

INDONESIA ARBITRATION

Quarterly Newsletter

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Message from The Chairman of the Board

Thirty years have elapsed since BANI (Badan Arbitrase Nasional Indonesia) – the Indonesia Arbitration Center, was established 3 December 1977 at the instigation and initiative of Prof. R. Soebekti, the Chief Justice of the Supreme Court of the Republic of Indonesia, in cooperation with Mr. Harjono Tjitrosobono, the Chairman of Indonesian Bar Association (Ikatan Advokat Indonesia – IKADIN) and myself with the full support of the Chairman of Indonesia Chamber of Commerce And Industry. Air Marshall (ret.) Suwoto Sukendar and its Vice Chairman, Mr. Julius Tahija. This was a historic step taken introducing BANI into the Indonesian Business and Legal Community.

Unparallel legal advances in the years followed those first hesitant arbitration activities, with the result that, at this very moment, arbitration has developed into a factor influencing practically every field of the In-

donesian and International legal life of society. The complex mechanism of advanced “peaceful settlement of dispute in commercial/business” can only function through the combined efforts of BANI’s members and the full support of the national legal community. Let us work together in furthering BANI positive development.

In this connection, I am pleased to present this first newsletter and do hope you enjoy reading it. If you happen to have news items or articles that you would like us to include in the next newsletter please do not hesitate to contact the BANI Secretariat

for necessary details. Please feel free to circulate the newsletter to those that might have interest in reading it. I do hope to be able publishing the newsletter on a quarterly basis.

Jakarta, 1 October 2007

Prof. Dr. H. Priyatna Abdurrasyid



■ Prof. Dr. H. Priyatna Abdurrasyid

is an independent institution managed and overseen by a Governing Board and an Advisory Board made up of distinguished individuals from the public and private sectors.

About BANI

Badan Arbitrase Nasional Indonesia (BANI) is the main arbitration centre in Indonesia. It provides excellent facilities for international and domestic arbitration, mediation, binding opinion and other forms of ADR including hybrid arbitration as alternatives to litigation for the settlement of commercial disputes. It offers parties a neutral and independent forum to resolve their commercial disputes and provides the necessary institutional support by acting autonomously and independently in regard of upholding law and justice. BANI helps parties to appoint their arbitrator when they are unable to agree and it monitors and supervises the progress of the arbitration.

Established in 1977 on initiative of three prominent lawyers, namely the late Prof Soebekti and Mr. Harjono Tjitrosobono and Prof. Dr. H. Priyatna Abdurrasyid, BANI is an independent institution managed and overseen by a Governing Board and an Advisory Board made up of distinguished individuals from the public and private sectors. The Centre is located in Jakarta with offices in some Indonesia major cities including Surabaya, Bandung, Pontianak, Denpasar, Medan, Batam and Palembang.

Committed to complete neutrality and independence in its role as an arbitral institution, BANI has developed its own rules and procedures for arbitrations, both domestic and international, taking place in Indonesia. Other rules opted by the parties may also be applied. The Arbitration Board designates arbitrators in accordance with provisions of the agreements and from candidates recommended by the Secretariat.

BANI has developed a pool of arbitrators and experts in the law and practice of arbitration and conciliation. More than 100 arbitrators are now included on BANI's Panel of Accredited Arbitrators; they include respected professionals drawn from the domestic bar, university and business community as well as distinguished international jurists. About thirty percent of the arbitrators in the list are foreign nationals, who are non-resident of Indonesia. Also, BANI does not require that arbitrators be selected from pre-established lists, thus ensuring the greatest possible freedom of choice and flexibility in the constitution of the Arbitral Tribunal. In arbitral proceedings, parties can place themselves on an equal footing in five key respects,

namely:

1. Place of arbitration
2. Language used
3. Procedures or rules of law applied
4. Nationality
5. Legal Representation

As arbitration may take place in any language and with arbitrators of any nationality, BANI arbitration rules provide great flexibility, therefore it is possible to structure a neutral procedure offering no undue advantage to any party. To provide for the general exchange of information and assistance, BANI has cooperation agreements with various centers and organizations in various countries, among others:

- The Japan Commercial Arbitration Association;
- The Netherlands Arbitration Institute;
- The Korean Commercial Arbitration Board;
- Australian Centre for International Commercial Arbitration;
- The Philippines Dispute Resolution Centre;
- Hong Kong International Arbitration centre;
- The Foundation for International Commercial Arbitration and Alternative Dispute Resolution (SICA-FICA);
- Singapore Institute of Arbitrators

BANI is one of the founding members of Asia Pacific Regional Arbitration Group.

Please visit www.bani-arb.org for more information.



■ BANI Governing Board with BANI Palembang board member and the Chairman of Chamber of Commerce & Industry of South Sumatra

Selintas Tentang BANI

Badan Arbitrase Nasional Indonesia (BANI) adalah pusat arbitrase di Indonesia. Lembaga arbitrase ini memberikan beragam jasa yang berhubungan dengan arbitrase, mediasi dan bentuk-bentuk lain dari Alternatif Penyelesaian Sengketa (ADR) termasuk hybrid arbitration sebagai alternatif penyelesaian sengketa komersial melalui pengadilan. BANI menawarkan kepada para pihak forum yang independen

untuk menyelesaikan sengketa bisnis dan memberikan dukungan kelembagaan yang diperlukan dengan bertindak secara otonomi dan independen dalam penegakan hukum dan keadilan. BANI membantu para pihak menunjuk arbiter apabila mereka tidak mencapai kesepakatan dan memantau dan mengawasi proses arbitrase.

Didirikan pada tahun 1977 atas prakarsa tiga pakar hukum terkemuka, yaitu almarhum Prof Soebekti S.H. dan Harjono Tjitrosoebono S.H. dan Prof. Dr. H. Priyatna Abdurrasyid, BANI adalah lembaga independen yang dikelola dan diawasi oleh Dewan Pengurus dan Dewan Penasehat yang terdiri dari tokoh-tokoh masyarakat dan sektor bisnis. BANI berkedudukan di Jakarta dengan perwakilan di beberapa kota besar di Indonesia termasuk Surabaya, Bandung, Pontianak, Denpasar, Medan, Batam dan Palembang.

Bertekad untuk sama sekali netral dan independen dalam perannya sebagai lembaga arbitrase, BANI telah mengembangkan aturan dan tata cara sendiri, termasuk batasan waktu di mana Majelis Arbitrase harus memberikan putusan. Aturan ini terutama dimaksudkan untuk arbitrase dalam negeri maupun internasional yang mengambil tempat di Indonesia. Dewan Pengurus menunjuk arbiter menurut ketentuan-ketentuan dalam perjanjian dan dari calon-calon yang direkomendasikan oleh Sekretariat.

BANI telah memiliki sejumlah arbiter dan pakar di bidang hukum dan praktik arbitrase dan konsiliasi. Pada saat ini tercatat lebih dari 100 arbiter dalam Daftar BANI mengenai Arbiter Yang Berakreditasi; mereka meliputi para profesional terdiri dari para ahli hukum dan dari kalangan universitas dan masyarakat bisnis di dalam negeri maupun ahli hukum dari luar negeri, Sekitar 30 persen dari arbiter dalam

Daftar Arbiter BANI adalah berkebangsaan asing dan bukan penduduk Indonesia. BANI juga tidak mensyaratkan bahwa arbiter dipilih dari daftar yang tersedia, dengan demikian memberikan jaminan adanya kebebasan untuk memilih dan fleksibilitas dalam pemilihan Majelis Arbitrase. Dalam proses arbitrase, para pihak dapat berpijak pada kaki yang sama dalam lima hal pokok, yakni:

1. Tempat arbitrase
2. Bahasa yang digunakan
3. Tatacara atau peraturan hukum yang digunakan
4. Kebangsaan
5. Penasehat Hukum

As arbitration may take place in any language and with arbitrators of any nationality, BANI arbitration rules provide great flexibility, therefore it is possible to structure a neutral procedure offering no undue advantage to any party.

Untuk saling pertukaran informasi dan bantuan, BANI telah mengadakan kesepakatan bekerja sama dengan berbagai lembaga dan organisasi di berbagai negara, antara lain:

- The Japan Commercial Arbitration Association;
- The Netherlands Arbitration Institute;
- The Korean Commercial Arbitration Board;
- Australian Centre for International Commercial Arbitration;
- The Philippines Dispute Resolution Centre;
- Hong Kong International Arbitration centre;
- The Foundation for International Commercial Arbitration and Alternative Dispute Resolution (SICA-FICA);
- Singapore Institute of Arbitrators

BANI adalah salah satu anggota pendiri Asia Pacific Regional Arbitration Group.

Informasi tambahan dapat diakses dari www.bani-arb.org.

■ Memorandum of Cooperation with Indonesia Chamber of Commerce & Industry

On 19 December 2006, BANI and Indonesia Chamber of Commerce and Industry (KADIN) signed a Memorandum of Cooperation, whereby both parties formally put on paper their aspiration and vision to work together to provide mutual support to each other for the development and promotion of arbitration practice in Indonesia. Represented in the signing were Prof. Dr. H. Priyatna Abdurrasyid and Mr. Mohamad S. Hidayat, respectively, the Chairman of BANI and Chairman of KADIN. The event was graced by Mrs. Mari Elka Pangestu, the Indonesian Minister of Trade.

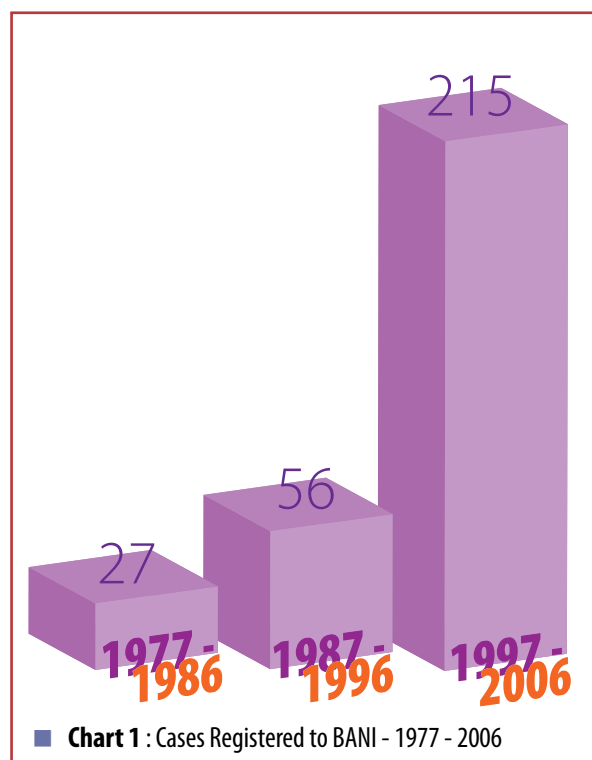
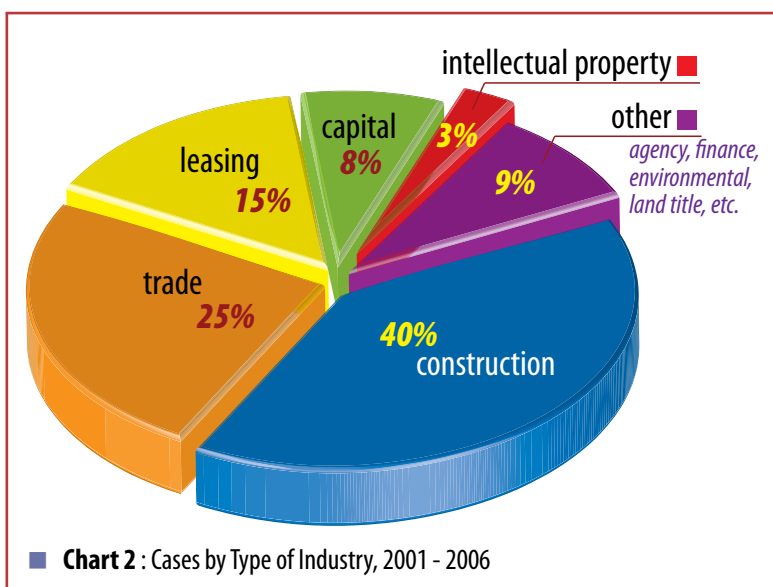
KADIN will encourage its members and business communities in Indonesia to use BANI as a forum for settlement of its dispute with its domestic or international business partner. However, under the principle of independency in the process of arbitration/alternate dispute resolution, KADIN will not interfere directly or indirectly in the case of its member involves in the BANI arbitration forum.



Arbitration Development in Indonesia

Since the promulgation of new Arbitration Law (Law Nr. 30 of 1999), there is growing interests for arbitration in Indonesia as an alternate settlement for dispute resolution. This may be seen by increased number of cases registered in BANI. For example, before 1999 the number of cases registered for arbitration averaged seven, versus twenty cases between 2000 and 2006. The number is on increasing trend (31 cases in 2006) and the disputes cover wider sectors of business, involving trade, industry and financing, with the majority is related to construction (36%) and trade (26%).

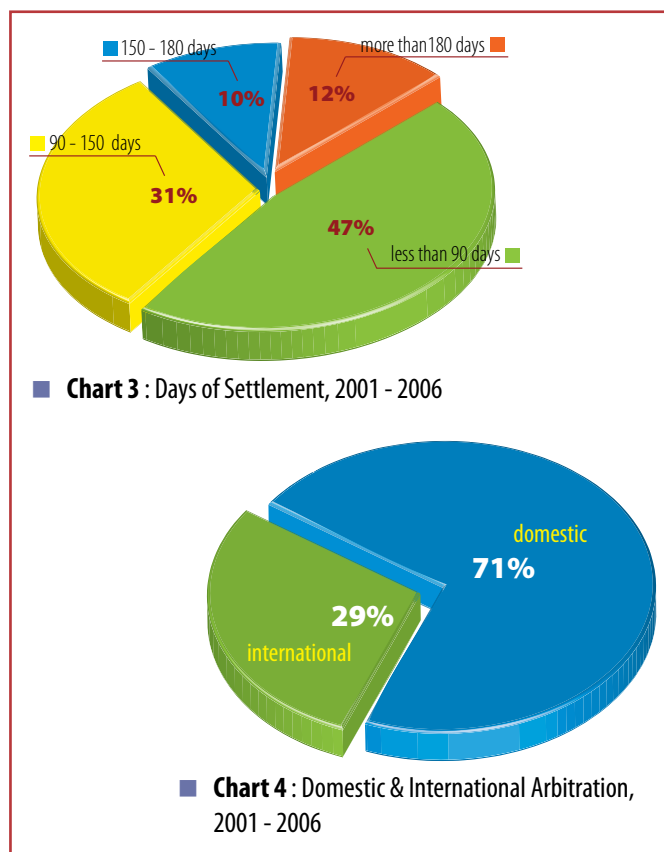
Such growth has been consistent with the increased business activities world-wide and has been attributable to that the Arbitration Law seems to have provided the necessary arbitration procedures both for the proceeding and enforcement of arbitral awards, thereby ensuring legal certainty. Under Arbitration Law, the execution of arbitral awards by the District Court should now be a matter of course and without any difficulty.



Perkembangan Arbitrase di Indonesia

Sejak diundangkannya Undang-undang Arbitrase (UU No. 30 Tahun 1999), minat terhadap arbitrase di Indonesia sebagai penyelesaian sengketa alternatif meningkat. Hal ini dapat dilihat dari meningkatnya jumlah perkara sengketa yang di daftar di BANI. Misalnya, sebelum tahun 1990 jumlah perkara rata-rata tujuh, dibandingkan dengan 20 kasus antara 2000 dan 2006. Jumlah ini cenderung meningkat (31 kasus dalam tahun 1996) dan mencakup sengketa dalam sektor bisnis yang luas, meliputi perdagangan, industri dan keuangan, dengan yang terbanyak berkaitan dengan konstruksi (36%) dan perdagangan (26%).

Pertumbuhan tersebut sejalan dengan meningkatnya kegiatan bisnis di dunia dan disebabkan oleh kenyataan bahwa Undang-undang Arbitrase baru telah memberikan prosedur yang diperlukan, baik untuk berlangsungnya perkara maupun penegakan putusan arbitrase, karenanya ada kepastian hukum. Berdasarkan UU Arbitrase, pelaksanaan putusan arbitrase yang dilakukan oleh Pengadilan Negeri merupakan hal biasa dan tanpa kesulitan.



Profile



■ BANI Surabaya Boards

Introducing BANI Surabaya Office By Hartini Mochtar Kasran S.H., FCBArb

BANI Surabaya Office is initially named BANI East Java, which was established in the end of 1984 with its first chairman Drs. Supoyo Ak., who was then replaced by Prof. Soebiono Tjitrowinoto S.H. (Retired Chief Justice of Higher Court for East Java). Presently BANI Perwakilan Surabaya is chaired by Mrs. Hj. Hartini Mochtar Kasran, S.H.. The changed name to BANI Surabaya Office started on 1 January 2004 based on the decision of BANI Number 03.041/XII/SK-BANI/PA dated 2 December 2003 on the Establishment and Organization of BANI Offices in other places.

Like in other International Arbitration Institutions, the Indonesia Chamber of Commerce & Industry (KADIN) East Java supported the establishment of BANI in Surabaya. The role of business community in the establishment of arbitration centre is essential, as the business community essentially requires arbitration centre which procedurally can meet the need for quick or without undue delay for dispute resolution. For example, Chamber of Commerce has great influenced in the establishment of International Chamber of Commerce (ICC) Court of Arbitration in Paris in 1919. The support of business community in the establishment was also experienced by other International Arbitration Tribunals, such as the American Arbitration Association (1926), the British Institute of Arbitration, Permanent Institute of Arbitration Den Haag, Yemeni Center for Conciliation and Arbitration, Regional Centre for Arbitration which was established in the AALCC Conference in Kuala Lumpur (1978) and Arbitration Regional Centre for Africa inn Cairo, Egypt (1979).

Even the arbitration rules are formulated by business community, such as in The Convention on the Settlement of International Disputes Between States and National States (ICSID) in Washington D.C. (March 18, 1965). All the universal provisions have been accommodated in the Arbitration Law since 12 Augustus 1999, namely Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution.

As an extra judicial institution, BANI Surabaya Office is acting autonomously and independently in the enforcement of law and justice through arbitration. The services

include dispute resolution through arbitration or other alternative dispute resolution, such as negotiation, mediation, conciliation and providing binding opinion in accordance with BANI's procedure rules or other procedure rules which are agreed to by the parties, including cost of arbitration, procedure, etc.

Profil

Memperkenalkan Bani Perwakilan Surabaya Oleh Hartini Mochtar Kasran S.H., FCBArb

BANI Perwakilan Surabaya pada awalnya bernama BANI Jawa Timur yang didirikan pada akhir tahun 1984 dengan ketua pertamanya Drs. Supoyo Ak., yang kemudian digantikan oleh Prof. Soebiono Tjitrowinoto S.H. (mantan Ketua Pengadilan Tinggi Jawa Timur). Pada saat ini BANI Perwakilan Surabaya dipimpin oleh Ny. Hj. Hartini Mochtar Kasran, S.H.. Perubahan nama menjadi BANI Perwakilan Surabaya dimulai 1 Januari 2004 yang ditetapkan berdasar Surat Keputusan BANI Pusat Nomor 03.041/XII/SK-BANI/PA tertanggal 2 Desember 2003 tentang Pembentukan dan Penyelenggaraan Kantor-kantor Perwakilan BANI di tempat-tempat lain.

Seperti terjadi juga pada Lembaga Arbitrase Internasional lain, Kamar Dagang Indonesia (KADIN) Jawa Timur mendukung pembentukan BANI di Surabaya. Peran dunia usaha pada pembentukan lembaga arbitrase sangat menentukan, karena dunia usaha pada hakekatnya sangat membutuhkan lembaga arbitrase yang secara prosedural memenuhi keinginan mendapatkan penyelesaian yang cepat atau tidak berlarut-larut. Misalnya, Chamber of Commerce telah berpengaruh dan berperan dalam pembentukan International Chamber of Commerce (ICC) Court of Arbitration di Paris pada tahun 1919.

Dukungan dunia usaha dalam awal pembentukan juga dialami oleh Tribunal Arbitration International lainnya, seperti the American Arbitration Association (1926), the British Institute of Arbitration, Permanent Institute of Arbitration Den Haag, Yemeni Center for Conciliation and Arbitration, Regional Centre for Arbitration yang didirikan dalam sidang AALCC di Kuala Lumpur (1978) dan Arbitration Regional Afrika yang berkedudukan di Kairo, Mesir (1979).

Bahkan ketentuan-ketentuan arbitrase (arbitration rules) pun disusun oleh dunia usaha seperti dalam The Convention on the Settlement of International Disputes Between States and National States (ICSID) di Washington D.C. (Maret 18, 1965). Semua ketentuan universal tersebut telah masuk dalam payung hukum arbitrase yang berlaku sejak tanggal 12 Agustus 1999, yakni Undang-undang Nomor 30 Tahun 1999 Tentang Arbitrase dan Alternatif Penyelesaian Sengketa.

Sebagai badan ekstra yudisial BANI Perwakilan Surabaya bertindak otonom dan independen dalam penegakan hukum dan keadilan melalui arbitrase. Penyediaan jasa-jasa meliputi penyelenggaraan penyelesaian sengketa melalui arbitrase atau bentuk-bentuk alternatif penyelesaian sengketa lainnya, seperti negosiasi, mediasi, konsiliasi dan pemberian pendapat yang mengikat sesuai dengan Peraturan Prosedur BANI atau peraturan prosedur lainnya yang disepakati oleh para pihak yang berkepentingan, termasuk biaya arbitrase, prosedur, dan lain-lain.

■ Arbitration Tribunal

The selection of the Arbitral Tribunal is one of the most critical steps in arbitration. Under the Arbitration Rules, the Arbitral Tribunal may compose of one or more arbitrators. When only one arbitrator is to be designated, he or she is appointed by the Court, unless the parties agree otherwise. When three arbitrators are to be designated, each party nominates an arbitrator; the third arbitrator, who chairs the tribunal, is appointed either with the agreement of the parties or co-arbitrators, or by the Court. When the parties are unable to agree on the number of arbitrators, the Rules provide that the Court shall appoint a sole arbitrator.

BANI has developed a pool of arbitrators and experts in the law and practice of arbitration and conciliation. More than 100 arbitrators are now included on BANI's Panel of Accredited Arbitrators; they include respected professionals drawn from the domestic bar, university and business community as well as distinguished international jurists. About thirty percent of the arbitrators in the list are foreign nationals, who are non-resident of Indonesia.

BANI does not require that arbitrators be selected from pre-established lists, thus ensuring the greatest possible freedom of choice and flexibility in the constitution of the Arbitral Tribunal.

The list of arbitrators in BANI is shown below.

■ Majelis Arbitrase

Pemilihan Majelis Arbitrase merupakan salah satu langkah terpenting dalam arbitrase. Berdasarkan Peraturan Arbitrase, Majelis Arbitrase dapat terdiri dari satu arbiter atau lebih. Jika hanya satu arbiter yang ditunjuk, arbiter tersebut dapat diangkat oleh Majelis, kecuali para pihak menyetujui yang lain. Jika tiga arbiter, maka masing-masing pihak dapat mengusulkan satu arbiter; arbiter yang ketiga yang akan bertindak sebagai ketua dapat ditunjuk berdasarkan kesepakatan kedua pihak atau oleh Majelis. Manakala para pihak tidak dapat menyepakati jumlah arbiter, Peraturan menetapkan bahwa Majelis menunjuk arbiter tunggal.

BANI telah memiliki sejumlah arbiter dan pakar di bidang hukum dan praktik arbitrase dan konsultasi. Pada saat ini tercatat lebih dari 100 arbiter dalam Daftar BANI mengenai Arbiter Yang Memiliki Akreditasi; mereka meliputi para profesional terdiri dari para ahli hukum dan dari kalangan universitas dan masyarakat bisnis di dalam negeri maupun ahli hukum dari luar negeri. Sekitar 30 persen dari arbiter dalam Daftar Arbiter BANI adalah berkebangsaan asing dan bukan penduduk Indonesia.

BANI tidak mensyaratkan bahwa arbiter dipilih dari daftar yang tersedia, dengan demikian memberikan jaminan adanya kebebasan untuk memilih dan fleksibilitas dalam pemilihan Majelis Arbitrase.

■ List of Arbitrators / Daftar Arbiter

Indonesian Arbitrators

- | | | |
|----------------------------------|----------------------------------|--------------------------|
| 1. H. Priyatna Abdurasyid | 25. H. Kahardiman | 51. Hariwardono Soeharno |
| 2. M. Husseyn Umar | 26. Augusdin Aminoedin | 52. I Made Widnyana |
| 3. Harianto Sunidja | 27. Fransiska Oei | 53. I Gusti Ngurah Oka |
| 4. N. Krisnawenda | 28. H. Gusnando S. Anwar | 54. I Wayan Tantra |
| 5. T. Mulya Lubis | 29. Januar Hakim | 55. H. Anwar Saleh |
| 6. Mohammad Salim | 30. H. Agus G. Kartasasmita | 56. Nurdjanah A. S. |
| 7. Abdullah Makarim | 31. Adhi Moersid | 57. Herujono Hadisuparto |
| 8. Soegiri | 32. H.R. Sidjabat | 58. Yudi Haliman |
| 9. H. Bismar Siregar | 33. Suntana S. Djatnika | 59. Jimmy Sutjianto |
| 10. Setiawan | 34. Jusuf Arbianto Tjondrolukito | 60. Omar Ishananto |
| 11. Anangga Wardhana Roosdiono | 35. Akmam Umar | 61. Wawan Setiawan |
| 12. H. Adi Andojo Soetjipto | 36. Hasjim Djalal | 62. Marthen Basiang |
| 13. B.M. Kuntjoro Jakti | 37. H. Fathurrahman Djamil | 63. Maliki Tedja |
| 14. Fatimah Achyar | 38. M. Daud Silalahi | 64. Rachmat Purwono |
| 15. Sudargo Gautama | 39. Mariam Darus | 65. Richard Wahjoedi |
| 16. H. Ali Basya Loebis | 40. Djuhaendah Hasan | 66. Mustofa |
| 17. Sunarindrati Tjahjono | 41. Moh. Hasan Wargakusumah | 67. Madjedi Hasan |
| 18. Hj. Lieke Rukmini | 42. H. Ahmad M. Ramli | 68. H. Iing Rochman K |
| 19. Fred B.G. Tumbuan | 43. Huala Adolf | 69. H. Jafar Sidik |
| 20. Sutan Remy Sjahdeini | 44. Tengku Nathan Machmud | 70. Ichjar Musa |
| 21. Humphrey R. Djemat | 45. Henry Kapen Silalahi | 71. Junaedy Ganie |
| 22. Abdul Hakim Garuda Nusantara | 46. Etty R. Agoes | 72. W. Suwito |
| 23. H. Benjamin Mangkoedilaga | 47. Hary Djatmiko | 73. Purwanto |
| 24. Frans H. Winarta | 48. Rudhi Prasetya | |
| | 49. Hj. Hartini Mochtar Kasran | |
| | 50. Ismet Baswedan | |

Expatriate Arbitrators

- | | | |
|-----------------------------------|---------------------------------------|------------------------------------|
| 1. <i>Albert Jan Van den Berg</i> | 11. <i>Jan Paulsson</i> | 23. <i>Soonwoo Lee</i> |
| 2. <i>Andrew John Rogers</i> | 12. <i>Jacques Covo</i> | 24. <i>Tan Chee Meng</i> |
| 3. <i>Arthur L. Marriot</i> | 13. <i>Jean-Christophe Liebeskind</i> | 25. <i>Varghese George</i> |
| 4. <i>Custodio O. Parlade</i> | 14. <i>Ms. Karen Mills</i> | 26. <i>Vasudevan Rasiah</i> |
| 5. <i>Cecil Abraham</i> | 15. <i>Leslie Chew</i> | 27. <i>Woo Tchi Chu</i> |
| 6. <i>Colin Y. C. Ong</i> | 16. <i>Ms. Louise Barrington</i> | 28. <i>Lawrence Boo</i> |
| 7. <i>David A. R. Williams</i> | 17. <i>Michael Hwang</i> | 29. <i>A. James Booker</i> |
| 8. <i>Dato' Jude P. Beny</i> | 18. <i>Ms. Meef Moh</i> | 30. <i>Michael Sinjorgo</i> |
| 9. <i>Gregory Churchill</i> | 19. <i>Michael Charles Pryles</i> | 31. <i>AA de FINA</i> |
| 10. <i>Ian G. Pyper</i> | 20. <i>Nick Stone</i> | 32. <i>Robert B. Morton</i> |
| | 21. <i>Paul Whitley</i> | 33. <i>Justice K. Govindarajan</i> |
| | 22. <i>Phai Cheng Goh</i> | 34. <i>Richard Tan</i> |

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INTERNATIONAL ARBITRATION
 One Day Seminar, Hotel Borobudur, Jakarta, Dec 6, 2007

Keynote Speaker:
Prof. Dr. Bagir Manan, S.H. MCL,
 Chief Justice of Supreme Court of Indonesia

Speakers:

Prof Dr. H. Priyatna Abdurrasyid "BANI and International Arbitration"
M.S. Hidayat (Ketua Umum KADIN) "The Role of Arbitration in the Global Economy"
Maurice Burke, BA LLB "Arbitration as Concept and Process in Settling International Commercial Disputes"
Prof Richard Tan, LLB "Law and Issue in the Enforcement of International Arbitration Award"
Prof Dr. Colin Yee Cheng Ong "Arbitration and Investment Disputes"
Prof. Dr. Achmad M Ramli (Kepala BPHN) "The Role of Court in Arbitration/Alternative Dispute Resolution"

■ Seminar on Arbitration

BANI Will Host One Day Seminar On International Arbitration

On 3 December 2007, BANI will mark its 30th Anniversary. In conjunction with the anniversary, the highlight event will include one day seminar on International Arbitration, to be conducted in Jakarta. The venue will take place in Hotel Borobudur, Jakarta.

BANI has invited a number of distinguished speakers who will speak on the following topics:

- Keynote speaker by Prof. Dr. Bagir Manan, S.H. MCL, the Chief Justice of Supreme Court of Republic of Indonesia;
- BANI and International Arbitration by Prof Dr. H. Priyatna Abdurrasyid, one of the founders of BANI and presently the Chairman of BANI's Governing Board;
- The Role of Arbitration in the Global Economy by Mr. M.S. Hidayat, the Chairman of Indonesian Chamber of Commerce and Industry;

- Arbitration as Concept and Process in Settling International Commercial Disputes by Mr. Maurice Burke, BA LLB, the Joint Head of Herbert Smith's dispute resolution practice in Southeast Asia;
- Law and Issue in the Enforcement of International Arbitration Award by Prof Richard Tan LLB. FCIA (UK). FSIA, Past President of Singapore Institute of Arbitrators;
- Arbitration and Investment Disputes by Prof Dr. Colin Yee Cheng Ong, President of Arbitration Association of Brunei and a panel member of ASEAN Protocol on Enhanced Dispute Settlement Mechanism; and
- The Role of Court in Arbitration/Alternative Dispute Resolution by Prof. Ahmad M. Ramli (Kepala Badan Pembinaan Hukum Nasional - BPHN / Head of Agency for National Law Development).

For detail, please contact BANI Secretariat at Wahana Graha Building, 2nd Floor, Jalan Mampang Prapatan 2, Jakarta 12760 Indonesia, Phone 62-21-7940542, Fax 7940543, E-mail: bani-arb@indo.net.id; webs: www.bani-arb.org.

Articles

■ Featured Article on Arbitration

Foreign Element Provisions Under the Indonesia's Arbitration Law

By **Huala Adolf**

The legal basis for the practice of arbitration in Indonesia is the Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution ("Arbitrase dan Alternatif Penyelesaian Sengketa") ("the Law").

In addition, Indonesia as a civil law jurisdiction is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 as ratified by the Presidential Decree No. 31 of 1982. Indonesia is also a member to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 ratified by the Law No. 5 of 1968.

The Law embodies both domestic and foreign provisions on arbitration. The latter includes the following elements.

a. Language Used in the Arbitration Proceedings

The Law stipulates that the language used in the arbitral proceedings must be in the Indonesian language. However, if the parties agree and approved by the arbitration tribunal, other language such as English may be used (Art 28 of the Law).

In the course of its proceedings, Badan Arbitrase Nasional Indonesia or the Indonesia Arbitration Center ("BANI"), has in some occasions used English.

The translation into Indonesian language of the original documents written in English may also be required before the original documents written in English be submitted to the arbitration tribunal (Article 14 BANI Rules).

Despite English used during the hearings, the award must be made in Indonesian language. A translation of the award may be made in English language if the parties require so.

b. Foreign Arbitrators

The Law does not stipulate who are capable of being an arbitrator. Article 12 of the Law however lays down several requirements for a person to be qualified as arbitrator. They are:

- 1) Being competent to perform legal actions;
- 2) Being at least 35 years old of age;
- 3) Having no relation with the parties, including family or financial relations, and
- 4) Having at least 15 years of experience in his/her field.

BANI has the list of foreign arbitrators. In fact, about 30 % of its listed arbitrators are foreigners. They include Americans, Europeans, Asian citizens.

c. Representation of foreign legal assistance

As a rule, foreign lawyers are not allowed to practice law in Indonesia. They are not allowed either to represent their clients before the Indonesian courts.

The Arbitration Law is silent on this matter but it has become a common practice that the parties are and may be represented by their counsels. The Law confirms this and requires that this representation must be expressly stated by a special power of attorney (Article 29 (2) Law).

During the practice of arbitration in BANI, foreign lawyers may represent their clients. However, they must be accompanied by the Indonesian lawyers in the course of the proceedings.

d. Venue of Arbitration

According to Article 37 of the Law, the venue of arbitration shall be determined by the arbitrators or upon the request of the parties, at the venue of the arbitration chosen by the parties. Arbitrator however may hear the expert's testimony or arbitration hearings outside the agreed venue. The investigation of the witness or expert is conducted in accordance with the Indonesian Civil Procedural law. In addition, Arbitrator may conduct investigation on the venue where the goods are located, including in foreign states.

e. Arbitration Rules

Basically, it is the freedom of the parties to designate the arbitration procedural rules. If no decision of the parties is made, the arbitration body itself will determine so. Usually, the procedural rules to be applied is the procedural law already in existence in the Arbitration body. BANI however has in a number of occasion adopted UNCITRAL Arbitration Rules 1976.

f. Applicable Law

Article 56 (2) of the Law states, that the parties may designate the applicable law to the existing or future dispute, including foreign law. It is worth noting that the arbitrator may apply *ex aequo et bono* without the authorisation of the parties. Thus, the Law provides broader leeway to arbitrator to apply the law in case the parties fail to designate the law.

g. Foreign Awards

Chiefly, the Law distinguishes between the national and international (foreign) arbitration awards. The treatment for obtaining its execution order of these awards is under different courts.

In addition, the Law provides special the provisions on the execution of the awards where one of the parties is the government of the Republic of Indonesia. If this is the case, the Law requires that execution order is needed from the Supreme Court of the Republic Indonesia. The execution order subsequently becomes the legal basis for the Central Jakarta District Court to enforce the award.

If the dispute only involves between private parties, the execution is only required from District Court of Central Jakarta (Article 65 of the Law). The District Court of Central Jakarta is the only court authorised to handle issue of the recognition and enforcement of international (foreign) arbitral awards.

Under the new Law, the international arbitration awards shall be enforced in Indonesia, if:

- 1) The country where the award is made is also a member to bilateral or multilateral agreement with Indonesia on the recognition and enforcement of foreign arbitral awards;
- 2) The award is within the purview of the commercial/trade law under Indonesia law.
- 3) It does not contrary with the public order.
- 4) It can be enforced only after it receives execution order from the Chairman of the Central Jakarta District Court (Article 66 of the Law).

It should be also worth noting that the request of the enforcement of the international arbitration awards will be served only after the award is registered with the Registrar of the Central Jakarta District Court.

The request for enforcement of the award shall be accompanied with:

- 1) The duly authenticated original award of a duly certified copy thereof and its official translation in Bahasa Indonesia ('Bahasa' or Indonesian official language).
- 2) The Original document or certified copy of arbitration agreement and its official translation into Indonesian language.
- 3) The statement from the Indonesian mission in the country where the award is made that the applicant's request is bound by bilateral or multilateral agreement on the recognition and enforcement of foreign arbitral awards in which Indonesia is a party to it.



Huala Adolf is lecturer at the Faculty of Law University of Padjadjaran, Bandung and several universities in Indonesia. The field of his interests include International Law, Arbitration and International Economy Law.

He has published a number of books (mostly in Indonesia), among others are *Aspects of the State in the International Law*, *The Law of International Economy – An Introduction*, *The Basics of International Law*, and *The Law on International Dispute Resolution*. In addition to lecturing, he is also actively providing counsel to students in writing thesis and dissertation and serving as external examiner for PhD Dissertation at several universities in Indonesia and overseas.

■ Drafting an Arbitration Agreement

Arbitration is possible only if there is an agreement between the parties providing for it. Almost national and international arbitration institution, such as ICC (Paris), SIA (Singapore), NAI (Netherlands), BANI (Indonesia), etc. recommend that all parties wishing to have recourse to arbitration include the standard clause in their contracts, namely the forum (arbitration institution in which arbitration will be conducted), rules of arbitration and the number and selection of arbitrators.

For example ICC and BANI suggest that the specific text on **Table 1** is included in the contract.

In addition to the forum (ICC, SIA, BANI, etc.) and rules of arbitration, it may also be desirable for the parties to stipulate in the arbitration clause itself:

- the law governing the contract;
- the number of arbitrators;
- the place of arbitration; and
- the language of the arbitration.

Note that each arbitration institution has its own Rules of Arbitration. While they may differ, however in general they contain many similar items such as:

1. Prevailing Procedure;
2. Arbitration Panel, including the qualifications, appointment, etc.
3. Arbitration Proceedings, including venue of hearings, language, governing law, fee, expenses, etc.
4. Award.

Parties should also consider the possible need for special provisions in the event that arbitration is contemplated among more than two parties. In addition, the law in some countries may lay down certain requirements in respect of arbitration clauses.

In principle, parties should also always ensure that the arbitration agreement is:

- **in writing.** The effectiveness of an arbitration clause first of all depends on proof of its existence. It should therefore generally be in writing. The 1958 New York Convention specifically states (Art. II) that Contracting States shall recognize arbitration agreements “in writing”.
- **carefully drafted.** Time and again, the Court receives requests for arbitration based on ambiguous arbitration clauses. Badly worded clauses, at the very least, cause delay. At worst, they may impede the arbitration process.

■ Membuat Perjanjian Arbitrase

Persidangan arbitrase hanya dapat berjalan jika terdapat perjanjian antara para pihak mengenai hal tersebut. Hampir semua lembaga arbitrase nasional dan internasional, seperti ICC (Paris), SIA (Singapore), NAI (Netherlands), BANI (Indonesia), dan lain-lain menyarankan bahwa semua pihak yang ingin menggunakan arbitrase memasukkan klausula baku dalam perjanjiannya, khususnya mengenai forum (lembaga arbitrase di mana arbitrase akan diselenggarakan), peraturan arbitrase dan pemilihan arbiter.

*Misalnya ICC dan BANI menyarankan teks yang terdapat dalam **Tabel 1** dimasukkan dalam kontrak.*

ICC	BANI
<p>“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the ICC by one or more arbitrators appointed in accordance with the said Rules.”</p>	<p>“All disputes arising from this contract shall be binding and be finally settled under the administrative and procedural Rules of Arbitration of Badan Arbitrase Nasional Indonesia (BANI) by arbitrators appointed in accordance with said rules”.</p> <p>“Semua sengketa yang timbul dari kontrak mengikat dan diselesaikan menurut tata cara administratif dan aturan dari Badan Arbitrase Nasional Indonesia (BANI) oleh arbiter-arbiter yang ditunjuk berdasarkan aturan-aturan tersebut.”</p>

■ Table 1 : Arbitration Clause

Selain forum (ICC, SIA, BANI, dll.) dan aturan arbitrase, dapat juga dimasukkan oleh para pihak dalam klausula arbitrase hal-hal berikut:

- hukum yang mengatur kontrak;
- jumlah arbiter;
- tempat arbitrase diselenggarakan; dan
- bahasa yang digunakan dalam persidangan arbitrase.

Dapat ditambahkan bahwa masing-masing lembaga arbitrase mempunyai aturannya masing-masing. Sementara aturan tersebut

dapat berbeda, namun umumnya mengandung pokok-pokok yang sama, seperti:

1. Tatacara yang berlaku;
2. Majelis Arbitrase, termasuk kualifikasi, penunjukan dsbnya.
3. Persidangan Arbitrase, termasuk tempat persidangan, bahasa, hukum yang berlaku, biaya, dan lain-lain.
4. Putusan

Para pihak diharapkan juga mempertimbangkan adanya ketentuan khusus dalam hal arbitrase mencakup lebih dari dua pihak. Selain itu, hukum di beberapa negara mungkin mensyaratkan ketentuan-ketentuan tertentu dalam hal klausula arbitrase. Pada dasarnya, para pihak selalu berusaha agar perjanjian arbitrase dibuat:

- **Tertulis.** Efektivitas dari klausula arbitrase pertamanya tergantung pada bukti keberadaannya. Karenanya dibuat tertulis, Konvensi New York Tahun 1958 secara khusus (Pasal II) menyatakan bahwa Negara-negara anggota harus mengakui perjanjian arbitrase.
- **Dibuat dengan hati-hati.** Seringkali terjadi, pengadilan menerima permohonan arbitrase yang didasarkan pada klausul arbitrase yang tidak jelas. Klausul yang dibuat dengan kata-kata yang kurang tepat, sedikitnya dapat mengakibatkan proses menjadi tertunda, bahkan yang terburuk adalah menghambat berjalannya proses arbitrase.