrin: Jurnal Dunia Ilmu Hukum dan Politik, Vol. 2, No. 2, 2024, hlm. 13-24. DOI : https://doi.org/10.59581/Doktrin-widyakarya.v2i1.1950.

membutuhkan perantara, *Smart Contract* memungkinkan perjanjian berjalan otomatis melalui sistem blockchain. Kehadiran mekanisme ini bukan hanya mempercepat transaksi, tetapi juga menekan biaya dan menambah kepercayaan karena dijalankan oleh kode yang transparan. Kehadiran *Smart Contract* pada perkembangannya akan berdampak pada peran notaris, dan lembaga hukum formal lainnya. *Smart Contract* merevolusi konsep kepercayaan yang sebelumnya menjadi domain lembaga hukum formal, kini dapat dijalankan oleh algoritma secara transparan. Sebagai contoh dalam perdagangan internasional, pembayaran kepada eksportir bisa dilakukan secara otomatis begitu sistem blockchain mengkonfirmasi bahwa barang benar-benar tiba di pelabuhan tujuan.

Smart Contract bekerja melalui kode pemrograman yang berisi syarat-syarat kontrak. Setelah disimpan dalam blockchain, kontrak tersebut akan mengeksekusi perintah secara otomatis setelah kondisi dan syarat terpenuhi. Karena sifat blockchain yang tidak bisa diubah, catatan transaksi tetap aman dan dapat diverifikasi siapa pun. Hal ini membuat *Smart Contract* lebih andal dibanding kontrak konvensional yang seringkali rawan manipulasi. Meski menawarkan keunggulan, *Smart Contract* tidak lepas dari tantangan. Sifat immutability blockchain memang menjamin kepastian data, tetapi juga berarti kesalahan kode tidak bisa diperbaiki dengan mudah. Dalam praktiknya, kerugian bisa terjadi jika ada celah atau bug dalam program kontrak. Inilah sebabnya aspek teknis *Smart Contract* harus diimbangi dengan kapasitas keandalan teknologi dan hukum yang memadai.

Penerapan *Smart Contract* dapat dilakukan pada berbagai sektor, mulai dari keuangan, logistik, marketplace, hingga pariwisata. Misalnya, pembayaran hotel atau tiket pesawat dapat diproses otomatis hanya setelah transaksi terverifikasi, sehingga konsumen lebih terlindungi dari risiko penipuan. Contoh-contoh ini menunjukkan bahwa *Smart Contract* mampu menciptakan efisiensi dan kepastian hukum baru dalam ekosistem digital. Secara keseluruhan, *Smart Contract* adalah langkah revolusioner yang menggabungkan teknologi dan hukum dalam satu kerangka digital. Namun, agar manfaatnya optimal, diperlukan regulasi yang jelas dan adaptif. Uni Eropa melalui MiCA sudah mulai menata arah tersebut. Ketentuan implementasi yang lebih detail diperlukan agar *Smart Contract* dapat menjadi landasan modern kontrak dalam bisnis digital yang transparan, efisien, dan terpercaya.

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The Urgency of Implementing the IBA Guidelines on Party Representation as an Ethical Standard for Legal Counsel in Arbitration Proceedings in Indonesia

Mursal Maulana

Abstract

Dalam proses penyelesaian sengketa melalui arbitrase, Party Representative (perwakilan para pihak) mempunyai peran yang sentral untuk menjamin proses arbitrase berjalan dengan prinsip yang adil (fairness). Ketiadaan regulasi khusus mengenai perwakilan para pihak dalam arbitrase di Indonesia telah menciptakan kesenjangan yang signifikan dalam menjamin keadilan, profesionalisme, dan integritas etika dalam proses arbitrase. Situasi ini menimbulkan risiko ketidaksetaraan prosedural, melemahkan prinsip kesetaraan hak, dan mengancam kredibilitas arbitrase sebagai mekanisme penyelesaian sengketa yang adil. Artikel ini membahas urgensi penerapan the IBA Guidelines on Party Representation as an Ethical Standard for Legal Counsel in Arbitration Proceedings di Indonesia. Saat ini, Kode Etik Advokat yang berlaku di Indonesia masih bersifat terlalu umum dan belum dapat menjawab isu-isu etika dalam arbitrase, sementara lembaga arbitrase domestik belum menetapkan standar etika mereka sendiri yang mengikat. Meskipun bersifat Soft Law, instrument ini dapat dijadikan sebagai alternatif.

Keywords: *Arbitrase, Party Representative, the IBA Guidelines on Party Representation as an Ethical Standard for Legal Counsel in Arbitration Proceedings.*

INTRODUCTION

Arbitration is a private dispute resolution mechanism in nature. Arbitral proceedings need not take place in public, arbitrators do not act as government officials, and the parties have the power to decide how they want to arbitrate. Arbitrators perform an adjudicatory function by hearing the opposing parties' arguments and apply agreed rules to decide, binding the parties with their decision or known as award rather than merely advising them.[1]

Emmanuel Gaillard, a leading arbitration expert, stated that there are three main actors in arbitration. First, the Essential Actor, consisting of the Arbitrator and the Parties. Guillard emphasized that (*There is no arbitration without parties or without arbitrators, but arbitration can exist without anyone else*). Second, the Service Providers in the arbitration process. Third, the Party or entity that makes a significant contribution to maintaining the integrity and effectiveness of the arbitration process or Value Providers.[2]

In arbitration, the parties may also be represented by party representatives or counsel, who play a crucial role in presenting arguments, evidence, and legal submissions on behalf of their clients. In the context of international arbitration, the involvement of counsel from diverse legal traditions and jurisdictions has raised the need for uniform standards of professional conduct. Accordingly, rules and guidelines on counsel ethics have been developed to ensure fairness, integrity, and efficiency in arbitral proceedings, thereby safeguarding both the legitimacy of the process and the enforceability of arbitral awards.

While it is a well-established principle that legal counsel are governed by the rules of conduct of their national bar associations, this principle creates ambiguity in the regulation of conduct in the international arena, due to some inconsistencies between the ethical rules of different jurisdictions where legal counsel reside. For example, there are significant differences in the obligations of legal counsel in cross-examining witnesses in countries that follow a civil law system

1 Tony Cole and Pietro Ortolani, *Understanding International Arbitration*, Routledge, London, 2020, p. 1.

2 Emmanuel Gaillard, *Sociology of international arbitration*, Arbitration International, Vol.31, 2015, p.3-10.

compared to countries that follow a common law approach. Such inconsistencies can be detrimental to the fairness and expectations of the parties in arbitration proceedings. Even when legal counsel are similarly situated under their national ethical rules, the lack of an internationally agreed-upon code of ethical conduct can create inconsistencies, either due to differences in interpretation or due to the unfair application of principles to the client's advantage, due to the absence of a supranational authority governing their conduct.[3]

The regulation of counsel conduct is particularly urgent in both international and domestic arbitration. In international arbitration, the absence of harmonized ethical rules may lead to unequal standards of advocacy, forum shopping, and even tactical abuses that can undermine procedural fairness and the credibility of the arbitral process. Establishing clear ethical guidelines thus contributes to creating a level playing field for parties coming from different legal backgrounds.

In the Indonesian context, where arbitration is increasingly used to resolve complex commercial disputes, the lack of specific regulation governing counsel conduct in arbitration poses potential risks, such as conflicts of interest, excessive delay tactics, or breaches of confidentiality. Introducing a framework of ethical standards for party representatives in domestic arbitration would not only strengthen the integrity of arbitral proceedings in Indonesia but also align the national practice with international best practices, thereby enhancing the attractiveness of Indonesia as a seat of arbitration.

Relying solely on the general provisions of the Advocates Law and the Code of Ethics for Advocates is insufficient to address the distinctive nature of arbitration. Arbitration, unlike litigation before state courts, is characterized by its flexibility, confidentiality, and transnational dimension. These features create situations where the ethical challenges faced by counsel in arbitration are qualitatively different from those in ordinary court proceedings. Therefore, the development of specific rules or guidelines governing counsel conduct in arbitration both international and domestic is pivotal important.

The conduct of legal counsel in international arbitration proceedings has been a widely discussed topic in the legal literature. Academic interest in this issue arises from the lack of consensus on which ethical rules apply to legal counsel in international disputes. The lack of clear guidelines and the potential overlap between various sometimes conflicting ethical standards create ethical dilemmas that cannot be resolved by individual legal counsel. Because there is no transnational body governing the practice of international arbitration, any proposed solution must be voluntarily adopted by the arbitration community itself.

As the practice of international arbitration evolves, the ethical dilemmas faced by practitioners are becoming more frequent and complex. Many legal counsels report that when acting as counsel in international arbitrations, they are often unsure which ethical rules they should follow and generally prefer to defer to the ethical rules of their registered bar association. However, the rules of conduct of these associations rarely apply beyond their local jurisdiction.[4]

With the increasing complexity and transnational nature of business relationships, the role of legal counsel in arbitration has become increasingly crucial, not only in defending the client's interests but also in maintaining the integrity and fairness of the arbitration process itself. In this context, the IBA Guidelines on Party Representation in International Arbitration have emerged as internationally recognized standards of ethics and professional conduct to govern the practice of legal counsel during arbitration proceedings.

This article will analyze the urgency of implementing the IBA Guidelines on Party Representation as an ethical standard for legal counsel in arbitration proceedings in Indonesia in five main sections. The first section will discuss A Glimpse of Counsel Ethics in Arbitration. The second section will review The Role of the IBA Guidelines on Party Representation. Next, the third section will present the Scope of the IBA Guidelines on Party Representation. The fourth section contains an analysis of the urgency of implementing these guidelines in Indonesia, as well as strategies that can be taken to integrate them into the national arbitration legal framework and practice. Finally, the fifth section will summarize the main findings and provide concrete recommendations to encourage the implementation of the IBA Guidelines as an ethical guideline that can strengthen professionalism and integrity in arbitration in Indonesia.

3 Eeti Garg, *Ethics of Counsel in International Arbitration: The Need for A Uniform Code of Conduct* (May 12, 2020), p.2. Available at SSRN: https://ssrn.com/abstract=3756295 or http://dx.doi.org/10.2139/ssrn.3756295

4 Nuna Lerner, 'Counsel Ethics in International Arbitration: A No-Man's Land or a Strategic Playground?', in Carlos González-Bueno (ed), 40 Under 40 International Arbitration (2024) (Dykinson, S.L. 2024), p. 53–71.

A GLIMPSE OF COUNSEL ETHICS IN ARBITRATION

Ethics derives from the Greek word *ethos*, meaning character, and the Latin word *mores*, meaning custom. In law, ethics describes how individuals choose to interact with one another, while in philosophy, it explains what is considered good for both individuals and society, and establishes the obligations each person must fulfill to themselves and others. While law often reflects ethical principles, the two are not completely identical. Many actions that are generally considered unethical are not prohibited by law. Conversely, not everything regulated by law reflects ethical norms. Therefore, most professions have detailed and enforceable codes of ethics for their members, known as professional ethics, or in law, legal ethics.[5]

Fahira Brodlija illustrates that the story of legal counsel ethics in international arbitration is very similar to the Cinderella fairy tale. When the clock strikes midnight, all that remains is her glass slipper. This leads the prince to search throughout the kingdom to find the perfect girl in the right size to "live happily ever after." Legal counsel ethics in international arbitration also involves an ongoing search, with no clear end in sight. It is crucial to apply the correct law, find the appropriate forum to file a complaint, and then determine the appropriate solution.[6]

International arbitration exists in a situation like what Catherin Roger observed as an ethical no-man's land, where there is no clear ethical certainty. Arbitration is often conducted in jurisdictions where the legal counsel for both parties is not licensed to practice. The extraterritorial impact of national codes of ethics tends to be unclear, as does the applicability of national ethical rules in non-judicial forums such as arbitration. There is no supranational authority to oversee the conduct of legal counsel in this context, and local bar associations rarely reach that far. Arbitration tribunals themselves have no legal authority to sanction legal counsel, and there are no specific ethical norms formally recognized for legal counsel in international arbitration. Thus, where ethical regulation should exist, there is a profound void.[7]

FILLING THE ETHICAL GAP: THE ROLE OF THE IBA GUIDELINES ON PARTY REPRESENTATION TOP OF FORM

On May 25, 2013, the Council of the International Bar Association adopted the IBA Guidelines on Party Representation in International Arbitration (known as the "IBA Guidelines" or "Guidelines"). This brief document was prepared in response to growing demand from legal practitioners for clear guidance on the ethical standards applicable to party representatives in international arbitration proceedings. These Guidelines are not intended to limit the inherent flexibility that is a significant advantage of international arbitration. The parties and the arbitral tribunal can adapt them to the specific circumstances of each arbitration. These Guidelines are part of the IBA Guidelines and Rules family for the conduct of international arbitration: the IBA Rules on the Taking of Evidence in International Arbitration (2010) and the IBA Guidelines on Conflicts of Interest in International Arbitration (2014).

This instrument was drafted in 2008. At that time, the IBA Arbitration Committee established a Task Force on Counsel Conduct in International Arbitration. The Task Force's mandate was to consider issues of counsel conduct and party representation in international arbitration. Two years later, a survey was conducted to explore ethical issues such as conflicts of interest, third-party funding, communications with prospective arbitrators and third parties, witness preparation, disclosure and corruption, money laundering, fraud, and other illegal acts. The survey results revealed a high level of uncertainty among respondents regarding the rules governing party representation in international arbitration.[8]

The debate surrounding the importance of ethical regulation of party representation in international arbitration has been ongoing since the 1970s. Scholars such as Jan Paulssen, V.V. Veeder, Cyrus Benson, R. Doak Bishop, Margrete Stevens, and Gary Born have addressed this issue. In 2009, Cyrus Benson published a checklist comprising nine categories of ethical standards (called the 'Benson Checklist'). Benson's checklist identifies areas of professional conduct where lawyers may be subject to varying ethical obligations. The nine

5 Legal Encyclopedia, Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/wex/ethics#:~:text=The%20word%20%22ethics%22%20is%20derived,Model%20Rules%20of%20Professional%20Conduct

6 https://legalblogs.wolterskluwer.com/arbitration-blog/counsel-ethics-in-international-arbitration-the-glass-slipper-still-does-not-fit/

7 Catherine Roger, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 Mich. J. Int'l L. 341 (2002), p.342-343.

8 Tom Cummins, The IBA Guidelines on Party Representation in International Arbitration Leveling the Playing Field?, Arbitration International, Volume 3, No. 3, 2014, p. 430.

categories covered in the checklist include: general conduct; integrity and the duty to be honest; presentation of legal arguments; handling of evidence; disclosure of information; communication with witnesses; communication with the arbitrator; communication with opposing counsel; and compliance with the arbitrator's orders or decisions. Furthermore, Benson distinguishes between two types of ethical resolutions: aspirational resolutions, which are recommendations or calls for lawyers to do something; and mandatory resolutions, which are ethically binding obligations.

In 2011, R. Doak Bishop and Margrete Stevens proposed the Bishop/Stevens Code, a more ambitious but less flexible code of ethics than the Benson Checklist. This code consists of 28 rules expressly intended to replace national codes of ethics in international arbitration practice. Based on existing legal ethics standards, the code covers broad issues such as independence, client confidentiality, conflicts of interest, and professional fees and instructions.

While it covers similar procedural areas to the Benson Checklist such as communication with the tribunal, presentation of evidence, and professional conduct their objectives differ. The Benson Checklist is a flexible and adaptable guide, while the Bishop/Stevens Code is a comprehensive code of ethics.

Furthermore, The Hague Principles on Ethical Standards for Counsel (2010) is also a significant effort to establish global ethical principles. These principles apply to anyone acting as legal counsel before an international court or tribunal, focusing on values such as fairness, professionalism, independence, as well as specific guidance on communication, evidence, and relations with the opposing party and the court.

In a transnational context, in addition to the IBA Guidelines on Party Representation in International Arbitration, there are other rules and ethical guidelines for the legal profession. One important guideline is the IBA General Principles of the Legal Profession (2011), specifically Article 2.5, which states that a lawyer appearing before a court or tribunal must comply with the rules applicable to that forum. This provision emphasizes the importance of forum-specific rules in maintaining integrity and professionalism during the judicial or arbitration process.

Furthermore, Article 4.1 of the CCBE Code of Conduct (drafted by the Council of Bars and Law Societies of Europe) also emphasizes that a lawyer handling a case before a court or tribunal must adhere to the rules of conduct applicable to that forum. These guidelines serve as an ethical reference for legal practitioners in Europe, particularly in the context of cross-border legal practice.

In the United States, the Model Rules of Professional Conduct issued by the American Bar Association (ABA) also provides guidance through Model Rule 8.5, which states that lawyers are bound by the ethical rules of the tribunal in which they practice, or, if the tribunal lacks specific rules, by the rules of the jurisdiction in which the tribunal is located.[9]

These three instruments collectively represent an effort to provide a clear and applicable ethical structure in situations where a single, universally applicable framework does not exist. However, problems arise in the context of international arbitration tribunals, which often lack their own ethical rules. This absence of formal ethical guidelines creates uncertainty, prompting initiatives such as the IBA Guidelines on Party Representation, which aim to bridge this gap.

Thus, while the IBA Guidelines play a central role in establishing ethical standards in international arbitration, other guidelines such as the CCBE Code, ABA Model Rules, and IBA General Principles remain significant as normative references in assessing and guiding the professional conduct of lawyers in international forums.

In international arbitration practice, most national laws and arbitration institutions do not specifically regulate ethical standards for party representation. Provisions regarding professional conduct generally still depend on each country's domestic legal system or code of ethics for the legal profession. One notable exception is the London Court of International Arbitration (LCIA), which, through its LCIA Arbitration Rules 2020, has explicitly regulated the ethics of legal representatives.

These rules are outlined in the Annex: General Guidelines for the Parties' Legal Representatives, which is an integral part of the rules. These guidelines contain basic ethical principles, such as the obligation to act honestly, avoid actions that interfere with the process, and prohibit attempts to improperly influence the arbitrator. Thus, the LCIA is one of the few arbitral institutions that provides a binding ethical framework for legal representatives in international arbitration proceedings.

9 Catherine A. Rogers, Ethics in International Arbitration, Oxford University Press, 2014, p.33-34.

BOTTOM OF FORM

Scope of *IBA Guidelines on Party Representation*

The IBA Guidelines on Party Representation in International Arbitration consist of several main sections that systematically regulate the behavior of legal representatives, from general principles to sanctions for violations. In addition, the IBA Guidelines on Party Representation are also supplemented with commentaries or interpretative guidelines.

The guidelines open with a Preamble, which explains the primary purpose of these guidelines: to promote efficiency, integrity, and a level playing field in arbitration. The Preamble emphasizes that these guidelines are not legally binding unless explicitly agreed to by the parties or adopted by an arbitral tribunal. Nevertheless, the IBA Guidelines hold an important position as widely recognized soft law in international arbitration practice.

The Definitions section defines key terms used in these guidelines. Some key definitions include Party Representative (meaning any person acting as counsel or legal representative for a party in the arbitration), Arbitral Tribunal and Proceedings, which refers to all stages of the arbitration process. The purpose of this section is to ensure consistent understanding of the terms used throughout the guidelines.

The Application of the Guidelines section then explains the context and application of these guidelines. The IBA Guidelines can be applied by agreement of the parties, through recognition by the tribunal in a procedural order, or used as a reference when ethical issues arise in arbitration proceedings. This flexible application allows the guidelines to serve as a normative tool responsive to the dynamics of each dispute.

In the Party Representation Generally section, the IBA emphasizes requirement to act with integrity, courtesy, and respect for the principle of equality. They are prohibited from engaging in any action that could obstruct the arbitration process or prejudice procedural fairness. This is a fundamental principle that underpins all professional conduct in arbitration.

The Communications with Arbitrators section specifically prohibits unilateral (ex parte) communications between party representation and arbitrators regarding the substance of the dispute, except in an administrative context that is transparent and open to all parties. The primary objective is to maintain the independence and impartiality of the arbitrator and to avoid conflicts of interest.

In Submissions to the Arbitral Tribunal, the guidelines require party representation not to convey misleading information or withhold relevant facts or law from the tribunal. party representation must present their legal and factual arguments honestly and respect the principle of fair hearing. The submission of documents and arguments must be conducted professionally, without manipulation or abuse of procedures.

Furthermore, the Information Exchange and Disclosure section governs behavior in the process of exchanging information and documents between parties. party representation are required to disclose requested and relevant information in accordance with the provisions of the arbitration procedure and must not intentionally conceal or withhold evidence that must be disclosed. The main objective to do so is to ensure that the information disclosure process is fair and transparent.

The Witnesses and Experts section regulates how party representation may interact with witnesses and experts who will be presented. Party representation may prepare witnesses to testify but are not permitted to influence or direct their testimony in a false manner. Witnesses and experts must also be treated professionally, while maintaining the integrity of the testimony and the objectivity of the expert.

Finally, the Remedies for Misconduct section provides the arbitral tribunal with the authority to respond to violations of these guidelines. The tribunal has discretionary authority to determine sanctions or corrective actions, such as issuing warnings, rescheduling proceedings, adjusting cost allocations, and recommending reporting to the relevant legal professional association. These sanctions are not automatically implemented but depend on the tribunal's assessment of the impact and seriousness of the violation committed by the party representation.

IMPLEMENTING THE IBA GUIDELINES IN INDONESIA: WHY AND HOW?

Arbitration as a dispute resolution method in Indonesia has experienced significant growth, both domestically and internationally. However, despite the growing number of arbitration cases, Indonesia still faces significant regulatory challenges governing the ethics and conduct of party representation involved in the arbitration process.

Currently, there are no specific regulations governing party representation in arbitration in Indonesia. The current code of ethics for advocates is general in nature and does not specifically address ethical obli-

gations during arbitration proceedings. This creates ambiguity and potential inconsistencies in the ethical practices of party representation in arbitration proceedings.

Furthermore, arbitration institutions operating in Indonesia do not yet have their own codes of ethics that serve as guidelines for standard behavior for party representation during the arbitration process. The absence of these guidelines has the potential to create issues of integrity and professionalism in dispute resolution, ultimately undermining the parties' trust in the arbitration mechanism.

In this context, the implementation of the IBA Guidelines on Party Representation is crucial and relevant. These guidelines can fill the existing regulatory gap by establishing clear ethical and behavioral standards party representation in arbitration. By adopting the IBA Guidelines, Indonesia can increase transparency, consistency, and professionalism in the arbitration process, while strengthening the parties' and the public's trust in this alternative dispute resolution mechanism.

By adopting globally recognized guidelines, Indonesia can more easily harmonize domestic arbitration practices with international standards, attract more foreign investment, and facilitate cross-border cooperation. The implementation of international ethical guidelines reflects Indonesia's commitment to maintaining the quality and credibility of its arbitration system, which is essential for building a reputation as an arbitration-friendly country.

How to Implement the IBA Guidelines in Indonesia? A highly feasible first step is for national arbitration institutions, such as BANI (Indonesian National Arbitration Board), to take the initiative to draft and adopt specific ethical rules governing the conduct of party representations in national and international arbitrations. This is crucial given that existing codes of ethics for advocates are not yet compatible and do not specifically address issues arising in the arbitration context, leaving a regulatory gap that needs to be filled.

As a temporary solution, parties to an arbitration can incorporate the IBA Guidelines on Party Representation as part of a procedural order (PO). Furthermore, these guidelines can be implemented through a clause in the arbitration agreement, although in practice, ethical guidelines could be included in the *acta compromise* after a dispute has arisen. This is because in drafts of arbitration clause on the *pactum de compromittendo* typically drafted by corporate representative and attention to ethical provisions is still relatively limited or not a primary focus.

For long-term measures, it is recommended that a specific code of ethics be developed for party representation in arbitration, which can be adopted by PERADI (Indonesian Advocates Association) or arbitration institutions in Indonesia. Adopting the IBA Guidelines as part of this code of ethics will not only strengthen the professional and ethical standards, but also provide legal certainty and increase party confidence in the arbitration process in Indonesia.

In addition to the steps already mentioned, the implementation of the IBA Guidelines can also be achieved through specialized arbitration education and certification. One effective way is to integrate these guidelines into the legal education and lawyer training curriculum in Indonesia. Law schools and advocate professional training institutions can incorporate material on the IBA Guidelines into arbitration and advocate professional ethics courses, so that prospective advocates are equipped with an understanding of the standards of behavior expected in arbitration practice from an early age.

Furthermore, to improve the competence of party representation wishing to focus on arbitration, special certification that adheres to the IBA Guidelines should be encouraged. This certification can take the form of intensive training or professional development programs that emphasize the importance of adherence to internationally recognized ethical guidelines. This type of certification can better guarantee the quality of party representation in arbitration and ensure professional recognition.

To strengthen and expand the application of these guidelines, institutions such as BANI, PERADI, or related institutions can collaborate with international organizations that play a strategic role in developing arbitration standards, such as the International Bar Association (IBA) or the International Council for Commercial Arbitration (ICCA).

CONCLUSION AND KEY TAKEAWAYS

Based on the previous discussion, it can be concluded that the absence of specific and comprehensive ethical standards in arbitration practice in Indonesia, particularly regarding party representation, has the potential to give rise to ethical dilemmas, conflicts of interest, and legal uncertainty. This situation not only impacts the professionalism of legal counsel but also the parties' trust in the integrity of the arbitration process itself. The IBA Guidelines on Party Representation,

as widely recognized guidelines in international arbitration practice, offer an ethical framework that can be adapted to the Indonesian context as both a short-term and long-term solution. Therefore, the urgency of adopting or adapting these guidelines is increasingly apparent in efforts to build a credible and globally standardized national arbitration system.

Key Takeaways:

1) The Indonesian Advocates' Code of Ethics does not yet specifically regulate ethical issues that arise in arbitration practice, particularly those related to the role of legal counsel across jurisdictions.
2) BANI and other national arbitration institutions have the opportunity to develop more contextual internal codes of ethics to address this gap in standards of conduct in the arbitration process.
3) As a temporary practical measure, parties can choose to implement the IBA Guidelines through a Procedural Order (PO) to ensure fairness and professionalism in proceedings.
4) Adoption or adaptation of the IBA Guidelines by professional organizations such as PERADI or arbitration institutions will strengthen Indonesia's position in international arbitration practice and increase the competitiveness of national arbitration institutions.
5) The implementation of clearer ethical standards will prevent abuse of process, increase user confidence, and strengthen the integrity of arbitration as an alternative dispute resolution forum.
6) Collaboration among stakeholders from regulators, practitioners, academics, to professional organizations is needed to formulate and institutionalize adaptive yet firm ethical standards for arbitration.

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NEWS & EVENTS

19 MARCH 2025

National Commission on Muslim Filipinos (NCMF) visited BANI

On 19 March 2025, the National Commission on Muslim Filipinos (NCMF) paid a visit to the BANI Arbitration Center. The purpose of the visit was to engage in discussions on the sharing of best practices in promoting alternative dispute resolution, specifically in relation to settling disputes between Muslims through mediation and arbitration. The delegation from NCMF was warmly received by the Governing Board of BANI Arbitration Center.

27 MAY 2025

Socialization Event BANI Arbitration Rules 2025

As part of its efforts to promulgate the Arbitration Rules 2025 to the public, BANI Arbitration Center organized a socialization event at the Grand Melia in Jakarta on 27 May 2025. The event was attended by a distinguished group of lawyers, legal advisors, consultants, businesspersons, and arbitration practitioners. The Arbitration Rules 2025 were presented by Mr. Huala Adolf, Vice Chairman, and Mr. Eko D. Prasetiyo, Vice Secretary General.

28 MAY 2025

Webinar (hybrid) BANI Palembang – Unsri : International Seminar "The Challenge of Using Arbitration in the Era of Society 5.0"

BANI Palembang, in collaboration with Universitas Sriwijaya Palembang, hosted an international webinar on the topic "The Challenge of Using Arbitration in the Era of Society 5.0" on 28 May 2025. The webinar featured esteemed speakers from Macau, India, Malaysia, and Indonesia, including representatives from BANI Palembang and Universitas Sriwijaya.

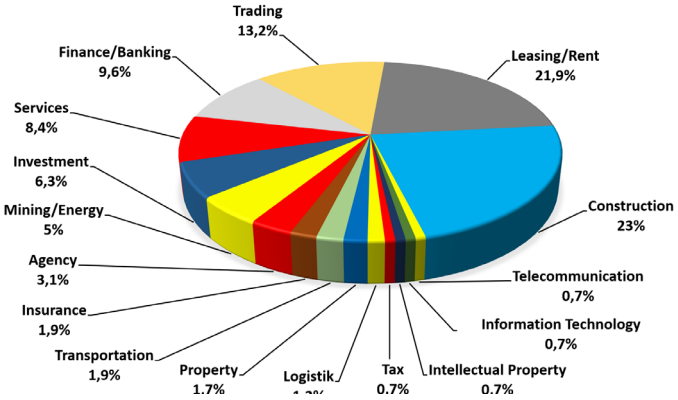
11 JUN 2025

Arbitrator Discussion

As part of its ongoing efforts to maintain the competencies and knowledge of its listed arbitrators, BANI Arbitration Center hold an "Arbitrators' Discussion" on 11 June 2025 at the Pullman Thamrin, Jakarta. The issue discussed was on the new provisions under the 2025 BANI Arbitration Rules. These included the provisions on Emergency Arbitration and seizure of assets.

Statistics of BANI

In the period 2019-2023, the construction business was the most in cases registered at BANI. Then followed by the Leasing/rent sector, where year after year they alternate as the most resolved sector at the BANI Arbitration Center. The rest can be seen in the following graph.



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 out of the contract shall be settled by Badan Arbitrase Nasional Indonesia (BANI) under BANI Arbitration Rules whose awards shall be final and binding upon the parties."*

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, baik yang bersifat nasional maupun internasional, yang timbul dari perjanjian ini akan diselesaikan dan diputus oleh Badan Arbitrase Nasional Indonesia (BANI) menurut peraturan dan prosedur BANI, yang putusannya mengikat kedua belah pihak 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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