

BANI legal status up in the air

11 April 2019 | Contributed by [Makarim & Taira S](#)

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Overview

The Indonesia National Board of Arbitration (BANI), otherwise known as the BANI Arbitration Centre, provides a range of services in relation to arbitration, mediation, binding opinions and other forms of dispute resolution. BANI was established in 1977 by three prominent lawyers (ie, R Subekti, Haryono Tjitrosoebono and H Priyatna Abdurrasyid), with initial support from the Indonesian Chamber of Commerce and Industry. BANI has its headquarters in Mampang, Jakarta and offices in major Indonesian cities, including Surabaya, Bandung, Pontianak, Denpasar, Medan, Palembang and Batam.

In 2015 all of the original BANI founders passed away. On 8 September 2016 BANI *Pembaharuan* (ie, the Renewed BANI) was created by way of Ministry of Law and Human Rights (MOLHR) Decision AHU-0064837.AH.01.07.TAHUN 2016 of 20 June 2016. As its official name is also BANI, it has become known as BANI Sovereign due to its office being in the Sovereign building. The original BANI is now referred to as BANI Mampang due to its office being in Mampang, Jakarta.

BANI Sovereign claims that it is a revised version of BANI Mampang. According to BANI Sovereign, BANI Mampang was based on a statute that authorised its founders to appoint the governing board. Further, BANI Sovereign has its own:

- code of ethics;
- rules;
- procedures;
- fee structures; and
- list of arbitrators.

BANI Sovereign was founded by several heirs of the BANI founders and caretakers due to rumoured tensions between them and the other BANI Mampang members.

However, the board of BANI Mampang does not recognise BANI Sovereign and claims that it has been using the BANI name unlawfully. The BANI Mampang board also claims that although nothing in the law requires BANI to have legal entity status, it is an institution with articles of association, an organisational structure and a work plan like any other organisation. The BANI Mampang board also argues that BANI has gained international recognition. It was among the initiators of such regional forums as the Asia-Pacific Regional Arbitration Group and the Regional Arbitral Institutes Forum. It is also a member of the International Council for Commercial Arbitration.

Court rulings on BANI duality

In 2016 BANI Mampang filed an administrative suit against the MOLHR in the Jakarta Administrative Court, asking it to declare the establishment decree of BANI Sovereign (MOLHR Decision AHU-0064837.AH.01.07.TAHUN 2016) null and void. On 6 July 2017 the Jakarta Administrative Court issued such a declaration. The ruling was appealed to the Jakarta High Administrative Court and subsequently to the Supreme Court. The Supreme Court upheld the Jakarta Administrative Court's decision.

Conversely, at the end of 2016 BANI Sovereign filed a civil suit against BANI Mampang in the South Jakarta District Court (Case 674/Pdt.G/2016/PN JKT). In August 2017 the South Jakarta District Court ruled in BANI Sovereign's favour, disputing the management of BANI Mampang and declaring MOLHR Decision AHU-0064837.AH.01.07.TAHUN 2016 to be valid. BNI Mampang appealed the South Jakarta District Court ruling. However, in 2018 the Jakarta High Court upheld the ruling.

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BANI Mampang also filed a trademark infringement lawsuit in the Jakarta Commercial Court against BANI Sovereign's use of the BANI trademark. To date, the final result of the dispute is unknown.

Comment

This duality could create uncertainty when commercial parties wish to appoint BANI as the dispute settlement forum in their contract or enforce their existing agreements by referring their disputes to BANI for arbitration. This could lead to arguments over which BANI is referred to in the dispute settlement clause of a contract, as both BANIs claim to be the legitimate institution.

The main concern is that opposing parties may delay proceedings by disputing the jurisdiction of the arbitral entity and involving the Indonesian courts in the process. This situation may also affect parties which are currently negotiating agreements or have plans to negotiate future contracts under which BANI will be the designated dispute resolution forum.

Given the above, parties whose existing arbitration clause refers to BANI Mampang or BANI Sovereign, parties that are currently undergoing arbitration proceedings before BANI Mampang or BANI Sovereign and parties which intend to choose BANI Mampang or BANI Sovereign as their dispute resolution forum in Indonesia should seek legal advice on the possible legal consequences, as there is currently no legal certainty regarding the enforcement of BANI awards.

Pending clarity on which BANI should be considered the appropriate arbitration tribunal in Indonesia, some practitioners are trying to mitigate possible disputes (over which BANI has been appointed the dispute settlement forum in their clients' contracts) by including the establishment decree of the BANI that they wish to be their dispute settlement forum in their clients' arbitration clauses.

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