International Arbitration in Indonesia: Common Challenges

Badan Arbitrase Nasional Indonesia (BANI) is an important arbitral institution, as oil and gas contracts involving Indonesian projects almost invariably require BANI as their dispute resolution forum.

For any arbitral institution to gain the confidence of its prospective users, parties must feel assured of its transparency and institutional reliability. Our experience has shown that the theory and the practice of applicable arbitral procedures in Indonesia do not always reconcile.

In this article we outline some of the challenges we have encountered in BANI arbitrations, and some of the measures we believe could be taken in order to improve Indonesia's standing as a credible international arbitration centre.

Court intervention

Under Indonesian law, an agreement to arbitrate must be in writing. This is the case in many jurisdictions including in many "arbitration-friendly" ones, such as Singapore and England).

The Indonesian Arbitration Law of 1999 (AL) provides that, in order for disputes to be arbitrable:

- The dispute must be of a *commercial* nature and
- The *parties themselves* must have the authority to resolve the dispute.

If the parties have a valid arbitration agreement, it is a violation of the AL to initiate court proceedings to resolve a dispute.

If a party initiates court proceedings in relation to a dispute, which the parties have agreed in writing to refer to arbitration, judges must declare themselves to have no jurisdiction.

Despite this, the courts have, on occasion, shown themselves willing to try cases in spite of the existence of a valid arbitration agreement.

This causes delay and additional costs. It also becomes very difficult for the claimant to prevent their consensual agreement to arbitrate from being derailed by an obstructive respondent.

One commentator explains:

> *"Indonesia currently has no specially trained judges who can be assigned to handle arbitration related cases. Besides, the court staff assigned to assist in handling arbitral award registration and enforcement matters generally show no strong understanding of arbitration. Indonesia is also well known for its unnecessary court interference in matters related to arbitral awards, although the situation is now gradually improving."*[1]

Processes and procedures

BANI Rules are less comprehensive than the institutional rules of more established international arbitration bodies. They can be vague and, in parts, even contradict themselves.

Compounding this, many of the BANI procedures are overly bureaucratic, which can hamper efficiency. For example:

- The parties have to be physically present for all procedural and other hearings, which must be conducted orally. There is no scope for the tribunal to decide even procedural directions on paper or following a telephone call with the parties.

[1] Tony Budidjaja (Budidjaja International Lawyers) (2017).

- Each party has to submit all correspondence to BANI. BANI then distributes it to the tribunal and other parties, rather than the parties and tribunal communicating directly with one another.

- The final hearing is when the award is read out. Again, all parties must be present, requiring the tribunal and parties to be physically present in Jakarta. In contrast, many other arbitral institutions circulate their awards to the parties by email and post.

International counsel

Whilst no arbitration is immune to obstruction by hostile respondents, in our experience, the relative lack of infrastructure to support arbitration in Indonesia makes it a particularly fertile terrain for derailment by obstructive respondents.

It is a principle of international arbitral jurisprudence that *anyone* may represent a party in arbitration, even the individual themselves. Unlike in court litigation, parties' representatives in arbitrations do not have to be lawyers (although, in practice, they usually are).

Not unusually, the BANI Rules provide that, where the substantive law of the contract is Indonesian, any counsel has to be either Indonesian-qualified or, if they are a non-Indonesian representative, must be accompanied by Indonesian counsel.

However, uncertainty surrounding Indonesia's immigration laws can allow an obstructive respondent to effectively ban parties from being represented by international counsel – even where they are accompanied by local counsel – by threatening to report them to the immigration authorities and having them detained.

It is unclear whether a work permit, simply for the purpose of representing a client at arbitration hearings, is required by those foreign counsel not resident and employed in Indonesia.

However, if a work permit is, indeed, required then parties face a conundrum: there is no temporary work permit available that would entitle them to travel to Indonesia from time to time to represent a client at a hearing.

A business visa only entitles holders to attend meetings; it is not clear whether arbitration hearings would fall within that scope.

This issue needs to be addressed urgently by relevant parties, including BANI, as it creates uncertainty and opens the door for obstructive respondents to exclude foreign lawyers from representing their clients in Indonesian arbitrations.

The impact of this is far-reaching and it undermines Indonesia's potential as a credible international arbitration centre.

Will the real BANI please stand up?

In 2016, some members of BANI's board defected, establishing another arbitral institution that they named "BANI Pembaharuan".

In its press release, the newly established institution hailed BANI Pembaharuan as a "transformed BANI". The scope for costly and time-consuming confusion requires no explanation.

We understand that currently BANI and BANI Pembaharuan are in the process of lawsuit in several Indonesian courts to determine on the legitimacy of their entity status. However, to date, there is still no certainty on the outcome.

Whilst this issue is not insurmountable, for example by parties ensuring that their arbitration agreement clearly specifies to which of the two BANIs they intend to refer disputes, it is a further example of the lack of clarity and reliability that continues to blight the arbitration landscape in Indonesia.

Obstructive respondents

The lack of institutional coherence can make the arbitral process in Indonesia all too vulnerable to derailment by an unresponsive or obstructive respondent.

This is compounded by the district courts' willingness to intervene in any proceedings referred to them, even though it is a violation of the AL and of the BANI Rules to instigate court proceedings where the parties have agreed to arbitrate.

Amongst others, some of the particular challenges we have encountered with hostile respondents in Indonesia include those who have:

- Refused to enclose the documents referred to in their submissions, communicate with us directly, and threatened to appeal any procedural directions given by the tribunal that they do not like to court (despite them being disentitled from doing so).
- Tried to ensure that the arbitration is conducted in Bahasa Indonesian, despite the parties' agreement to conduct it in English.

Such conduct is particularly disappointing given that the AL and BANI Rules both expressly provide that the parties will conduct themselves in good faith during the arbitration process.

These tactics serve only to deter parties from choosing to arbitrate in Indonesia and undermine Indonesia's substantial potential as a dispute resolution centre.

Conclusion

The international arbitration community welcomes Indonesia's emergence as a credible arbitral jurisdiction and wants to see a robust institutional and legislative infrastructure to support its development.

BANI, as the flagship arbitration body for administered arbitrations, needs to be better equipped and supported to withstand the challenges we have outlined.

Relevant parties must rally together to ensure that the process is impartial, objective and expedient, and that the courts respect the parties' agreement to resolve their disputes through arbitration.

Interference with the arbitral process should be restricted to well-defined and narrow grounds, rights of appeal to the courts should be limited, and practices such as permitting an unsatisfied party to have a second bite at the proverbial cherry through the re-litigation of disputes in the courts should be eradicated.

As was the case with many jurisdictions that are now widely considered 'arbitration-friendly", if Indonesia is to realise its potential as a trusted and credible arbitral jurisdiction, the courts and legislative bodies need to become the guardians of arbitration, rather than the enablers of obstructive parties.

There are many practitioners, jurists and academics putting considerable energy into promoting international arbitration in Indonesia; their efforts must be underpinned by institutional support and infrastructure at the macro level in order to make meaningful progress.

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