

Indonesia

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of Indonesia?

The principle source of the law of arbitration in Indonesia is Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (August 12, 1999) (the “Indonesian Arbitration Law”).

Where appropriate, this paper will also address the Rules of Arbitration Procedure of the Indonesian National Arbitration Body (*Badan Arbitrasi Nasional Indonesia* or “BANI”) (the “BANI Rules”).

The legal requirements of an arbitration agreement under the Indonesian Arbitration Law are as follows:

- a. The agreement to arbitrate must be in writing and signed by the parties or in notarial deed form (Articles 4(2), 9(1) and 9(2) of the Indonesian Arbitration Law).
- b. If the agreement is made prior to the dispute, the agreement (i.e., the arbitration clause) must clearly state that all disputes arising out of a particular legal relationship between the parties shall be settled through arbitration (Article 2 of the Indonesian Arbitration Law).
- c. If the agreement is made after a dispute arises, the agreement must contain the following:
 - (i) the subject matter of the dispute;
 - (ii) the full names and addresses of the parties;
 - (iii) the full name(s) and residential address(es) of the arbitrator or the members of the tribunal;
 - (iv) the place where the arbitrator or the tribunal shall make its/their award;
 - (v) the full name of the secretary to the arbitrator or the tribunal;
 - (vi) the time period in which the arbitration is to be completed;
 - (vii) a statement from the arbitrator(s) accepting appointment as such; and
 - (viii) a statement from the disputing parties that they will bear all costs of the arbitration. (Article 9(3) of the Indonesian Arbitration Law).

To avoid any unnecessary legal risks, the arbitration clause should be in Indonesian if both parties to the agreement are Indonesian, although the agreement may be in English or a national language used by one of the parties with an Indonesian translation if at least one of the parties is foreign (Article 31 of Law No. 24 of 2009 regarding the National Flag, Language and Emblem and the National Anthem (July 9, 2009)).

1.2 What other elements ought to be incorporated in an arbitration agreement?

Based on Indonesian arbitration practice, an arbitration agreement should also specify:

- (i) the arbitration rules (if any) to be followed;
- (ii) the language of proceedings;
- (iii) the place of arbitration; and
- (iv) whether the award is to be made on the basis of law or fairness and appropriateness (*ex aequo et bono*).

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

A written arbitration agreement obviates the rights or the parties to bring a dispute in the District Courts, which would otherwise have jurisdiction over civil disputes (Article 11(1) of the Indonesian Arbitration Law). The District Courts have no authority to hear disputes where parties are bound by an arbitration agreement (Article 3 of the Indonesian Arbitration Law), and are required to reject, and not participate in the resolution of, disputes which have already been adjudicated by arbitration, except in limited circumstances as provided in the Arbitration Law (Article 11(2) of the Indonesian Arbitration Law).

Indonesian courts honour arbitration agreements with increasing frequency. It is nonetheless not uncommon for parties who lose (or expect to lose) an arbitration, and in particular an international arbitration, to attempt to bypass an arbitration agreement or award by bringing a suit in a District Court on a theory of tort or fraud. The argument is that the purported tort or fraud renders the arbitration agreement unenforceable or occurs outside the scope of the arbitration agreement. It is possible that a suit on this basis may initially enjoy success in the District Court, although this is not always the case and decisions along these lines are frequently reversed on appeal and/or cassation.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in Indonesia? Were there any significant changes made to that arbitration legislation in the past year?

The Indonesian Arbitration Law governs the enforcement of arbitration proceedings in Indonesia. There are no significant changes made to that Law in the past year.

2.3 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The Indonesian Arbitration Law applies to all arbitrations conducted within the territory of Indonesia and to the enforcement and recognition of both domestic and international arbitral awards. There is no distinction between “domestic” and “international” with regard to the nationality of the parties or the location of their project or dispute. The only difference between a domestic arbitration, being one conducted in Indonesia, and an international arbitration, being one conducted outside Indonesia, is the procedure and venue for recognition and enforcement of the award. In addition, as one would expect, provisions of the Arbitration Law governing the conduct of the arbitration proceedings themselves apply only to domestic arbitrations.

2.4 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

No, the Indonesian Arbitration Law is not based on the UNCITRAL Model Law (including its 2006 amendments). The Indonesian Arbitration Law is an amalgamation of a number of principles from predecessor legislation (1849 Dutch Code of Civil Procedure). Some of the differences between the two are as follows:

- (i) incorporation by reference is not clearly established in Indonesia;
- (ii) based on the Indonesian Arbitration Law, unless the parties agree otherwise, the language will be Indonesian, regardless of the language of the documents involved;
- (iii) the Indonesian Arbitration Law states that a case is decided on documents unless the parties or the arbitrators wish to have hearings, whereas the UNCITRAL Model Law requires hearings unless the parties agree otherwise;
- (iv) awards in Indonesia must be reasoned;
- (v) the Indonesian Arbitration Law only permits typographical errors and the like to be corrected, and the parties have only 14 days to so request; and
- (vi) grounds for annulment of Indonesian awards are far more limited than those set out in the UNCITRAL Model Law, and consist principally of fraud, forgery or concealed material documents.

The Indonesian Arbitration Law also incorporates provisions for the recognition and enforcement of international arbitral awards, which were missing from predecessor legislation, to bring Indonesian Law into conformity with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which Indonesia became a party to in 1981.

2.5 To what extent are there mandatory rules governing international arbitration proceedings sited in Indonesia?

The Indonesian Arbitration Law contains mandatory provisions governing the appointment of arbitrators and challenges to their appointment and the form and delivery of arbitral awards. The Indonesian Arbitration Law also provides rules governing other procedural matters, which may be followed in an ad hoc arbitration in Indonesia. If the parties elect to use a national or international arbitration institution to settle their dispute, then the rules and procedures of that institution will apply, except as the parties otherwise decide (Article 34 of the Indonesian Arbitration Law).

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of Indonesia? What is the general approach used in determining whether or not a dispute is “arbitrable”?

According to the Indonesian Arbitration Law, a dispute is arbitrable only if that dispute is of a commercial nature (i.e. commerce, banking, finance, capital investment, industry and intellectual property rights) and concerns rights which, as a matter of Law and regulation, fall within the full legal authority of the disputing parties (Article 5(1) jo. the Official Elucidation of Article 66(b) of the Indonesian Arbitration Law).

In addition, arbitration is not permitted for matters which, as a matter of Law, may not be settled privately (Article 5(2) of the Indonesian Arbitration Law). Phrased differently, matters requiring state intervention cannot be arbitrated. Examples of matters which may not be arbitrated include bankruptcy, divorce, adoption and criminal matters.

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

The authority of an arbitrator to rule on his or her own jurisdiction is not clearly set out in the Indonesian Arbitration Law, although nothing in the Indonesian Arbitration Law prevents an arbitrator from doing so. A jurisdictional objection may, and sometimes is, brought before the courts as well.

3.3 What is the approach of the national courts in Indonesia towards a party who commences court proceedings in apparent breach of an arbitration agreement?

If a party commences court proceedings in apparent breach of an arbitration agreement, some courts decline jurisdiction, in which case there are no court proceedings. Other courts accept jurisdiction where claims are made along the lines discussed in question 1.3 above. As stated above, court decisions accepting jurisdiction where there is a valid arbitration agreement are frequently reversed on appeal and/or cassation.

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national tribunal? What is the standard of review in respect of a tribunal’s decision as to its own jurisdiction?

The Indonesian Arbitration Law expressly provides that courts may address the issue of the jurisdiction and competence of the national tribunal at the time an application is made to the Chief of the relevant District Court for an order enforcing an arbitral award (Article 62(3) of the Indonesian Arbitration Law). An application for this order may be made only after the award is registered with the Clerk of the District Court in accordance with applicable Law (Article 59(1) of the Indonesian Arbitration Law), in the event that the parties do not voluntarily comply with the award (Article 61 of the Indonesian Arbitration Law). In deciding whether to grant the order for enforcement, the Chief of the District Court is required, as a preliminary matter, to consider whether the arbitral award satisfies the requirements as to arbitral jurisdiction (i.e., matters which are permitted for arbitration) prescribed by the Indonesian Arbitration Law and whether the award is contrary to public morals or public order (Article 62(2) of the Indonesian Arbitration Law).

The following are the requirements that must be satisfied for a tribunal lawfully to exercise jurisdiction under the Indonesian Arbitration Law:

- (i) lawful agreement between the parties to submit their dispute to arbitration and the granting of authority by the parties to the tribunal, as contained in a written document (which may be an electronic document) signed by the parties (Article 4(1),(2) of the Indonesian Arbitration Law);
- (ii) if the above agreement occurs in counterparts, then evidence that the counterparts have been received by the parties is required (Article 4(3) of the Indonesian Arbitration Law); and
- (iii) the requirements described in question 3.1 above are satisfied.

3.5 Under what, if any, circumstances does the national law of Indonesia allow a tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Third parties outside an arbitration agreement may involve themselves and take part in arbitration proceedings if they have concerned interests and their involvement is agreed by the disputing parties, as well as approved by the tribunal hearing the dispute concerned (Article 30 of the Indonesian Arbitration Law). However, the Indonesian Arbitration Law is silent on the circumstances that would allow a tribunal to assume jurisdiction over individuals or entities that are not parties to an agreement to arbitrate. Since the basis for a tribunal's authority is an arbitration agreement, it is almost certain that an arbitral award would not be binding on a third party that did not voluntarily participate in arbitration proceedings in compliance with Article 30 of the Indonesian Arbitration Law.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in Indonesia and what is the typical length of such periods? Do the national courts of Indonesia consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

There are no provisions of Law prescribing a limitation period specifically for the commencement of arbitrations. As with other civil matters generally, claims brought in arbitration are subject to the statutes of limitations prescribed in the Indonesian Civil Code.

3.7 What is the effect in Indonesia of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Law No. 37 of 2004 regarding Bankruptcy and Suspension of Debt Repayments (October 18, 2004) (the "Indonesian Bankruptcy Law") governs this issue.

The Indonesian Bankruptcy Law stipulates that, where a debtor has been declared bankrupt, any legal proceedings initiated by the debtor may, at the request of the defendant, be suspended so as to give the liquidator the opportunity to assume control of the proceedings and determine whether to continue them (Article 28(1) of the Indonesian Bankruptcy Law).

Where the debtor acts as defendant in court proceedings, to the extent a judgment would be satisfied from the assets of the debtor, the proceedings terminate as a matter of Law upon the debtor's being declared bankrupt (Article 29 of the Indonesian Bankruptcy Law). The Indonesian Bankruptcy Law does not specify whether

this outcome applies also to arbitration proceedings against a bankrupt debtor, but we believe that an Indonesian court may extend this outcome to arbitration proceedings as well, in which case it may not be impossible to have an arbitration award recognised and enforced in Indonesia in these circumstances.

Prior to a declaration of bankruptcy and subsequent liquidation of a bankrupt debtor, the Indonesian Bankruptcy Law allows for a period of time during which a debtor's payment obligations are suspended and the debtor is not declared bankrupt or liquidated. During this period, the debtor is permitted to attempt to negotiate a composition plan with its creditors. A suspension of payment obligations does not result in the termination of court proceedings or prevent the initiation of new court proceedings (Article 243(1) of the Indonesian Bankruptcy Law). However, the consent of the administrator appointed by the Commercial Court for purposes of administering the suspension of payment obligations is required as a condition to the debtor being a plaintiff or defendant in any case involving the debtor's assets (Article 243(3) of the Indonesian Bankruptcy Law). A Judge may also suspend court proceedings to prove a debt if that debt is acknowledged by the debtor and the plaintiff does not have an interest in obtaining the judgment to enforce rights against third parties (Article 243(2) of the Indonesian Bankruptcy Law). Again, we believe that an Indonesian court may extend the application of these provisions to arbitration proceedings as well.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The Indonesian Arbitration Law concerns questions of procedural Law and not substantive Law. The Law applicable to the substance of a dispute is determined under general rules governing the choice of Law, which are not clear.

If the parties to an agreement have elected a choice of Law, then that choice of Law will generally be honoured by the Indonesian courts under the principle of freedom of contract, embodied in Article 1338 of the Indonesian Civil Code. The choice of Law may be challenged if it is in violation of statute or contrary to good morals or public order, as per Article 1337 of the Indonesian Civil Code. The choice of Law applies only to matters of contract (i.e., matters governed by Book III of the Indonesian Civil Code) and not to matters of person (Book I of the Indonesian Civil Code), property (Book II of the Indonesian Civil Code) or statutory Law.

If a contract does not stipulate a choice of Law, then Indonesian choices of Law rules apply. Indonesian Law does not specifically prescribe a rule for determining the governing law of a contract. A court will be likely to apply the rule applicable to legal acts generally, namely that the Law governing a legal act is the Law of the jurisdiction in which the act occurs.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

The parties to a dispute are permitted under the principle of freedom of contract, embodied in Article 1338 of the Indonesian Civil Code, to choose their Law of contract. If they choose Indonesian Law, then the principles of Book III (regarding obligations) of the Indonesian Civil Code will apply. If they choose a foreign Law, then the foreign Law of contract will apply.

Nothing in Indonesian Law supports the principal that the parties may, by agreement, set aside matters of Law outside the scope of the law of contracts, and in particular matters of mandatory or regulatory Law, unless the Law of the jurisdiction whose interests are implicated permits the parties to do so. In cases where the jurisdiction whose interests are implicated is Indonesia, the nature of Indonesian statutory Law is that its provisions are mandatory where they apply, unless they expressly state otherwise. In very rare cases, a court may decline to apply a statutory provision by reason of legal custom or appropriateness, especially if there is already a line of Supreme Court jurisprudence supporting the court's decision.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

If the arbitration is conducted in Indonesia, the Indonesian Arbitration Law governs the formation, validity and legality of the arbitration agreement. Indonesian Law is silent as to the choice of Law rules governing the formation, validity and legality of arbitration agreements conducted outside Indonesia.

5 Selection of tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The Indonesian Arbitration Law provides for circumstances in which the parties agree to appoint a single arbitrator (Article 14(1) of the Indonesian Arbitration Law) or two arbitrators, with the authority to appoint the third (Article 15(1) of the Indonesian Arbitration Law) in an *ad hoc* arbitration. However, nothing in the Arbitration Law prohibits the parties from configuring a tribunal more creatively than the traditional one- or three-arbitrator tribunal.

The Indonesian Arbitration Law also specifies minimum qualifications for arbitrators in an *ad hoc* arbitration, namely:

- (i) legal capacity (i.e., of legal age and not under legal guardianship);
- (ii) at least 35 years of age;
- (iii) no family relationship by blood or marriage to the second degree with either of the disputing parties;
- (iv) no financial or other interest in the arbitral award; and
- (v) at least 15 years' experience and active mastery of his field.

(Article 12(1) of the Indonesian Arbitration Law.)

In addition, judges, prosecutors, clerks of the court and other officials of justice are prohibited from serving as arbitrators (Article 12(2) of the Indonesian Arbitration Law).

The BANI Rules provide for a sole arbitrator (Article 10(1) of the BANI Rules) or a panel of three arbitrators (Article 10(3) of the BANI Rules), as the parties may agree. In special situations, if requested by a majority of the parties in dispute, the Chairman of BANI may approve the formation of a tribunal comprising more than three arbitrators (Article 10(5) of the BANI Rules). In the case of a tribunal comprising multiple arbitrators, the presiding arbitrator is selected by the Chairman of BANI after giving due consideration to nominations from the BANI panel of arbitrators made by the members of that tribunal who have already been selected (Article 10(3) of the BANI Rules).

The minimum qualifications for arbitrators according to the BANI Rules are similar to the minimum qualifications for arbitrators according to the Indonesian Arbitration Law. However, under the

BANI Rules, arbitrators are forbidden from having family relationships to the third degree and they must also not be serving government officials (Article 9(3) of the BANI Rules). BANI arbitrators must also hold BANI arbitration certificates or other qualifications accepted by BANI.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes, there are default procedures if the arbitration is *ad hoc* and the parties' chosen method for selecting arbitrators fails.

In the event that the parties cannot reach agreement on the choice of arbitrators, or no terms have been set concerning the appointment of arbitrators, the Chief Judge of the District Court shall appoint an arbitrator or tribunal (Article 13(1) of the Indonesian Arbitration Law).

In an *ad hoc* arbitration, where there is any disagreement between the parties with regard to the appointment of one or more arbitrators, the parties may request the Chief Judge of the District Court to appoint one or more arbitrators for resolution of such dispute (Article 13(2) of the Indonesian Arbitration Law).

If the parties have agreed to arbitration by a sole arbitrator, but 14 days after the respondent receives the names of the candidate or candidates suggested by the claimant, the parties have not agreed on a sole arbitrator, then the Chief Judge of the District Court may appoint the sole arbitrator upon application by either party (Article 14(3) of the Indonesian Arbitration Law).

If the parties have not agreed to arbitration by a sole arbitrator, but 30 days after receipt of the notice of arbitration by the respondent, one of the two parties has not appointed an arbitrator, then the arbitrator appointed by the other party shall serve as sole arbitrator (Article 15(3) of the Indonesian Arbitration Law).

Under the BANI Rules, the Chairman of BANI is authorised to appoint an arbitrator in the event that either party fails to appoint an arbitrator within the time limit regulated in the BANI Rules (Article 10 of the BANI Rules).

5.3 Can a court intervene in the selection of arbitrators? If so, how?

In an *ad hoc* arbitration, a court may be asked by a party to appoint one or more arbitrators if the parties do not reach agreement or they have not made provision for the appointment of arbitrators (Article 13 of the Indonesian Arbitration Law).

If a party objects to the appointment of an arbitrator on grounds permitted under the Indonesian Arbitration Law, and the other side does not agree to the objection or the arbitrator refuses to recuse himself, the party making the objection may apply to the Chief of the District Court for a final and binding decision in the fate of the arbitrator (Article 25 of the Indonesian Arbitration Law).

A similar role is played by the Chairman of BANI under the BANI Rules.

5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within Indonesia?

The following are the requirements as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators imposed by the Indonesian

Arbitration Law in an *ad hoc* arbitration:

- (i) an arbitrator must not be related by blood or marriage to the second degree with either of the disputing parties (Article 12(1)(c) of the Indonesian Arbitration Law);
- (ii) an arbitrator must not be financially or otherwise interested in the outcome of the arbitration (Article 12(1)(d) of the Indonesian Arbitration Law);
- (iii) Judges, prosecutors, clerks of the court and other judicial officials may not serve as arbitrators (Article 12(2) of the Indonesian Arbitration Law);
- (iv) a prospective arbitrator requested by one of the parties concerned to become a member of the tribunal is obligated to notify the parties concerned of matters which may impair his or independence or prevent an impartial award from being made (Article 18(1) of the Indonesian Arbitration Law);
- (v) a demand for recusal may be submitted against an arbitrator if sufficient cause and authentic evidence is found to give reason to doubt that the arbitrator will perform his or her duties independently or will be biased in rendering an award, or if it is proven that there is any familial, financial or employment relationship with one of the parties or its respective legal representatives (Article 22 of the Indonesian Arbitration Law); and
- (vii) an arbitrator may be dismissed if proven to have acted partially or to have exhibited a disgraceful attitude, which must be legally proven (Article 26(2) of the Indonesian Arbitration Law).

Under the BANI Rules, arbitrators are obligated to sign a Statement of Independence as provided by the BANI Secretariat (Article 9(4) of the BANI Rules).

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in Indonesia? If so, do those laws or rules apply to all arbitral proceedings sited in Indonesia?

The Law or rules governing the procedure of arbitration in Indonesia is the Indonesian Arbitration Law. The Indonesian Arbitration Law permits the parties, by express written agreement, to stipulate rules of procedure governing their arbitration, to the extent that the rules so stipulated are not contrary to the Indonesian Arbitration Law (Article 31(1) of the Indonesian Arbitration Law). The parties may also by agreement submit their dispute to a national or international arbitral institution, in which case the rules and procedure of that institution will apply, except as the parties otherwise agree (Article 34 of the Indonesian Arbitration Law).

If the parties do not stipulate rules of procedure or submit their dispute to a national or international arbitral institution, then the provisions of the Indonesian Arbitration Law shall apply (Article 31(2) of the Indonesian Arbitration Law).

6.2 In arbitration proceedings conducted in Indonesia, are there any particular procedural steps that are required by law?

If an arbitration is conducted in Indonesia under the rules of a national or international arbitral institution, then the rules and procedures of that institution will apply, except as the parties otherwise agree.

The Indonesian Arbitration Law stipulates requirements for the notice of arbitration, appointment of arbitrators, challenges to the appointment of arbitrators, enforcement of an arbitral award and challenges to an arbitral award. These requirements are mandatory

for *ad hoc* arbitrations. They are also generally repeated in the BANI Rules.

The provisions of the Indonesian Arbitration Law governing the conduct of the arbitration proceedings themselves are mandatory only in the case of *ad hoc* arbitrations conducted in Indonesia.

The particular procedural steps that are required by the Indonesian Arbitration Law in *ad hoc* arbitration proceedings conducted in Indonesia are as follows:

- (i) the claimant must submit its claim within the time frame agreed by the parties or, if there is no such agreement, within the time frame determined by the tribunal (Article 38(1) of the Indonesian Arbitration Law);
- (ii) the claim must contain at least the following:
 - a. the full names and the places of residence or domicile of the parties;
 - b. a brief description of the dispute with evidence appended; and
 - c. a clear claim.

(Article 38(2) of the Indonesian Arbitration Law);

- (iii) upon receiving the claim from the claimant, the tribunal shall deliver a copy of the claim to the respondent together with an order that the respondent must provide its written Reply within 14 days following the respondent's receipt of the claim (Article 39 of the Indonesian Arbitration Law);
- (iv) immediately upon receiving the Reply of the respondent, the tribunal shall deliver a copy of the Reply to the claimant and shall order the parties to appear for an initial hearing at latest 14 days following the order (Article 40(1) of the Indonesian Arbitration Law);
- (v) in the Reply, or by the latest in the first hearing, the respondent may submit a counterclaim, and the claimant shall be given the opportunity to respond to the same (Article 42(1) of the Indonesian Arbitration Law);
- (vi) in the event both parties appear on the hearing date, the tribunal shall first try to reach an amicable settlement between the disputing parties. (Article 45 of the Indonesian Arbitration Law);
- (vii) if an amicable settlement is not reached, the parties shall be given the opportunity to submit written statements of their positions and supporting evidence as they deem appropriate to support their respective positions within the time frames stipulated by the tribunal (Article 46(2) of the Indonesian Arbitration Law);
- (viii) the proceedings must conclude within 180 days following the formation of the tribunal, unless the parties agree otherwise. In practice, this requirement is frequently waived up front in the arbitration clause;
- (ix) the arbitral award shall be delivered within 30 days following the conclusion of hearings (Article 57 of the Indonesian Arbitration Law); and
- (xiii) within 14 days following the receipt of an award, the parties may file a request to the tribunal to make administrative corrections or to add to or delete portions of the award so that it responds fully to the initial claim and does not go beyond the claim (Article 58 of the Indonesian Arbitration Law).

The BANI Rules follow the Indonesian Arbitration Law, except that:

- (i) the respondent has a period of 30 days to submit its Reply to BANI to be conveyed, to the tribunal and the claimant (Article 17(1) of the BANI Rules); and
- (ii) in the event that the respondent has submitted a counterclaim or set-off, the claimant shall be afforded a period of 30 days, or such other time limit as the tribunal may deem appropriate, to submit its Reply to the counterclaim or claim for set-off (Article 17(4) of the BANI Rules).

6.3 Are there any rules that govern the conduct of an arbitration hearing?

The following are the rules that govern the conduct of arbitration hearings in an *ad hoc* arbitration under the Indonesian Arbitration Law:

- (i) arbitration hearings shall be closed to the public (Article 27 of the Indonesian Arbitration Law);
- (ii) the language used in arbitration proceedings shall be the Indonesian language, except if, with the approval of the tribunal, the parties agree to use another language (Article 28 of the Indonesian Arbitration Law);
- (iii) arbitration hearings are conducted in writing, and oral hearings are held only if agreed by the parties or are considered necessary by the tribunal (Article 36(1) of the Indonesian Arbitration Law);
- (iv) the examination of fact and expert witnesses is conducted in accordance with rules generally applicable in Indonesian civil procedure (Article 37(3) of the Indonesian Arbitration Law);
- (v) arbitration hearings must be concluded within 180 days after the date on which the tribunal is formed (Article 48(1) of the Indonesian Arbitration Law); and
- (vi) the secretary of the tribunal shall document hearing proceedings in minutes (Article 51 of the Indonesian Arbitration Law).

The BANI Rules are similar except that the hearing venue is determined by BANI and the agreement of the parties or at another venue if deemed necessary by the tribunal with the agreement of the parties (Article 13(4) of the BANI Rules).

6.4 What powers and duties does the national law of Indonesia impose upon arbitrators?

The Indonesian Arbitration Law imposes powers and duties upon arbitrators as follows:

- (i) arbitrators must make fair and just awards in accordance with prevailing law (Article 17(2) of the Indonesian Arbitration Law);
- (ii) arbitrators may grant provisional awards and or other interlocutory decisions to ensure orderly proceedings, including with regard to the seizure, third party custody or sale of easily damaged goods (Article 32(1) of the Indonesian Arbitration Law);
- (iii) arbitrators are allowed to extend the duration of their terms of duty as considered necessary to examine a dispute (Article 33 of the Indonesian Arbitration Law);
- (iii) arbitrators may instruct that all documents or evidence shall be accompanied by a translation into a language determined by the tribunal (Article 35 of the Indonesian Arbitration Law);
- (iv) arbitrators shall determine the place of the arbitration unless it has been decided by the parties (Article 37(1) of the Indonesian Arbitration Law);
- (v) arbitrators may hear witness testimony or hold hearings as they deem necessary at places outside the place where the arbitration is conducted (Article 37(2) of the Indonesian Arbitration Law);
- (vi) arbitrators may conduct an examination at the location of disputed property or other matters in relation to the dispute being heard (Article 37(4) of the Indonesian Arbitration Law);
- (viii) arbitrators are entitled to request the parties to submit additional written explanations, documents or other evidence deemed necessary within the time frame determined by the

Arbitrators (Article 46(3) of the Indonesian Arbitration Law);

- (ix) arbitrators are entitled to summon witnesses and/or expert witness (Article 49(1) of the Indonesian Arbitration Law); and
- (x) arbitrators are entitled to request the assistance of one or more expert witnesses to prepare a written report regarding a specific matter related to the subject matter of the dispute (Article 50(1) of the Indonesian Arbitration Law).

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in Indonesia and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in Indonesia?

Law No. 18 of 2003 regarding Advocates (April 5, 2003) (the "Advocates Law") prohibits lawyers from other jurisdictions from practicing Law in Indonesia (Article 23(1) of the Advocates Law). It is not clear whether this prohibition applies to appearances in arbitration proceedings.

A foreign legal advisor is allowed to participate in a BANI arbitration case only if he or she is accompanied by an Indonesian-admitted lawyer (Article 5(2) of the BANI Rules).

There is no consensus as to whether foreign lawyers must be licensed by the Indonesian Ministry of Law and Human Rights as foreign legal advisors and/or hold a valid Indonesian work permit as a condition to appearing in legal matters in Indonesia.

6.6 To what extent are there laws or rules in Indonesia providing for arbitrator immunity?

The Indonesian Arbitration Law grants provides that an arbitrator may not be held legally accountable for any actions undertaken during the hearing process in fulfilment of his or her function as an arbitrator unless the actions are proven to have been undertaken in bad faith (Article 21 of the Indonesian Arbitration Law).

Nonetheless, if an arbitrator or tribunal fails to make an award within the determined time frame, without a valid reason, the arbitrator may be required to compensate the parties for costs and losses cause by the delay (Article 20 of the Indonesian Arbitration Law).

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Aside from the appointment and recusal or arbitrators, the courts have no jurisdiction to deal with any matters subject to arbitration, other than enforcement or other relief that may be sought after issuance of an award.

This is generally similar with the BANI Rules, which provides that the tribunal shall have full authority to determine the procedure and to make such rulings as it deems appropriate and as a consequence, national courts does not have jurisdiction to deal with procedural issues arising during an arbitration (Article 19(2) of the BANI Rules).

6.8 What is the approach of the national courts in Indonesia towards *ex parte* procedures in the context of international arbitration?

The Indonesian Arbitration Law does not expressly address *ex parte* procedures in the context of international arbitration, although it does permit them in the context of domestic arbitration. In practice,

the Indonesian courts generally enforce international arbitral awards where the proceedings are conducted as *ex parte* procedures, provided that it can be shown that the parties were properly notified of the proceedings (Article 44(2) of the Indonesian Arbitration Law).

7 Preliminary Relief and Interim Measures

7.1 Is an arbitrator in Indonesia permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

The Indonesian Arbitration Law permits a tribunal in domestic proceedings to make provisional and other interlocutory awards, including for the seizure, third party custody or sale of easily damaged goods (Article 32(1) of the Indonesian Arbitration Law). There is no requirement that a tribunal obtain a court's consent to render provisional or other interlocutory relief. However, as with arbitral awards generally, application must be made to the Chief Judge of the District Court to enforce a provisional or other interlocutory award if the parties do not voluntarily comply with the award.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

The Indonesian Arbitration Law is clear that, except in certain limited matters pertaining to the appointment and recusal of arbitrators, and generally in the enforcement of arbitral awards, the courts do not have jurisdiction over matters that are lawfully the subject of arbitration proceedings.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Where a court determines that a matter is subject to a legally-binding arbitration clause or arbitration agreement, the Indonesian Arbitration Law provides clearly that a court has no subject matter jurisdiction. This includes requests for interim relief by parties to arbitration agreements. We are not aware of any instance in which a court, having found a legally-binding arbitration clause or arbitration agreement, nonetheless accepts a party's request for interim relief.

7.4 Under what circumstances will a national court of Indonesia issue an anti-suit injunction in aid of an arbitration?

Indonesian Law does not expressly provide for an anti-suit injunction and does not generally permit a court of first instance to determine or limit the jurisdiction of another court by injunction. The court's authority is limited to a determination of its own jurisdiction. On appeal, a higher court may rule as to whether a lower court properly exercised jurisdiction. As a result of the foregoing, an Indonesian court will not issue an anti-suit injunction in aid of an arbitration.

7.5 Does the national law allow for the national court and/or tribunal to order security for costs?

The Indonesian Arbitration Law does not expressly address security for costs. In an *ad hoc* arbitration, the Indonesian Arbitration Law treats an arbitrator's appointment as a contract between the arbitrator and the disputing parties (Article 17(1) of the Indonesian Arbitration Law). Nothing in the Indonesian Arbitration Law prohibits an arbitrator from requiring that the contract provide security for costs as a condition to his or her appointment.

The BANI Rules provide that a matter will not be examined or proceedings may not be continued unless all arbitration costs, determined based on a set scale in relation to the amount in dispute, are paid (Article 19(4) of the BANI Rules).

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in Indonesia?

Under the Indonesian Arbitration Law, parties to an *ad hoc* arbitration are afforded an equal opportunity to explain their positions in writing and to submit evidence necessary to support their positions (Article 46 of the Indonesian Arbitration Law). Evidence is generally to be presented and examined through written exchanges (Article 36(1) of the Indonesian Arbitration Law). Evidence may be examined orally if agreed by the parties or considered necessary by the tribunal (Article 36(2) of the Indonesian Arbitration Law). A tribunal may also make a field visit for the examination of evidence (Article 37(4) of the Indonesian Arbitration Law).

The Indonesian Arbitration Law also permits a tribunal to summons fact witnesses, although there is no sanction for failure to comply (Articles 49 and 50 of the Indonesian Arbitration Law), and to request the assistance of expert witnesses.

The Indonesian Arbitration Law provides that both fact and expert witnesses are to be examined in accordance with rules generally applicable in the Law of Civil Procedure (Article 37(3) of the Indonesian Arbitration Law). The Indonesian Law of Civil Procedure is contained principally in *Reglement op de Rechtsvordering* (Staatsblad 1847 No. 52 juncto. 1849 No. 63) and the *Herziene Inlands Reglement* (Staatsblad 1941 No. 44), both of which date from the Dutch colonial era.

The rules of evidence under the BANI Rules are as follows:

- (i) each of the parties has the burden to explain its position, to submit evidence substantiating that position and to prove the facts relied upon it in support of its claim or reply (Article 23(1) of the BANI Rules);
- (ii) the tribunal may, if it considers it appropriate, require the parties to address any enquiry or present any documentation the tribunal deems necessary, and/or to present a summary of all documents and other evidence which that party has presented and/or intends to present in support of the facts in issue set out in its Statement of Claim or Reply, within such time limits as the tribunal shall deem appropriate (Article 23(2) of the BANI Rules);
- (iii) the tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered (Article 23(3) of the BANI Rules);
- (iv) if the tribunal considers it necessary, and/or at the request of either party, expert or factual witnesses may be summoned, who may be required by the tribunal to present testimony first in a written statement, and on the basis written testimony, the tribunal may determine, on its own or upon

request of either party, whether oral testimony is required (Article 23(4) of the BANI Rules);

- (v) if the claimant wishes to submit additional documents or other evidence, the claimant must make reference to that evidence in the Statement of Claim (Article 16(3) of the BANI Rules);
- (vi) the respondent shall make reference to any additional documents or other evidence intended to be submitted to the tribunal in its Reply (Article 17(2) of the BANI Rules); and
- (vii) the tribunal shall decide which further evidence and/or written statements, in addition to the Statement of Claim and the Reply, shall be required from the parties or may be presented by them and shall fix the periods of time for submitting such statements, and the tribunal shall not be required to consider any additional submissions other than those which it has ruled to be appropriate (Article 22(2) of the BANI Rules).

8.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure (including third party disclosure)?

In an *ad hoc* arbitration, the Indonesian Arbitration Law provides that a tribunal may request parties to produce additional written explanations, documents or other evidence deemed necessary within a time period as determined by the arbitrator (Article 46(3) of the Indonesian Arbitration Law). At the order of the tribunal or at the request of the parties, one or more fact or expert witnesses may be called (Article 49(1) of the Indonesian Arbitration Law). Although the Indonesian Arbitration Law does not provide sanctions for non-compliance, a tribunal would certainly be permitted to draw negative inferences from a failure to produce requested documents or other disclosure.

In BANI proceedings, the tribunal similarly has the authority to require parties to provide further evidence and/or written statements (Article 22(2) of the BANI Rules).

8.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

The Indonesian Arbitration Law does not provide for any circumstances in which an Indonesian court is permitted to intervene in matters of disclosure. In any event, the principle of compulsory discovery does not apply in Indonesian civil procedure.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal? Is cross-examination allowed?

In an *ad hoc* arbitration, the Indonesian Arbitration Law provides that fact witnesses and expert witnesses may be called by the tribunal or the parties (Article 49(1) of the Indonesian Arbitration Law). Both fact and expert witnesses must be sworn before the tribunal (Article 49(3) of the Indonesian Arbitration Law).

Nothing in the Indonesian Arbitration Law expressly prohibits a tribunal from accepting written testimony from a fact witness. In keeping with Indonesian traditions of civil procedure, however, written testimony as to factual matters is unlikely to be persuasive, except in extraordinary circumstances.

The Indonesian Arbitration Law permits a tribunal to request the assistance of one or more expert witnesses in providing an expert report regarding specific issues arising in connection with the subject matter of a dispute (Article 50 of the Indonesian Arbitration

Law). The parties are required to provide information and explanations as required by the expert witness. The tribunal is required to forward a copy of the expert report to the parties for their responses. If, in the view of the parties, any aspect of the expert report is unclear, the expert witness may be called to give testimony before the tribunal in the presence of the parties and their counsel.

Under the BANI Rules, witness testimony shall be kept in strict confidence among the parties, the Arbitrators and BANI (Article 13(1) of the BANI Rules). If the tribunal considers it necessary, and/or either party requests, the tribunal may summons expert witnesses and/or fact witnesses. A witnesses may be required by the tribunal to present its testimony in a written statement first, on the basis of which the tribunal shall determine, on its own or upon the request of either party, whether the witness shall be required to give oral testimony as well (Article 23(4) of the BANI Rules). The party requesting that a fact or expert witness be summoned must pay in advance all costs related to the presence of the witness (Article 23(5) of the BANI Rules). Before giving a testimony, a fact or expert witness shall take an oath (Article 23(6) of the BANI Rules).

8.5 Under what circumstances does the law of Indonesia treat documents in an arbitral proceeding as being subject to privilege? In what circumstances is privilege deemed to have been waived?

The Advocates Law requires that communications between an attorney and his or her client for the purpose of giving or obtaining legal advice will be privileged. The privilege belongs to the client, who may waive the privilege by express consent or by disclosing the privileged communications in the arbitration proceedings (Article 19 of Advocates Law).

Although not encapsulated in a formal rule, Indonesian legal practice generally accepts that any document marked "without prejudice" may be deemed privileged. It is not clear whether this principle is limited to communications in the context of settlement negotiations or applies more generally.

In addition to the privileges provided by the Indonesian Advocates Law, the Indonesian Advocates Code of Ethics (May 23, 2002) provides that the following shall be privileged:

- (i) correspondence between opposing counsel may not be shown to a judge if it is marked "Sans Prejudice"; and
- (ii) discussions or correspondence in the framework of settlement negotiations between advocates that have not reached conclusion may not be used as evidence in court.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award?

Under the Indonesian Arbitration Law, an arbitral award must contain the following:

- (i) a statement stating, "For the Sake of Justice based on the Almighty God", written at the top of the award;
- (ii) the full names and addresses of the parties;
- (iii) a brief description of the dispute;
- (iv) the positions of the respective parties;
- (v) the full names and addresses of the arbitrators;
- (vi) considerations and conclusions of the tribunal concerning the entire dispute;
- (viii) the opinion of each of the respective arbitrators if there is a

- difference of opinion within the tribunal;
- (ix) the holdings of the award;
 - (x) the place and date of the award; and
 - (xi) the signatures of the members of the tribunal.

(Article 54(1) of the Indonesian Arbitration Law.)

The failure of an arbitrator to sign an award, because of illness or death, if noted in the award itself, will not affect the enforceability of the award (Article 54(2) of the Indonesian Arbitration Law).

The award shall set forth a time period within which the award must be implemented (Article 54(3) of the Indonesian Arbitration Law).

Under the BANI Rules, an award shall be prepared in the Indonesian language, and if requested by a party or otherwise deemed appropriate by the tribunal, in the English language or another language (Article 14(4) of the BANI Rules). An award shall be made in writing and shall state the reasons upon which the award is based. The award must be passed based on legal stipulations or based on justice and propriety (Article 29 of the BANI Rules). An award shall be signed by the arbitrators and contain the date and place at which it is rendered. If there are three arbitrators and one of them fails to sign an award, the award shall state the reason for the absence of the signature (Article 30 of the BANI Rules).

10 Appeal of an Award

10.1 On what bases, if any, are parties entitled to appeal an arbitral award?

The Indonesian Arbitration Law provides expressly that an arbitral award is final and binding (Article 60 of the Indonesian Arbitration Law). This is equivalent to a statement that an arbitral award is not subject to appeal.

The Indonesian Arbitration Law does permit an application to annul an arbitral award in the following instances:

- (i) a letter or document submitted in the examination proceedings is, after the award is issued, found to be fraudulent or is declared fraudulent;
- (ii) a document which is decisive in its effect was concealed by a party and is discovered after the award is issued; or
- (iii) an award arises from a scheme of fraud by one of the parties to the dispute.

(Article 70 of the Indonesian Arbitration Law.)

In the case of a domestic arbitral award, the Indonesian Arbitration Law permits the Chief Judge of the District Court to refuse to order enforcement of the award if the exercise of jurisdiction by the tribunal was unlawful under the provisions of the Indonesian Arbitration Law or the award is contrary to public morals or public order (Article 62(2) of the Indonesian Arbitration Law). In reaching a decision not to order enforcement of a domestic arbitral award, the Chief Judge of the District Court is not permitted to examine the grounds or reasoning of the award (Article 62(4) of the Indonesian Arbitration Law). The decision of the Chief Judge of the District Court not to order enforcement of a domestic arbitral award is not subject to appeal.

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

- (i) 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;
- (ii) the award falls within the scope of commercial law within the meaning of Indonesian law;

- (iii) the award does not violate public order;
- (iv) the award has obtained an *exequatur* from the Head of the Central Jakarta District Court; and
- (v) if the Republic of Indonesia is a party to the dispute decided by the award, the award has obtained an *exequatur* from the Supreme Court of the Republic of Indonesia.

(Article 66 of the Indonesian Arbitration Law.)

10.2 Can parties agree to exclude any basis of appeal or challenge against an arbitral award that would otherwise apply as a matter of law?

As there is no basis on which to appeal an arbitral award in Indonesia, this question is not relevant.

The parties may not agree by contract to exclude any of the bases provided by the Indonesian Arbitration Law for annulling an arbitral award, for refusing to order enforcement of a domestic arbitral award or for refusing to recognise and enforce an international arbitral award.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

There are no provisions in the Indonesian Arbitration Law expressly permitting the parties to an arbitration to create a right of appeal by contract. It is therefore highly unlikely that the Indonesian courts would accept jurisdiction in these circumstances.

10.4 What is the procedure for appealing an arbitral award in Indonesia?

There is no procedure to appeal an arbitral award under the Indonesian Arbitration Law.

If a party wishes to apply to have an award annulled, the following procedures apply:

- (i) the application for annulment of the award must be submitted in writing within 30 days following the date that the arbitral award was submitted to and registered with the Clerk of the District Court;
- (ii) the application for annulment of the award must be addressed to the Chief Judge of the District Court;
- (iii) if the Chief Judge accepts the application to annul, the annulment may apply to the whole or part of the award, as the Chief Judge determines. The Chief Judge may order that all or a part of the dispute be re-examined by the same or a different arbitrator or determine that the dispute is not capable of being re-examined in arbitration;
- (iv) the Chief Judge is required to deliver his or her decision of whether or not to annul the award within 30 days following the date on which the application is received;
- (iv) the decision of the Chief Judge to annul an award may be finally appealed to the Supreme Court. The Indonesian Arbitration Law does not specify a time limit for this appeal; and
- (v) the Supreme Court is required to deliver its response to the appeal within 30 days following its receipt of the appeal.

(Article 72 of the Indonesian Arbitration Law.)

11 Enforcement of an Award

11.1 Has Indonesia signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Indonesia ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards by means of Presidential Decree Number 34 of 1981, dated August 5, 1981.

Indonesia entered two reservations to the Convention: (i) international arbitral awards which may be recognised and enforced in Indonesia are only those relating to commercial disputes; and (ii) recognition of awards has to be on the basis of reciprocity, i.e., rendered in a country which, together with Indonesia, is a party to an international convention regarding the recognition and enforcement of foreign arbitral awards.

11.2 Has Indonesia signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No, it has not.

11.3 What is the approach of the national courts in Indonesia towards the recognition and enforcement of arbitral awards in practice? What steps are parties required to take?

Generally, Indonesian courts honour the enforcement of domestic and international arbitral awards in Indonesia.

In the case of a domestic arbitral award, the procedure for enforcement is as follows:

- (i) the tribunal or its authorised proxy must deliver and register the original or authentic copy of the award to the Clerk of the District Court within 30 days of the award's issuance (Article 59(1) of the Indonesian Arbitration Law);
- (ii) failure to register the arbitration award pursuant to the above requirement shall render the award unenforceable (Article 59(4) of the Indonesian Arbitration Law);
- (iii) in the event that the losing party fails to perform its obligations under the arbitral award, the award shall be enforced by order of the Chief Judge of the District Court at the request of the winning party (Article 61 of the Indonesian Arbitration Law);
- (iv) the order of the Chief Judge shall be rendered within 30 days following the filing of the request for execution with the Clerk of the District Court (Article 62(1) of the Indonesian Arbitration Law);
- (v) the Chief Judge of the District Court must firstly examine the arbitral award to determine that it is based on a valid arbitration agreement and that the dispute is arbitrable as a matter of Law and that the award is consistent with good morals and public order (Article 62(2) of the Indonesian Arbitration Law);
- (vi) a decision of the Chief Judge of the District court that an award is not enforceable for the above reasons may not be appealed (Article 62(3) of the Indonesian Arbitration Law);
- (vii) the Chief Judge of the District Court must not examine the reasoning of the arbitral award (Article 62(4) of the Indonesian Arbitration Law); and
- (viii) once endorsed for enforcement by the Chief Judge of the District Court, the award may be executed in the same manner as a final and binding court decision in a civil case

(Article 64 of the Indonesian Arbitration Law).

Pursuant to the Indonesian Arbitration Law, all matters pertaining to the recognition and enforcement of international arbitral awards are to be handled by the District Court of Central Jakarta (Article 65 of the Indonesian Arbitration Law).

The decision whether or not to recognise and enforce an international arbitral award is to be made by the Chief Judge of the District Court of Central Jakarta, except where the Republic of Indonesia is a party to the dispute decided by the award, in which case the decision is made by the Supreme Court and then issued through Central Jakarta District Court (Article 66 of the Indonesian Arbitration Law).

The procedures for the recognition and enforcement of an international arbitral award are as follows:

- (i) application for enforcement of an international arbitral award shall be made after the award is submitted for registration to the Clerk of the District Court of Central Jakarta by the arbitrators or their attorney-in-fact; and
- (ii) the application for enforcement must be accompanied by:
 - (a) the original international arbitral award, or a copy authenticated in accordance with the provisions on authentication of foreign documents, together with a sworn translation of the award into the Indonesian language;
 - (b) the original agreement which is the basis for the international arbitral award, or a copy authenticated in accordance with the provisions on authentication of foreign documents, together with an official translation of the text of the agreement into the Indonesian language; and
 - (c) a certification from the diplomatic representative of the Republic of Indonesia in the country in which the international arbitral award was rendered stating that such country and the Republic of Indonesia are mutually bound by a bilateral or multilateral treaty providing for the recognition and enforcement of international arbitral awards.

(Article 67 of the Indonesian Arbitration Law.)

A decision of the Chief Judge of the Central Jakarta District Court to recognise and enforce an international arbitral award cannot be appealed (Article 68(1) of the Indonesian Arbitration Law). A decision not to recognise and enforce the award may be appealed to the Supreme Court (Article 68(2) of the Indonesian Arbitration Law). The Supreme Court must consider and decide the application for within 90 days following receipt of the appeal (Article 68(3) of the Indonesian Arbitration Law). The decision of the Supreme Court is final (Article 68(4) of the Indonesian Arbitration Law).

11.4 What is the effect of an arbitral award in terms of *res judicata* in Indonesia? Does the fact that certain issues have been finally determined by a tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

The Indonesian Arbitration Law is clear that arbitral awards are final and binding. They may not be appealed, although they may be annulled, and the Chief Judge of the relevant District Court may refuse to order the enforcement of a domestic arbitral award or the Chief Judge of the District Court of Central Jakarta may refuse to order the recognition and enforcement of an international arbitral award. To this extent, they are *res judicata* (or *ne bis in idem*, to follow the terminology preferred in Indonesia).

That said, in practice, it is not uncommon for parties facing an unfavourable arbitral award or the likelihood of an unfavourable

arbitral award to attempt to commence court proceedings grounded on theories of an unlawful act (similar to common law theories of tort). Since an unlawful act gives rise to remedies as a matter of law, rather than contract, some courts will hold that the unlawful act falls outside of the scope of the contract to which an arbitration clause pertains. In more sophisticated forms, the claim may be that the contract itself is the result of fraud or another unlawful act. In these circumstances, some Indonesian courts will accept jurisdiction and try the matter without regard to the arbitral award or ongoing arbitral proceedings.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The Indonesian Arbitration Law is silent on the standard for refusing enforcement of an arbitral award on the grounds of public policy. Court decisions refusing enforcement on grounds of public policy are sufficiently varied so that it is not possible to assert a meaningful uniform theory of what constitutes the standard. Moreover, Indonesian Law does not recognise the principle of *stare decisis*, and there is thus no institutional mechanism driving the creation of a meaningful standard.

12 Confidentiality

12.1 Are arbitral proceedings sited in Indonesia confidential? What, if any, law governs confidentiality?

The Indonesian Arbitration Law provides that proceedings in *ad hoc* arbitrations are closed to the public (Article 27 of the Indonesian Arbitration Law). Except where an agreement between the parties provides for more comprehensive confidentiality protections, it is not clear whether *ad hoc* arbitrations are confidential in any broader sense than the closed-door nature of the proceedings.

BANI Rules similarly provide that proceedings are to be closed to the public (Article 13 (2) of the BANI Rules).

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

The Indonesian Arbitration Law does not address whether information disclosed in arbitral proceedings may be referred to and/or relied on in subsequent proceedings. In the absence of an express prohibition in the Indonesian Arbitration Law, we doubt that a court or tribunal would prohibit use of the information in subsequent proceedings.

The BANI Rules on this point are similar (Article 13 (2) of the BANI Rules).

12.3 In what circumstances, if any, are proceedings not protected by confidentiality?

The Indonesian Arbitration Law is silent on this point. We suspect that arbitral proceedings may be open to the public or invited guests by agreement of the parties with the consent of the tribunal.

Under the BANI Rules, the obligation of confidentiality does not apply where so provided by Law or with the agreement of the parties to the arbitration (Article 13 (2) of the BANI Rules).

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The Indonesian Arbitration Law does not prescribe the remedies that are available in arbitrations. By default, a tribunal in a domestic arbitration may order the same remedies as a Civil Court. Incidentally, punitive damages are not available under Indonesian Law.

13.2 What, if any, interest is available, and how is the rate of interest determined?

The Indonesian Arbitration Law is silent on the application of interest to a monetary award. By default, a tribunal in a domestic arbitration may order that interest is payable on a monetary award in the same circumstances as the domestic courts. An Indonesian court may order the payment of interest on a monetary award from the date the claim is registered with the Clerk of the District Court (Article 1250 of the Indonesian Civil Code). As a matter of legal practice, court-imposed interest is 6% per annum. A different rate of interest may be imposed if provided in the contract on which the claim is based. A court may also impose a time-measured penalty if a party fails to implement an order of the court for an act other than the payment of monetary amount.

The BANI Rules permit the tribunal to impose a penalty and/or interest on a losing party that fails to comply with a final award (Article 32 of the BANI Rules).

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Pursuant to the Indonesian Arbitration Law, costs and expenses of an *ad hoc* arbitration will be charged to the losing party (Article 77 of the Indonesian Arbitration Law). However, in the event that the claim is only partially granted, the arbitration expenses shall be charged to the parties in equal proportions. Costs and expenses do not include fees and expenses of legal counsel.

The allocation for cost and expenses of arbitration in BANI will be determined by the tribunal (Articles 36 and 37 of the BANI Rules). However, costs associated with the execution of the award shall be borne by the losing party in the event the losing party does not voluntarily comply with the award (Article 39 of the BANI Rules). The respective parties shall bear the costs of their own legal representation, except where the tribunal determines that a party made proceedings unnecessarily complex or difficult (Article 38 of the BANI Rules).

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The arbitral award is not itself subject to tax in Indonesia. However, any funds or other taxable benefit received by a party will be taxable to an Indonesian tax subject in the same manner as other ordinary income.

14 Investor State Arbitrations

14.1 Has Indonesia signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)?

Yes, on September 28, 1968.

14.2 Is Indonesia party to a significant number of Bilateral Investment Treaties (BITs) or Multilateral Investment treaties (such as the Energy Charter Treaty) that allow for recourse to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID)?

Indonesia has entered into BITs with many states (more than 20). Most of those BITs stipulate ICSID arbitration.

Law No. 25 of 2007 regarding Capital Investment (April 26, 2007) (the "Investment Law") provides that if the government fails to reach an agreement for compensation or damages in the case of a nationalisation or an expropriation, the matter shall be settled by arbitration (Article 7(2) of the Investment Law). Yet, the Investment Law is silent on whether it refers to an ICSID arbitration or some other arbitration.

14.3 Does Indonesia have standard terms or model language that it uses in its investment treaties and, if so, what is the intended significance of that language?

There are no standard terms or model language that have been adopted in the BITs to which Indonesia is a party, with regard to arbitration as a dispute settlement mechanism. However, they do all provide for arbitration to settle disputes between the contracting party and an investor of the other contracting party. Most BITs

stipulate ICSID Arbitration, but some refer to *ad hoc* arbitration or to the competent court of the Contracting Party.

14.4 What is the approach of the national courts in Indonesia towards the defence of state immunity regarding jurisdiction and execution?

If Indonesia has agreed in writing to submit a dispute to arbitration, then the defence of state immunity does not apply to proceedings in the Indonesian courts regarding jurisdiction and execution.

15 General

15.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in Indonesia? Are certain disputes commonly being referred to arbitration?

Indonesia has a large oil and gas industry. Current procurement rules stipulated by the Upstream Oil and Gas Supervisory Agency (BPMIGAS) provide that, to be eligible for cost recovery, an agreement providing for the settlement of disputes by arbitration must designate Indonesia as the site of arbitration under the BANI Rules.

State-owned enterprises generally require that their procurement agreements include submission to the Indonesian courts or to arbitration in Indonesia under the BANI Rules.

15.2 Are there any other noteworthy current issues affecting the use of arbitration in Indonesia, such as pending or proposed legislation that may substantially change the law applicable to arbitration?

No, there is no pending or proposed legislation that may substantially change the Law applicable to arbitration in Indonesia.

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A full service corporate law firm, SSEK has a strong international reputation in M&A, banking & finance, infrastructure, oil & gas, mining & natural resources. We assist both domestic and foreign clients in all areas of business and ensure compliance with the complex regulatory requirements for doing business in Indonesia. The work of SSEK has been described as "a high-calibre and sophisticated service" that gives "thorough and effective advice" to all its clients (Chambers Asia 2009).