International Arbitration

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Introduction

In Indonesia, domestic and international arbitration falls under the Arbitration Law (Law No. 30 of 1999). The Arbitration Law is not based on the UNCITRAL Model Law. Under the Arbitration Law, any award handed down outside the territory of Indonesia (e.g. in Singapore or London) is classified as an international arbitration award. An international arbitral award also includes any award issued by an arbitration institution or ad hoc arbitration which, under Indonesian law, is deemed as an international arbitration award. Any award other than the above is classified as a domestic arbitration award. Most parts of the Arbitration Law concern domestic arbitration. However, the Arbitration Law does provide the procedure and requirements for enforcing an international arbitration award.

Indonesia ratified the New York Convention on 5 August 1981 under Presidential Decree No. 34 of 1981, and the New York Convention has been in force in Indonesia since 5 January 1982. Indonesia acceded to the New York Convention on 7 October 1981. Other than the New York Convention, Indonesia has not signed any other treaty on the recognition and enforcement of arbitration awards.

The main arbitration centre is the Indonesian National Arbitration Board (Badan Arbitrase Nasional Indonesia/BANI). There are also several special arbitration bodies which handle disputes in certain areas of law and industry to accommodate the need for special arbitration, among others: the Indonesia Capital Market Arbitration Board (Badan Arbitrase Pasar Modal Indonesia/BAPMI) for capital market disputes; the National Syariah Arbitration Board (Badan Arbitrase Syariah Nasional/BASYARNAS) for Islamic banking matters; and the Indonesian Construction Arbitration and Alternative Dispute Resolution Board (Badan Arbitrase dan Alternatif Penyelesaian Sengketa Konstruksi Indonesia/BADAPSKI) for construction cases. A few international arbitration bodies have a presence in Indonesia, such as ICC (International Chamber of Commerce) and the Chartered Institute of Arbitrators’ chapter.

Only the Central Jakarta District Court (CJDC) handles the enforcement of international arbitration awards. More details are provided below in “Enforcement of arbitration awards”.

Arbitration agreement

Under the Arbitration Law, an arbitration agreement must be drawn up in writing and contain an arbitration clause, or a separate agreement may be entered into after a dispute arises. The arbitration clause should state, among other things, the parties’ intention to settle any dispute through arbitration, the arbitration rules and the seat of arbitration.

An arbitration agreement entered into after a dispute arises must be signed by both parties.
or drawn up in a notarial deed form. The Arbitration Law requires the arbitration agreement to contain: the matter under dispute; the parties’ full names and addresses; the arbitrator’s or panel of arbitrators’ full names and addresses; the seat of arbitration; the secretary’s full name and address; the settlement period; the arbitrators’ acceptance; and the parties’ commitment to bear the arbitration fees. Without these requirements, an agreement is deemed null and void.

Under the Arbitration Law, the option of arbitration is only available for disputes of a commercial nature and those concerning rights held by the disputing parties under the prevailing laws and regulations. Disputes that cannot be settled amicably under the laws cannot be settled through arbitration.

Under the Arbitration Law, a third party who is not a party to the arbitration agreement is allowed to participate in the arbitration proceedings if it has a relevant interest in the proceedings, the disputing parties agree, and the arbitrator or panel of arbitrators approves. The Arbitration Law recognises the principle of competence under which the district courts do not have jurisdiction to try disputes between parties bound by an arbitration agreement. The principle of separability also applies in Indonesia, under which an arbitration agreement does not become null and void if the main contract expires or becomes void.

**Arbitration procedure**

Under the Arbitration Law, the arbitration proceedings commence when the claimant serves a written notice of arbitration on the other party and files and registers a written petition for arbitration. The notice of arbitration must provide at least the names and addresses of the parties, a reference to the applicable arbitration clause or agreement, the agreement or matter which is the subject of the dispute, the grounds for the claim and the amount claimed (if any), the method of resolution desired, and the agreement entered into by the parties concerning the number of arbitrators. The petition for arbitration must contain at least the names and addresses of the parties, the facts supporting the petition for arbitration, the issue(s) in dispute, and the amount of relief or other remedy sought.

If the disputing parties do not determine the seat of arbitration, it will be determined by the arbitrator or arbitral tribunal. In practice, the arbitration hearings can take place outside of the seat of arbitration, provided that it is agreed by the disputing parties.

When a dispute is referred to arbitration, the parties must abide by the chosen arbitral rules and procedures. Therefore, the rules on evidence under the arbitration procedures agreed to by the disputing parties will apply. Arbitration evidentiary hearings follow the Indonesian Civil Procedure Law, which recognises five kinds of evidence: written evidence; witnesses; indication (conclusions by the arbitrator); confession; and oath.

In principle, the Arbitration Law requires Indonesian language to be used in the arbitration proceedings, unless otherwise agreed by the parties and approved by the arbitrator(s). Arbitration Law allows written evidence to be translated if so required by the arbitrator. For the examination of witnesses and experts, the disputing parties are required to provide their witnesses’ written testimony or experts’ written statements. If necessary, a hearing can be held to hear their testimony and statements.

The Arbitration Law is silent on the principles of privilege and disclosure. Therefore, they depend on the rules and procedures of the arbitration institution agreed to by the disputing parties and the law of the seat of arbitration. For example, in BANI, the disputing parties must provide written evidence when submitting the petition for arbitration. The written
evidence is delivered to the opposing party along with the petition for arbitration by the BANI Secretariat. If the disputing parties present witnesses and experts, they must then provide their written testimony and statements to the opposing party.

The Arbitration Law requires information on the commencement of arbitration proceedings in Indonesia to be kept confidential. Therefore, the pleading documents and evidence must be kept confidential. The arbitration proceedings must be completed at the latest within 180 calendar days of the constitution of the tribunal, and can be extended upon the parties’ agreement.

Arbitrators

The following are the requirements for an arbitrator:
(a) competent to perform legal acts;
(b) at least 35 years old;
(c) having no family relationship (by blood or marriage) to the third degree with the disputing parties;
(d) having no financial or other interest in the arbitration award; and
(e) having at least 15 years’ experience and active mastery in the field.

The appointment of the arbitrator or panel of arbitrators depends on the agreement between the disputing parties. If they fail to agree on the appointment or there is no provision on the appointment of an arbitrator or panel of arbitrators in the arbitration clause or arbitration agreement, they will be appointed by the chairman of the district court with jurisdiction over the respondent’s legal domicile. Note that judges, prosecutors, clerks and other court officials cannot be appointed as arbitrators.

The disputing parties can file a demand for recusal on the appointment of an arbitrator to the chairman of the district court with jurisdiction over the respondent’s legal domicile. The ground for filing a demand for recusal may be one of the following:
(a) sufficient cause and authentic evidence has been found to suspect that the arbitrator will not perform his/her duties independently or will be biased in rendering the award; or
(b) it is proven that the arbitrator has a family, financial or employment relationship with one of the disputing parties or its representative.

The mandate of the arbitrator or panel of arbitrators may be terminated on the following grounds:
(a) an award has already been rendered with respect to the matter in dispute;
(b) the time limit agreed to under the arbitration agreement (if any) including any extension has expired; or
(c) the disputing parties agree to cancel the appointment of the arbitrator or panel of arbitrators.

Under the Arbitration Law, arbitrators will not be held legally responsible for any action taken during the proceedings to perform their functions unless it is proven they took it in bad faith. If arbitrators fail to render an award within the time limit provided for no valid reason, they may be ordered to pay compensation for costs and losses incurred by the disputing parties because of the delay.

Minutes of hearings will be prepared and drawn up by the secretary for all arbitration proceedings. However, the Arbitration Law is silent on the procedures relating to a secretary to the arbitrator or tribunal. Therefore, it will be subject to the chosen rules and procedures. For example, under BANI Rules and Procedures, tribunal secretaries are appointed for administration purposes, such as submission of pleadings and evidence.
Interim relief

Under the Arbitration Law, the arbitrator or panel of arbitrators may issue a provisional or other interlocutory award at the request of one of the disputing parties. This includes attachment orders (penetapan sita jaminan/conservatoire beslag) for the respondent’s assets or goods, an order to deposit the goods with a third party, or an order to sell perishable goods (e.g. fruits and vegetables).

Under Indonesian law, an attachment order may be issued to prevent the respondent transferring or disposing of its assets during the proceedings, while a provisional award is essentially an order to the respondent to do or not do something. To enforce a provisional or other interlocutory award, the claimant must comply with the enforcement procedure explained below.

Indonesian law does not, in principle, recognise security for costs, although it may be requested if allowed under the chosen arbitration rules and procedures. Further, if the underlying agreement is governed and to be construed by a foreign law that allows security for costs, the claimant may ask the arbitrator or panel of arbitrators to rule on this matter. Under the Indonesian Civil Procedure Law, Indonesian courts may only enforce court rulings ordering a party to pay a certain amount of money or to vacate premises. This also applies to the enforcement of international arbitration awards in Indonesia.

Arbitration award

The Arbitration Law requires the following to be included in the arbitration award:

(a) a heading containing the words “Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa” (For The Sake Of Justice Based On Belief In Almighty God);
(b) the full names and addresses of the disputing parties;
(c) a brief description of the matter in dispute;
(d) the respective positions of the parties;
(e) the full names and addresses of the arbitrators;
(f) the considerations and conclusions of the arbitrator or panel of arbitrators concerning the dispute as a whole;
(g) the opinion of each arbitrator, if there is any difference of opinion among the members of the panel of arbitrators;
(h) the order of the award;
(i) the place and date of the award; and
(j) the signature(s) of the arbitrator or panel of arbitrators.

In principle, the above requirements apply to domestic arbitration awards. The Arbitration Law is silent on the formal requirements for international arbitration awards. Therefore, the contents of the international arbitration award are subject to the chosen arbitration rules and procedures as well as the law of the seat of arbitration.

The Arbitration Law requires the examination of any dispute to be completed within 180 days of the appointment of the arbitrator or panel of arbitrators, but if required, this can be extended by agreement among the disputing parties. The award must be rendered within 30 days of the closing of the examination of the dispute.

As indicated in “Interim Relief” above, Indonesian law also does not recognise any security for costs. Therefore it depends on the governing law of the underlying agreement between the disputing parties.

In principle, under the Indonesian Civil Code, the non-defaulting party may claim the...
following compensation from the defaulting party due to a breach of contract:
(a) actual costs and losses suffered and any profit which would have been enjoyed had there been no default (loss of expected profit); or
(b) losses which should have been predicted;
(c) losses directly caused by the default; and
(d) interest as permitted under Indonesian law (in general, 6% per annum).

Challenge of the arbitration award

Under the Arbitration Law, a domestic arbitration award that has been registered with the court can be annulled. The request for annulment must be submitted in writing and to the head of the relevant district court within 30 days of the submission and registration date of the award with the Registrar’s office of the relevant district court.

The following are the only reasons for which a request for annulment may be accepted:
(a) After the award has been rendered, letters or documents submitted are admitted or declared to be false/forged.
(b) After the award has been rendered, important decisive documents, previously concealed by the opponent, are revealed.
(c) The award was rendered based on a fraud committed by either of the disputing parties.

Based on a 2014 Constitutional Court ruling, an application for the annulment can be submitted to the relevant court without any final court ruling evidencing the ground of the request being required.

It is unclear under the Arbitration Law whether an Indonesian district court can annul an international arbitration award. However, the CJDC and the Supreme Court usually dismiss applications for the annulment of international arbitration awards on the ground that Indonesian courts do not have jurisdiction under Article V (1) point (e) of the New York Convention (a competent authority to set aside or suspend the award is the authority in which, or under the law of which, that award was made so that the recognition and enforcement of the award can be refused). As explained above, Indonesia has ratified the New York Convention.

The Arbitration Law is silent on modifications of arbitration awards. However, as explained, any modification of an award will depend on the arbitration rules and procedures agreed to by the disputing parties. For example, under the BANI rules and procedures, the disputing parties can review the draft award and ask the arbitrator or panel of arbitrators to revise it before they issue the final and correct arbitration award.

Enforcement of the arbitration award

Under the Arbitration Law, the arbitrator or its proxy is required to register a domestic arbitration award with the relevant district court (court with the jurisdiction over the losing party’s domicile) within 30 calendar days of the issuance of the award. The court’s registrar will issue a registration deed. Following the registration, the winning party can enforce the award against the other party according the Indonesian Civil Procedure Law as follows:
(a) file a petition to the relevant district court’s chairman asking them to formally summons the respondent to comply with the award (aanmaning), and
(b) file an attachment petition to the relevant district court’s chairman to seize or attach the respondent’s assets followed by their sale at public auction.
In Indonesia, international arbitration awards can be enforced according to the New York Convention. The CJDC is the only court authorised to enforce international arbitration awards. An international arbitration award can be enforced in Indonesia provided that:

(a) the award was rendered by arbitrator(s) in a country which is bound to the Republic of Indonesia by a bilateral or multilateral treaty on the recognition and enforcement of international arbitration awards;
(b) the award is within the scope of commercial law under Indonesian law;
(c) the award does not conflict with public order; and
(d) a writ of execution of the award has been obtained from the Chairman of the CJDC.

For an international arbitration award to be enforced in Indonesia, it must first be registered with the CJDC by the arbitrator(s) or its proxy. For registration, the following documents must be submitted to the court:

(a) the original or an authentic copy of the award and its official Indonesian translation;
(b) the original or an authentic copy of the arbitration agreement or the underlying agreement on which the award is based, as well as its official Indonesian translation; and
(c) a statement from the diplomatic representative of Indonesia in the country where the award was handed down, stating that the country is bound to Indonesia under a bilateral or multilateral treaty on the recognition and execution of international arbitration awards.

If the above requirements are satisfied, the Registrar of the CJDC will issue a deed on the registration of the international arbitration award. Following registration, if the respondent does not voluntarily comply with the international arbitration award, the procedure for enforcing the international arbitration award in Indonesia is the following:

(a) file a petition for a writ of execution (exequatur);
(b) file a petition (aanmaning) to the CJDC asking the CJDC to summons the respondent to comply with the international arbitration award; and
(c) file an attachment petition to the CJDC to seize or attach the respondent’s assets in Indonesia followed by their sale at public auction.

The above procedure is subject to the Indonesian Civil Procedural Law, and the Arbitration Law imposes no specific time limit for enforcing an international arbitration award in Indonesia. Therefore, the whole process often takes a long time, especially if the respondent’s assets are not easy to identify or are located in various different places in Indonesia.

The Arbitration Law is silent on the enforcement of an international arbitration award which has been set aside by a court in the seat of arbitration. Since Indonesia has ratified the New York Convention, under Article V (1) of the convention, the chairman of the CJDC may not issue a writ of execution if the international arbitration award has been set aside, and therefore the award cannot be enforced in Indonesia. However, the claimant can file an appeal in the Supreme Court.

In recent years, the numbers of the international arbitration awards that were registered with the CJDC have increased. However, since the Arbitration Law imposes no specific time limit for enforcing international arbitration awards, many applications for a writ of execution (exequatur) remain pending at the CJDC. In practice, it may take 9 (nine) to 12 (twelve) months (as of the registration of the international arbitration award) for the Chairman of the CJDC to issue the writ of execution.

An example of a high-profile case where the CJDC declared the international arbitration award unenforceable was the case of Astro against PT Ayunda Prima Mitra and PT First
Media. In this case, the Chairman of the CJDC declared the SIAC’s award unenforceable in Indonesia for the following reasons:
(a) the Award ordered PT Ayunda Prima Mitra and PT First Media to cease all court proceedings in Indonesia and prohibited them from submitting any further claims in Indonesia;
(b) the Chairman of the CJDC considered that a ruling intervening in on-going court proceedings in Indonesia violated Indonesia’s national sovereignty; and therefore
(c) the Chairman of the CJDC concluded that the SIAC Award violated public policy.
Note that the Indonesian legal system does not acknowledge the principle of binding precedent and therefore, courts are not bound to follow previous judgments.

Investment arbitration

By 2016, Indonesia had signed bilateral investment treaties (BITs) with 52 states. Most of the BITs have been in force as of their respective date (ranging from 1972 until 2009). However, in 2015 and 2016, the BITs between Indonesia and several states, such as Italy, Malaysia, The Netherlands, Turkey and Vietnam, were terminated unilaterally.

As a member of South East Asia Nations (ASEAN), Indonesia has signed several framework and investment agreements with, among others, India, China, Japan, and the Republic of Korea. Most of these agreements have been in force for a while (since from 2003 until 2010). Moreover, Indonesia has also signed the ASEAN Comprehensive Investment Agreement (in force since 2012) and the OIC (Organisation of Islamic Conferences) Investment Agreement (in force since 1980).

Indonesia also signed the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) on 16 February 1968, followed by the issuance of Law No. 5 of 1968 on the Settlement of Investment Disputes between States and Nationals of Other States on 29 June 1968. The ICSID Convention entered into force for Indonesia on 28 October 1968. The Republic of Indonesia has not signed the Energy Charter Treaty.

In recent years, the major on-going investment arbitration case involving Indonesia is Churchill Mining PLC and Planet Mining Pty Ltd (Claimants) v. the Republic of Indonesia (ICSID Cases Nos. ARB/12/14 and 12/40). This dispute is related to the revocation of mining business licences of PT Ridlatama Tambang Mineral, PT Ridlatama Trade Power, PT Investama Resource, and PT Investama Nusa Persada by the Kutai Timur Regent. This dispute has not been resolved yet.

To our knowledge, to date no investment arbitration awards have been registered with the CJDC. However, following the registration of the award, under the Arbitration Law, an international arbitration award (e.g. an investment arbitration award) involving Indonesia may be enforced in Indonesia under a writ of execution issued by the Chief Justice of the Supreme Court.
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