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Indonesia

Andi Yusuf Kadir¹ and Reno Hirdarisvita²

A. Legislation and rules

A.1 Legislation

International arbitration in Indonesia continues to be governed by Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (the “Arbitration Law”). Indonesia ratified the New York Convention through Presidential Decree No. 34 of 1981.

A.2 Institutions, rules and infrastructure

Indonesia has a number of arbitration institutions. These include: (i) the Indonesian National Board of Arbitration (*Badan Arbitrase Nasional Indonesia*) (BANI); (ii) the Indonesian Sharia Arbitration Board (*Badan Arbitrase Syariah Indonesia*) (BASYARNAS), which specializes in commercial disputes governed by Sharia law; (iii) the Indonesian Capital Market Arbitration Board (*Badan Arbitrase Pasar Modal Indonesia*) (BAPMI), which specializes in capital market disputes; and (iv) the Indonesian Commodities Arbitration Board (*Badan Arbitrase Perdagangan Berjangka Komoditi*) (BAKTI). Among these institutions, the most active is BANI, which is regarded as the most prominent Indonesian arbitration institution.

On 8 September 2016, BANI Pembaharuan or Renewed BANI was launched in Indonesia. It claims that it is actually a transformation of the existing BANI. The board of the original BANI has claimed that it

¹ Andi Yusuf Kadir is a partner of Hadiputranto, Hadinoto & Partners, Baker McKenzie’s Jakarta office. He is the Indonesia alternate member of the ICC International Court of Arbitration in Paris, co-chair of the arbitration and ADR commission of ICC Indonesia, committee member of YSIAC (Young Singapore International Arbitration Centre) and an arbitrator on the SIAC Reserve Panel.

² Reno Hirdarisvita is an associate of Hadiputranto, Hadinoto & Partners, Baker McKenzie’s Jakarta office. She has experience in advising and representing clients on international and domestic arbitrations, commercial litigation and compliance.

does not recognize BANI Pembaharuan and a number of court cases ensued following this launch, which will be discussed in Section B.

The duality issue has contributed to the decrease of confidence in BANI as the preferred dispute resolution forum in Indonesia. There is also concern that this development could be used improperly (eg, a party who disagrees with the other party's arbitration petition to BANI might file a new arbitration petition to BANI Pembaharuan).

B. Cases

The launch of BANI Pembaharuan stirred strong reaction from the original BANI. To date there are three court cases with respect to the dispute between these institutions. At the time of writing, all of these cases have been decided in the first instance court.

As the decisions are not legally enforceable and the courts did not declare for an immediately enforceable decision in each of the disputes, and they are subject to appeal proceedings, there are still no rights and obligations arising from the three decisions to the parties in dispute.

B.1 State administrative dispute

A state administrative dispute is a dispute between government institutions as defendants and individuals or private legal entities as plaintiffs which occurs as a result of the issuance of the decisions of the government institutions.

In *H. Kahardiman, S.H., FCBArb., et. al. v. the Minister of Law and Human Rights of the Republic of Indonesia and the Association of the Indonesian National Board of Arbitration* (as the intervening defendant) [2017],³ the arbitrators of the original BANI filed a state administrative claim against the Minister of Law and Human Rights of the Republic of Indonesia (the MOLHR) to nullify the MOLHR's

³ Jakarta State Administrative Court decision number 290/G/2016/PTUN.JKT dated 6 July 2017.



decree of 20 June 2016 approving the establishment of BANI Pembaharuan's legal entity. According to BANI, the MOLHR's approval of the establishment of a new legal entity bearing the name "BANI," while BANI has been in existence since 30 November 1977, is a violation of the principles of good governance.

In its decision, the Jakarta State Administrative Court agreed with BANI's arguments. In particular, it viewed that while BANI Pembaharuan had complied with the procedural requirements for the registration of a legal entity with the MOLHR, the MOLHR's failure to verify and clarify the name of the legal entity to be registered violated the principles of good governance. The Jakarta State Administrative Court subsequently nullified the MOLHR decree.

Assuming the Jakarta State Administrative Court's decision is upheld all the way to the Supreme Court, the MOLHR decree will no longer have legal effect and BANI Pembaharuan will lose its legal entity status. However, BANI Pembaharuan will remain in existence, as the validity of its deed of establishment was not questioned.

B.2 Civil dispute

In *Arman Sidharta Tjitrosoebono, et. al. v. M. Husseyn Umar, S.H., FcbArb., FciArb., et. al.*[2017],⁴ the heirs of the BANI founders filed an unlawful act claim against BANI's governing board at the South Jakarta district court. They argued that the appointment and designation of the defendants was not in accordance with BANI's statute and therefore the defendants were not the valid administrators of BANI. The plaintiffs also argued that as the legitimate heirs of the BANI founders, they were entitled to the ownership of BANI as well as any other rights and obligations arising from the establishment of BANI in 1977. This then led to the argument that they were also entitled to compensation for the amount of money that had been deposited by the BANI founders for the operational activities of BANI

⁴ South Jakarta District Court decision number 674/Pdt.G/2016/PN.Jkt.Sel. dated 22 August 2017.

in 1977. The plaintiffs also requested the court to legalize the deed of establishment of BANI Pembaharuan dated 14 June 2016, which was drawn up to impose the legal certainty of BANI as a legal entity.

The South Jakarta District Court viewed that the defendants were proven to be the valid heirs of the BANI founders and therefore they were entitled to the ownership of BANI as well as to obtain and manage all rights and obligations arising from the establishment of BANI. The Court also agreed with the plaintiffs that the current administrators of BANI should be deemed illegal and should step down. The Court further ruled that the establishment of BANI Pembaharuan is lawful. However, the Court rejected the claim for compensation as the plaintiffs failed to provide details of the loss suffered.

B.3 Intellectual property dispute

In *Association of BANI v. BANI and the Government of the Republic of Indonesia* [2017], BANI Pembaharuan submitted an intellectual property (IP) claim against BANI as the defendant and the Directorate General of Intellectual Property Rights, specifically the Directorate of Trademarks, as the co-defendant. BANI Pembaharuan claimed that the registration of the BANI trademark by BANI in 2002 should be deemed invalid by the court as BANI did not possess the required legal capacity to submit the registration of trademark. BANI Pembaharuan further claimed that its submission of registration of the BANI trademark in 2017 should be deemed valid.

The Commercial Court at the Central Jakarta District Court viewed that the defendant was proven to possess the legal capacity when it submitted the registration of the BANI trademark and as such the court rejected BANI Pembaharuan's claim.

In light of the ongoing disputes, parties intending to refer to BANI in their arbitration clauses should seek advice from their legal counsels to better analyze the impact of the BANI disputes to the effectivity of their arbitration clauses.



C. Funding in international arbitration

The Arbitration Law is silent on arbitration funding. With regard to arbitration costs, the Arbitration Law only stipulates that the costs will be paid by the losing party and if the claimant's petition is partially granted then the arbitration costs will be proportionately allocated between the parties.⁵

While the Rules and Procedures of the original BANI (the "BANI Rules") provide an elaboration on the payment of arbitration costs, the BANI Rules are also silent on the issue of arbitration funding. Article 36 of the BANI Rules stipulates that BANI will invoice each party for one half of the approximated costs, giving a time limit for the payment. If one party fails to pay its portion of the costs, this portion may be paid in the first instance by the other party and will be subsequently taken into account in the award with the obligation of the party failing to pay.

In practice, in proceedings before the original BANI, if a respondent fails to pay its portion of the estimated arbitration costs within the given time limit, the BANI secretariat will ask the claimant to cover the respondent's portion of payment within a certain time limit before proceeding with the hearings. If the claimant fails to cover the respondent's portion within the given time limit, BANI will remove the claimant's arbitration petition from its case register.

Article 37 of the BANI Rules provides a rule similar to the Arbitration Law, ie, in general, where one party is successful, the other party shall bear the costs; and where each party is partially successful, the costs will be allocated in accordance with the proportion of success of the claim of each party.

To date, in Indonesia the issue of arbitration (or even court litigation) funding by a third party has not been regulated and there has not been any publicly available case law discussing this issue.

⁵ Article 77 of the Arbitration Law.