

A STUDY OF COMMERCIAL ARBITRATION AND THE AUTONOMY OF THE INDONESIAN ARBITRATION LAW

Evita Isretno Israhadi, Borobudur University

ABSTRACT

Arbitration agreement between the parties is an important source of law in the arbitration proceeding, especially in commercial arbitrations. The commercial arbitration in Indonesia is monitored by permanent commercial arbitral tribunals for various fields. With the increase of commercial transactions, arbitration too has become a necessity. Out of court settlement has become the choice of business entities to resolve their disputes, which is consistent with the global practices. The problems begin when according to Indonesian Law district courts are not authorized to adjudicate disputes of parties bound by arbitration agreements. This grants autonomy to arbitration tribunals such as Indonesian National Board of Arbitration (Badan Arbitrase Nasional Indonesia)-BANI and the parties are liable to accept its verdict. This study proposes to understand the arbitration law of Indonesia, particularly to highlight its autonomous nature and to view it in the light of limitations and constraints. The result of discussion will be an input for Indonesia to amend its Arbitration Law.

Keywords: Arbitration, Autonomy, Commercial Enterprises, Global Practices.

INTRODUCTION

Arbitration is defined as a manner of resolving disputes through "private adjudication", whose decision is final and binding upon all parties concerned (Mills and Rakhmat, 2013). The Indonesia, Law no. 30, 1999 clearly states that a dispute that can be resolved through arbitration in the field of trade and business enjoys the same rights and services under the law and legislation as it would enjoy under any court of law (Smit, 2000). Arbitration has been frequently practiced in Indonesia, although recently a number of arbitration cases have been dropped significantly (Syrarief, Rina & Augustina, 2016). The commercial arbitration in Indonesia is monitored by permanent commercial arbitral tribunals that have been created by various associations and trade organizations active in various fields of trade and commerce (Smit, 2000). For instance, there are tribunals set up by Indonesian Association of Exporters, Indonesian Chamber of Commerce, Association of Exporters of Indonesian Products (*Organisasi Exportir Hasil Bumi*, Indonesia) in Jakarta; The Indonesian Association of Fire Insurance Underwriters, Jakarta; and The Indonesian Accident Underwriters Association, Jakarta. All these tribunals are monitored by the Indonesian National Board of Arbitration (*Badan Arbitrase Nasional Indonesia*) BANI.

Similarly, there are a few other arbitration institutions such as *Badan Arbitrasi Muamalat Islam* Indonesia (the *Indonesian Islamic Muam* Arbitration organizations in Indonesia *alat Board of Arbitration* (BAMUI)), with regard to the protection of intellectual property rights; Capital

Market Arbitration Board (*Badan Arbitrase Pasar Modal Indonesia*) (BAPMI) for capital market disputes; The Arbitration Board of Indonesian Sportsmanship (*Badan Arbitrase Keolahragaan Indonesia*) known as BAKI; Arbitration Board of Indonesian Sports (*Badan Arbitrase Olahraga Indonesia*) known as BAORI; Commodities Futures Trading Arbitration Board for futures trading disputes; and National Sharia Arbitration Board (*Badan Arbitrase Sharia Nasional*) (BASYARNAS) for transaction banking according to Islamic shariah principles to settle commercial and financial disputes (Smit, 2000; Seafood, 2010). However, BANI is the key arbitral institution in Indonesia which handles arbitrations in all sectors including corporations, insurance, financial institutions, manufacturing, intellectual property rights, construction, maritime and environment. It establishes its own rules and procedures known as the BANI Rules applicable to both domestic and international disputes. (BANI, 2016).

INDONESIAN NATIONAL BOARD OF ARBITRATION (BANI)

BANI is Indonesian private arbitration institution set up in 1977 with the purpose of providing an equitable, fair and quick settlement of commercial disputes arising in the fields of trade, industry and finance at the national as well as the international level. It was established in Jakarta by the Indonesian Chamber of Commerce and Industry (KADIN) by the Decision Number SKEP/152/DPN/1977 as a private arbitration institution in Indonesia. The BANI provides a range of services in relation to arbitration, mediation, binding opinion and other form of dispute resolutions. Equipped with a team of over 100 listed arbitrators both Indonesian nationals and foreign, its objective is to ensure a fair and speedy settlement of disputes of trade, industry and finance (BANI, 2016).

The BANI was established for the following purposes (BANI, 2016):

- To participate in the law enforcement process in Indonesia through the application of arbitration for resolving disputes in the various sectors of trade, industry and finance.
- To provide services for the dispute settlement through alternative dispute resolution, such as negotiation, mediation, conciliation or other rules as opted by the parties concerned.
- To act autonomously and independently in regard of upholding law and justice.
- To carry our studies and research and trading/education programs pertaining to arbitration and alternative dispute resolution.

The jurisdiction of BANI was strengthened by Law no.30 on Arbitration and Alternative Dispute Resolution promulgated in 1999 under which any disputes in the field of trade and commerce can be resolved only through arbitration and the rights given to parties under this law. The BANI was entrusted the responsibility to settle disputes arising from trade agreements between industries registered under the Indonesian Chamber of Commerce (BANI, 2016; Smit, 2000). Moreover, BANI has also cooperation agreements with arbitration associations in other countries for the purpose of promoting international commercial arbitration in those countries (Juwana, 2003; Houde and Small, 2004). These arbitration associations include the institutions such as 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) and Singapore Institute of Arbitrators. Furthermore, the BANI are also one of the founders and a member of Asia Pacific Regional Arbitration Group.

PROBLEM STATEMENT

The Indonesian law encourages that a dispute may be settled through arbitration before submitting it to a tribunal. Arbitration in Indonesia is also much preferred because of its speed and efficiency and adopting the principle of win-win solution with no appeals and cassation in most disputes (Heath, 2014; Juwana, 2003). The problem begins when according to Indonesian Law district courts are not authorized to adjudicate disputes of parties bound by arbitration agreements (Heath, 2014). Having executed an arbitration agreement disallows parties to take their dispute to the district courts and only the arbitral tribunal has the jurisdiction to determine all matters from the parties that are bound by an arbitration agreement. It is therefore essential to study the existing Commercial Arbitration law in Indonesia with respect to its activities so far and explore the possibility of any alternative dispute resolution strategies such as negotiation or mediation to resolve commercial disputes. Also, there is a need to study the autonomy enjoyed by the Indonesian Commercial Arbitration Law in the light of the existing national and international arbitration laws (Chaghooshi, 2013).

OBJECTIVES OF THIS STUDY

This study has been carried out with the following objectives:

- To investigate the Commercial Arbitration law in Indonesia and examine whether the law adheres only to the application of arbitration or also suggests alternative dispute resolution strategies such as negotiation, mediation, for resolving disputes
- To examine the extent to which Commercial Arbitration Law acts autonomously and independent of national and international arbitration laws.

SAMPLING AND POPULATION

The data used in this study was gathered from multiple sources and can be classified into two categories: Documentary data and interview data. The documentary data was collected from the libraries and the online sources of BANI and other authentic arbitration agencies while the interview data was collected from eight respondents, 4 arbitrators and 4 academicians, who had been exposed to the proceedings of arbitration institutions like BANI, BAPMI, BAMUI and had also worked as the panel arbitrators of the KADIN and Overseas Arbitration agencies. The profiles of the respondents for the interviews are shown in the Table 1.

**Table 1
PROFILES OF THE RESPONDENTS OF INTERVIEWS**

Coding	Work Experience	Exposure/Member
AB-001	15 Years	Panelist KADIN; Member BAPMI
AB-002	17 Years	Panelist KADIN; Member BAMUI
AB-003	13 Years	Panelist KADIN; Member BANI
AB-004	22 Years	Panelist KADIN; Member BANI
AC-001	29 Years	Member Australian Centre for International

		Commercial Arbitration
AC-002	21 Years	Panelist KADIN; Member BASYARNAS
AC-003	19 Years	Member, Singapore Institute of Arbitrators
AC-004	20 years	Member, Singapore Institute of Arbitrators

DATA COLLECTION METHODS

This study proposed to understand the Arbitration law of Indonesia, particularly to highlight its autonomous nature and to view it in the light of limitations and constraints faced by the Law no. 30 of 1999 that concerns arbitration and alternative dispute resolutions. A normative legal approach was adopted for this study which required studying secondary documentation such as domestic laws, legal theories, regulations, court decisions and other doctrines (Smit, 2000). Thus the secondary data was examined and analysed through a qualitative approach.

Secondly, for conducting interviews with arbitrators and academicians, researcher-completed schedule was used. The researcher-completed instrument was developed by the researcher in order to gain the required data through interviews (Meurer, Shirley, Jennifer, Lingling, Annette & Phillip, 2007). It was ensured that the respondents were informed how the data would be used and assured the level of confidentiality.

DATA ANALYSIS

The data analysis of this study began with an investigation of the Law no. 30 of 1999 on Arbitration and Alternative Dispute Resolution (Arbitration Law) which is Indonesia's Arbitration Law (BANI, 2016) and had come into force after the replacement of articles 615-651 of the Dutch Code of Civil Procedure. This law monitors and regulates both domestic and foreign arbitration. Its uniqueness and autonomous status is revealed from the fact that it did not adopt the United Nations Commission on International Trade Law (UNCITRAL), a model law on international commercial arbitration adopted by many countries like Japan and Australia (United Nations, 1994). Additionally, the interview data was also analysed to support the analysis of these legal documents. The focus was only to determine the extent of autonomy of the Indonesian arbitration laws or to find out whether any alternative arbitration mechanism was possible. The autonomy of Indonesia's Arbitration Law was much evident from the experiences of the respondents who shared their observations vividly

It was revealed that the Indonesian Arbitration Law provides very limited grounds for the court to undertake judicial control over arbitral awards (Seafood, 2010; Juwana, 2003; Sukirno, 2010; Heath, 2014; Hutabarat, Asido & Yeremia, 2013). No party was allowed to appeal to the court on any question of law arising out of an award made pursuant to an arbitration agreement. In other words, there is no provision in the Arbitration Law permitting court control over the decision of the arbitrators on the jurisdictional issue. Thus Indonesian courts do not have any jurisdiction over a dispute or its verdict subjected to an arbitration agreement and investigated under the Arbitration Law. Article 11 (2) of the Indonesian Arbitration Law stipulates that: 'The district court, before which an action is brought in a matter which is the subject to arbitration, must not interfere and must reject the action as inadmissible.' There are many cases when the court has refused to intervene in a dispute if the parties' contracts made a specific reference to arbitration (Mills and Rakhmat, 2013; Juwana, 2003; Heath, 2014; Sukirno and Ferry, 2010).

Even despite these provisions, if court proceedings are commenced in breach of an arbitration agreement, the other party can file an objection to the district court on the grounds of absolute competence challenging the court's authority and jurisdiction to adjudicate a case of breach. The district court will eventually declare that it has no authority to try the case and the case should be settled in accordance with the arbitration agreement.

Moreover, in contractual agreements of partnerships or joint ventures, in a trade or commercial context, the Indonesian Arbitration Law considers an arbitral clause independent from the main contract. Therefore, in case of invalidity of the main contract, the arbitral clause must not get invalidated. In other words, once the verdict of the arbitration is given, the parties are deemed to have waived their rights to appeal against or challenge the verdict in any court of law and must agree to the arbitration. Thus the Indonesian Arbitration Law provides autonomy to the arbitration agreement stating that an arbitration agreement cannot be revoked on the termination of the main agreement (Kazutake, 2005; Chaghooshi, 2013). Therefore, the Arbitration Law recognizes the separability principle (Salacuse, 2007).

Table 2 exhibits a few of these characteristics that suggest the autonomy of the Indonesian Arbitration Law.

CHARACTERISTICS HINTING AT AUTONOMY OF THE INDONESIAN ARBITRATION LAW	
Autonomy Principles	
Regulation	The tribunal must have the names and addresses of parties; of arbitrators, place where the arbitrator or the tribunal will make its/their award; the time period in which arbitration to be completed; a statement from the arbitrator(s) accepting appointment and a statement from the disputing parties that they will bear all costs of the arbitration.
Jurisdiction	The arbitration must take place in Indonesia; no provision in the Arbitration Law permitting court control over the decision of the arbitrators on the jurisdictional issue, hence, the Indonesian courts too do not have any jurisdiction over a dispute or its verdict subjected to an arbitration agreement investigated under the Arbitration Law
Execution	The BANI award must be registered with a District Court for quick execution. In case of non-compliance, the District Court can issue an order for compliance of arbitral awards and executed against assets within Indonesia.
Appeal	No party is allowed to appeal to the court on any question of law arising out of an award made pursuant to an arbitration agreement. Once the verdict of the arbitration is given, the parties are deemed to have waived their rights to appeal against or challenge the verdict in any court of law and must agree to the arbitration.

Another example of the autonomy of the Indonesian Arbitration Law is that a third party or a non-contracting party can voluntarily intervene and join the arbitration dispute if the third party has an interest in the arbitration dispute; and if the contracting parties agree for a non-contracting party to join the arbitration dispute; and if the presiding arbitrator or panel of arbitrators agrees for the non-contracting party to join the arbitration dispute (Kazutake, 2005; Chaghooshi, 2013). This provision gives autonomy to the law to draw a non-contracting party to join the arbitration dispute and also act as a co-defendant.

Evidence found was that Indonesian Arbitration Law is only applicable to arbitrations carried out within the territory of Indonesia; however their enforcement and recognition is both in domestic and international spheres. The law does not make any distinction between “domestic” and “international” during the arbitration with regard to the nationality of the parties or the geographical location of the dispute. To make a distinction, Article 1.9 of the Arbitration Law states that any arbitral awards rendered by an arbitration institution or by individual arbitrator(s) outside the jurisdiction of the Republic of Indonesia or by a foreign arbitration institution or foreign individual arbitrator(s) are deemed to be ‘international arbitration awards’. Hence, there is no provision in the law to grant the status of international arbitration to any arbitral award rendered within Indonesia.

An international arbitral award may be recognized and enforced in Indonesia if it satisfies the following requirements:

- The award is issued by a tribunal in a country with which Indonesia has a bilateral or multilateral agreement for the recognition and enforcement of arbitral awards;
- The award falls within the scope of commercial law within the meaning of Indonesian law;
- The award does not violate public order;
- The award has obtained an *exequatur* from the Central Jakarta District Court; and
- If the Republic of Indonesia is a party to the dispute decided by the award.

Moreover, unless the Republic of Indonesia is a party to any arbitrated dispute, the Indonesian Arbitration Law will not recognize any verdict nor will allow the enforcement of a foreign arbitral awards in Indonesia. This is consistent with its own predecessor legislation (1849 Dutch Code of Civil Procedure, which Indonesia closely adhered to. However, it does not follow the UNCITRAL Model Law (including its 2006 amendments) as is done by most other nations including Australia and Japan (United Nations, 1994; Houde and Small, 2004)

Evidence from the interview data also supported these findings. The respondents unanimously agreed that since the Indonesian laws were fully compatible with international norms and there was no need to depend upon foreign tribunals. It was also claimed that domestic remedies like the national courts or BANI arbitration tribunals were fully adequate to settle Investor-Indonesia disputes, if required. However, the arbitrator-respondents who had a wide exposure of the arbitration agencies in Indonesia disclosed that national courts as well as BANI lacked professional experts in the field of investments. Though there was a contradiction when academicians intervened and claimed that there was a full support of the academia to the judiciary system of Indonesia. However, the academic respondents agreed that it was not justified to depend only on BANI as a suitable mechanism to settle disputes. It was felt that its autonomy must be curtailed and parallel arbitration agencies must be developed in Indonesia or some alternative arbitration mechanism must be introduced.

LIMITATION OF THE STUDY

This study faced several limitations in terms of resources, cost and time. In the first place, scant or no literature exists on legislative amendments in Indonesia or the evolution of arbitration system in the form of prior research or published articles. Therefore, in order to overcome the limitation of resources, a few related studies within similar context were reviewed such as Salacuse (2007), Houde & Small (2004); Mills and Rakhmat (2013), Juwana (2003); Heath

(2014); and Sukirno and Ferry (2010). These studies guided the present research thoroughly in terms of providing examples of the applications of the laws in similar settings. The time constraint too affected the process of this study. In order to overcome the issue of time constraint, the scope of this study was narrowed down to focus only the scope and proceedings of the arbitration agencies particularly BANI in order to fulfil the objectives of the study.

Furthermore, the respondents from BANI and other arbitration agencies, a few of whom were government officials had also expressed their inability to participate in the study. To avoid this limitation, the present study depended highly on responses received from the selected arbitrators and academicians who were also promised a high level of confidentiality. Thus, with appropriate measures and techniques, the researcher managed to overcome the limitations.

CONCLUSION

Indonesia has its arbitration law based on Law no. 30 Year 1999 in regard with Arbitration and Alternative Dispute Resolution. This law stipulates how arbitration should proceed in Indonesia, Indonesia thus believes in Institutional Arbitration as it has several institutional agencies that are responsible for arbitration in their respective fields and disciplines. In Indonesia the arbitration proceeding also acts as a sort of Indonesian Civil Law to settle disputes related to both civil and commercial transactions. The findings of the study reveal the autonomous nature of the Indonesian Arbitration Law, suggesting hardly any possibility for alternative arbitration methods like negotiation or mediation. The study also found out that the arbitration verdicts cannot be challenge din any court of law, which is another evidence of the autonomy granted to the Indonesian Arbitration Law.

REFERENCES

- BANI. (2016). *Rules & Procedures Badan Arbitrase Nasional Indonesia*. Bani Arbitration Centre. *Concerning Arbitration and Alternative Dispute Resolution*. (1999) Law No. 30. Draft of the arbitration and alternative dispute resolution Act. <http://Www.Baniarbitration.Org/About.Php>
- Chaghooshi, F.S. (2013). *Is International Commercial Arbitration An Autonomous Legal System?* An Unpublished Thesis Submitted To McGill University, Montreal.
- Heath, J. (2014). Dispute Resolution in Indonesia: Arbitration vs. Litigation, *Corrs Chambers Westgarth*. Retrieved October 31, 2014, from <http://www.corrs.com.au/thinking/insights/dispute-resolution-in-indonesia-arbitration-vs-litigation/1/>
- Houde, M.F. & Small, K.Y. (2004). Relationships between international investment agreements. *OECD Working Papers on International Investment*.
- Hutabarat, P.M., Asido, M.P. & Yeremia, L.T.P. (2013). *Indonesia arbitration-getting the deal through*. (<https://Gettingthedeathrough.Com/Area/3/Arbitration/>)
- Juwana, H. (2003). *Dispute resolution process in Indonesia*. IDE Asian Law Series no. 21, Institute of developing economies (IDE-JETRO).
- Kazutake, O. (2005). Arbitration and party autonomy. *The Seinan Law Review*, 38(1).
- Meurer, W.J., Shirley, M.F., Jennifer, J.M., Lingling, Z., Annette, S. & Phillip, A.S. (2007). Qualitative data collection and analysis methods: The instinct trial. *Academic Emergency Medicine*, 14(11), 1067.
- Mills, K. & Ilman, F.R. (2013). *Arbitration Guide*. IBA Arbitration Committee Indonesia. Karimsyah Law Firm.
- Salacuse, J. (2007). Is there a better way-alternative method of treaty-based, investor-state dispute resolution? *Fordham International Law Journal*, 31(1), 138.
- Seafood Trade. (2010). Arbitration law in Indonesia. *Seafood Trading Intelligence Portal*
- Smit, H. (2000). *Commercial Arbitration: An International Bibliography*.
- Sukirno, T. & Ferry, A. (2010). Arbitration procedures and practice in Indonesia: Overview. *Q&A Guide to Arbitration Law and Practice in Indonesia*. Jakarta.

- Syrarief, E., Rina, S.S., Augustina, F. (2016). Legal approaches to online arbitration: Opportunities and challenges in Indonesia. *Directorate General of Higher Education Of Indoneisa*, (Dikti), Kakarta.
- United Nations. (1994). *UNCITRAL model law on international commercial arbitration*. UN publications.