

ACTIO INSIGHT



10 THINGS YOU NEED TO KNOW ABOUT HAVING
ARBITRATION SEAT IN INDONESIA



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By Setyawati Fitrianggraeni¹ and Eva F. Fauziah

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When drafting an arbitration clause, determining the seat of arbitration involving Indonesian parties is often contentious. One of the discussed points is whether the arbitration should be seated in Indonesia or in another place whose reliability is perceived as better developed as arbitration centers, such as Singapore, London, Paris, or Hong Kong. In some circumstances, the parties have even found themselves already bound by an arbitration clause referring to Indonesia as its seat. What would then be the implication of having arbitration seated in Indonesia? For sure, it would lead to the applicability of Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution (“**Indonesian Arbitration Law**”). We summarize the most important points so you know (better) what you would be getting from choosing Indonesia as the seat of arbitration.

1. Arbitrability

Arbitration cannot be used as a dispute resolution for all disputes. Rather, it is limited to disputes in the commercial sector and those concerning rights that are pursuant to laws and regulations where rights are fully controlled by the disputing parties.² The scope of trade sector itself, among others, include:³

- a. Trade
- b. Banking
- c. Finance
- d. Investment
- e. Industrial
- f. Intellectual Property Right

The phrase ‘among other’ in the elucidation suggests that the commercial scope is not only limited to those mentioned in the list. That said, if a dispute can be proven ‘commercial’ in nature, then that dispute it can be resolved in arbitration.

2. Arbitration Agreement is a Requirement

To arbitrate, Indonesian Arbitration Law requires a written arbitration agreement. It can either be made before or after a dispute.⁴ Having a solid arbitration agreement prior to a dispute is always advisable rather than waiting for a dispute to occur.

An arbitration agreement remains valid regardless of the occurrence of the following:⁵

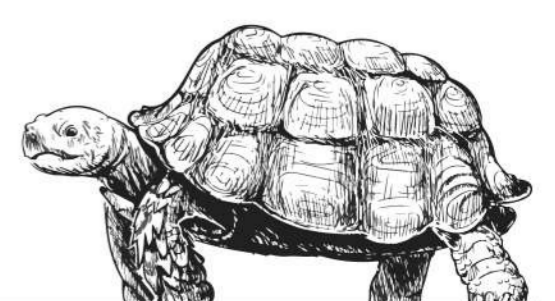
- a. Death of a party;
- b. Bankruptcy of a party;
- c. Novation;
- d. Insolvency of a party;
- e. Inheritance;
- f. if the prerequisites for the nullification of the principal agreement come into effect;
- g. if the performance of such agreement is transferred to third party with agreement of parties who arranged such arbitration agreement; or expiration or annulment of the principal agreement.

3. Courts Will Not Have Jurisdiction Over a Matter That Parties Have Agreed To Resolve in Arbitration

A valid arbitration agreement will exclude the parties’ right to resolve their dispute to the district court.⁶ This notion renders the District Court without competence to adjudicate the dispute between the disputing parties. Therefore, the District Court must reject and not be involved in a dispute that has been determined to use arbitration. The practice is in line with the provision as the judges handling disputes with arbitration agreements would announce that they have no jurisdiction and that parties would need to settle their dispute through arbitration.

4. Limited Role of Domestic Courts

Once the parties agree to resolve their dispute through arbitration, the District Court has a limited role in how the arbitration is proceeding. In a domestic ad hoc arbitration under Indonesian Arbitration Law, the relevant District Court may assist the parties related to the constitution of the arbitral tribunal including appointment,⁷ dismissal⁸ and challenge of arbitrators.⁹ District Courts also have an important role in the registration and enforcement of arbitral award, as in other jurisdictions.





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The present Indonesian Arbitration law is also unclear on how the Court could give assistance in, for example, summoning factual witness, dealing with ambiguous arbitration agreement, and enforcing interim awards.

5. Usage of Indonesian Language

The preferred language in all arbitral proceedings is Indonesian. This may be a challenge for a foreign party or foreign counsels involved in the arbitration. Subject to arbitrator(s)' approval, both disputing parties may choose another language to proceed.¹⁰

While an agreement must be drafted in Indonesian, when involving foreign parties, the parties could also contractually agree to proceed the arbitration in English or another foreign language.¹¹ When drafting an agreement bilingually, translation of the prevailing language is required.¹² In case of differences in interpretation, the interpretation will be made based on the prevailing language agreed in the agreement.¹³

In practice, the proceedings may be carried out bilingually rather than in English only. In this situation, interpretation may be (but not always) required to enhance communication during the hearing.¹⁴ The award, will then be issued in both Indonesian and the foreign language.

6. Arbitral Award Must Have Certain Elements

Another aspect that renders a national/domestic arbitral award in Indonesia distinctive is the requirement to open the award with a header (*irah-irah*) "FOR THE SAKE OF JUSTICE BASED ON THE GOD ALMIGHTY".¹⁵ This requirement is identical to the requirements of a court judgment. This header is essential because it determines the execution power of an award. Failure to include this header will render the award non-executable and even considered as null and void.

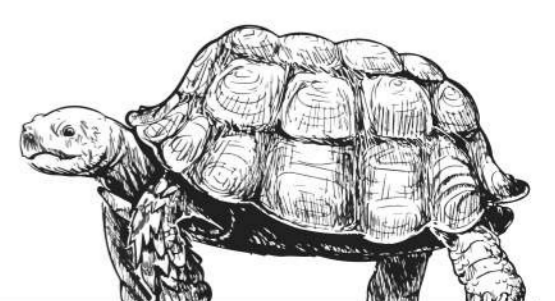
- a. full names and addresses of both parties;
- b. brief description of the dispute;
- c. standpoints of both parties;
- d. full names and addresses of the arbitrators;
- e. consideration and conclusion of the arbitrator or arbitral tribunal concerning the entirety of the dispute;
- f. opinions of each arbitrator in the event that there is dissenting opinion within the arbitral tribunal;
- g. verdict of the award;
- h. place and date of the award; and
- i. signature of the arbitrator or arbitral tribunal.

Furthermore, validity of an arbitral award is not affected in case it is not signed by one of the arbitrators because he/she is ill or passed away.¹⁶ The reasons on the absence of the signature must be included in the award.¹⁷ Finally, the award must expressly state the period for such award to be enforced.¹⁸

7. Limitation of Foreign Counsel's Involvement

Indonesian Law stipulates certain limitations for foreign counsel, under Law Number 18 of 2009 on Advocate ("Advocate Law") prohibits foreign counsels to proceed before Indonesian court, practice, and or establishing a legal service office or their representative in Indonesia.¹⁹ Advocate Law is silent on limitation for foreign counsel in Arbitration. Indonesian Arbitration Law also does not address this issue or other than a legal, (albeit a general) requirement, that there be a Specific Power of Attorney to represent a party in the arbitration.

Badan Arbitrase Nasional Indonesia (BANI Arbitration Center or "BANI") - the most respected and popular arbitration institution in the country, addresses this concern in its BANI Rules 2022. BANI Rules stipulates that in case a party is represented by foreign counsel for dispute subject to Indonesian law, the foreign counsel can only attend the proceedings if he/she is accompanied by an Indonesian counsel.²⁰ As most national/domestic arbitrations is proceeded under BANI Rules, this is the common approach when involving foreign counsel in a domestic arbitration.





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8. Arbitrator's Role Does Not Really End When an Award is Rendered

As part of award recognition and enforcement, a national/domestic arbitral award must be submitted and registered to the Registrar of District Court.²¹ This phase is conducted by the arbitrators or their attorney(s) no later than 30 (thirty) days from the date when the arbitral award is rendered.²² Failing to fulfill this process will cause the arbitral award to be non-executable.²³

The practice of who registers the award, whether it is the arbitrator(s) or their attorney, depends on the arbitration rules used by the parties. For example, registration of a BANI award is usually carried out by BANI arbitrators' attorney - normally the secretary of the tribunal. In arbitration under other rules (and also in international arbitration involving execution in Indonesia), the arbitrator(s) could also be represented by an attorney arranged by the prevailing party in the award. If the arbitration is governed under other rules, it is recommended that the prevailing Party to ask the arbitrators to provide a power of attorney for this purpose on the same date when the award is rendered.

9. The Enforcement of Arbitral Award is Dependent to the District Court

As arbitration institution is quasi-judicial; it lacks coercive effort for enforcement of arbitral award (execution). Although an arbitral award is final and binding,²⁴ if one of the disputing parties does not comply with the award, the other party must file an execution request to the Chairman of District Court who will consider and give its order for execution of arbitral award.²⁵ The order will be issued within 30 (thirty) days from when the request is registered. If the Chairman of District Court decided to reject the execution request on the grounds that it is against morality and public policy, there is no legal remedy available.²⁶ If the execution request for arbitral award is granted, the Chairman of District Court will make its order and the award will be enforced pursuant to provisions applicable to execution of a regular court judgment that has become final and binding.²⁷

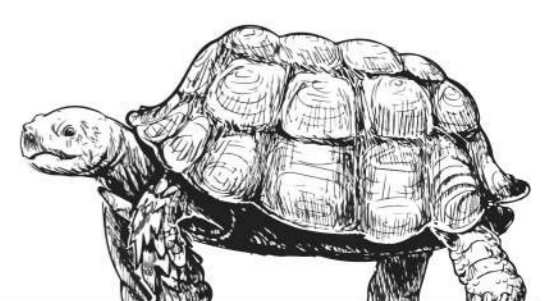
10. Annulment of Arbitral Award

An arbitral award is final and binding in nature. However, it can cease to exist through an annulment process if the arbitral award is proven to have been made on the following limited reasons:²⁸

- a. Letter or document which was submitted in the proceeding, after the award has been rendered, is admitted to being false or declared as false;
- b. After the award has been rendered, it is found that there is a decisive document which was concealed by the opposing party;
- c. The award is rendered based on fraud which was done with one of the parties who is related with the proceeding.

Annulment requests are made to the Chairman of District Court only after the arbitral award is submitted to and registered with the relevant District Court.²⁹ The request must be made within 30 (thirty) days after such award has been registered with to the Registrar of the relevant District Court. The Chairman of District Court will render its Decision regarding the annulment within 30 (thirty) days) from the date that the annulment request is received.³⁰ The appeal to an annulment judgment must be submitted directly to the Supreme Court.³¹ The Supreme Court shall render its Decision within 30 (thirty) days.³²

It is important to take the above points into consideration when determining whether Indonesia is the best seat of arbitration for the Parties. The list also acts as a reminder and road map for Counsels who intend to tread the waters of a domestic arbitration.





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2. Art. 5 of Indonesian Arbitration Law
3. Elucidation of Art. 66 letter b of Indonesian Arbitration Law
4. Art. 1 para 3 of Indonesian Arbitration Law: *"Arbitration agreement refers to an agreement in form of arbitration clause which is included in a written agreement that is made by both parties before the dispute occurs, or a separate arbitration agreement which is made by both parties after the dispute has occurred"*
5. Art. 10 of Indonesian Arbitration Law
6. Art. 3 in conjunction with Art. 11 of Indonesian Arbitration Law
7. Art. 13 para (1) of Indonesian Arbitration Law, i.e., when parties cannot reach an agreement on the appointment of arbitrator or there is no provision set between both parties on the appointment of arbitrator; Art. 14 of Indonesian Arbitration Law, i.e. when parties cannot agree on a sole arbitrator; Art. 15 para (4) and (5) of Indonesian Arbitration Law, i.e.: when appointed arbitrators cannot reach agreement on the presiding arbitrator.
8. Art. 19 para (4) of Indonesian Arbitration Law, i.e., when the arbitrator has declared his/her acceptance, he/she cannot resign without the approval from both disputing parties. If the arbitrator failed to secure such approval, then the dismissal of arbitrator duty shall be determined by the Chairman of the relevant District Court.
9. Art. 23 para (1) of Indonesian Arbitration Law
10. Art. 28 of Indonesian Arbitration Law
11. Art. 31 para (1) and (2) of Law Number 24 of 2009 on National Flag, Language, Emblem and Anthem ("Law 24/2009") and Art. 26 para (1) and (2) of Presidential Regulation Number 63 of 2019 on the Use of Bahasa Indonesia ("PR 63/2019")
12. Art. 26 para (3) of PR 63/2019
13. Art. 26 para (4) of PR 63/2019
14. This approach is also In line with Law 24/2009 and PR 63/2019
15. Art. 54 para (1) of Indonesian Arbitration Law. In Indonesian: *"Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa"*
16. Art. 54 para (2) of Indonesian Arbitration Law
17. Art. 54 para (3) of Indonesian Arbitration Law
18. Art. 54 para (4) of Indonesian Arbitration Law
19. Art. 23 para (1) of Advocate Law
20. Art. 5 para (2) of BANI Rules 2022
21. Art. 1 para (9) of Indonesian Arbitration Law: *"International Arbitral Award refers to an award which is rendered by an arbitral institution or individual arbitrator outside the jurisdiction of the Republic of Indonesia, or an award which is rendered by an arbitral institution or individual arbitrator, of which, according to legal provisions of the Republic of Indonesia, it shall be deemed as an international arbitral award. International Arbitral Award refers to an award which is rendered by an arbitral institution or individual arbitrator outside the jurisdiction of the Republic of Indonesia, or an award which is rendered by an arbitral institution or individual arbitrator, of which, according to legal provisions of the Republic of Indonesia, it shall be deemed as an international arbitral award."*
22. Art. 59 of Indonesian Arbitration Law
23. Art. 59 para (1) in conjunction with Art. 59 para (3) of Indonesian Arbitration Law
24. Art. 60 of Indonesian Arbitration Law
25. Art. 61 of Indonesian Arbitration Law
26. Art. 62 of Indonesian Arbitration Law
27. Art. 64 of Indonesian Arbitration Law
28. Art. 70 of Indonesian Arbitration Law
29. Art. 71 of Indonesian Arbitration Law
30. Art. 72 para (3) of Indonesian Arbitration Law
31. Art. 72 para (4) of Indonesian Arbitration Law
32. Art. 72 para (5) of Indonesian Arbitration Law

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