

12th
Edition

2018-2019

The
Baker McKenzie
International
Arbitration Yearbook

Indonesia





Indonesia

Andi Yusuf Kadir¹ and Zarina Marta Dahlia²

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 (“Arbitration Law”), to which no legislative amendment was made in 2018. Indonesia ratified the New York Convention through Presidential Decree No. 34 of 1981.

A.2 Institutions, rules and infrastructure

Subject to the nature of the dispute, parties who choose arbitration as a dispute settlement forum in Indonesia have a number of choices about where to arbitrate. Indonesia has a number of arbitral institutions, including: (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 arbitral institution.

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 and co-chairman of the arbitration and ADR commission of ICC Indonesia.

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

On 8 September 2016, another arbitral institution with the name Badan Arbitrase Nasional Indonesia (BANI) was launched. Since then, there are two arbitral institutions that use the name BANI. The two BANIs are now referred by the public in accordance with their location, with the original BANI being referred to as BANI Mampang and the newly established BANI as BANI Sovereign. Since the launch of BANI Sovereign, there has been a duality issue as BANI Sovereign claims that it is actually a transformation of the existing BANI, whereas the board of the original BANI claims that it does not recognize BANI Sovereign. This duality issue has led to disputes on which BANI is actually the “real” BANI.

B. Cases

To date, there have been three court cases in relation to the dispute between BANI Mampang and BANI Sovereign: (i) a state administrative dispute,³ (ii) a civil dispute and (iii) an intellectual property dispute.⁴

In the state administrative dispute, the arbitrators of the original BANI filed a state administrative claim against the Minister of Law and Human Rights of the Republic of Indonesia (“MOLHR”) to nullify the MOLHR’s decree of 20 June 2016 approving the establishment of BANI Sovereign’s legal entity.

On 8 May 2018, the state administrative dispute was decided by the Supreme Court through decision No. 232K/TUN/2018 (“Supreme Court Decision”). In its decision, the Supreme Court upheld the Jakarta Administrative Court’s decision and nullified the Jakarta Administrative High Court’s Decision. In the Supreme Court Decision, the MOLHR was ordered to nullify the MOLHR decree. As

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

⁴ *Association of BANI v. BANI and the Government of the Republic of Indonesia* [2017].



a result of that decision, the MOLHR decree will no longer have legal effect and BANI Sovereign will lose its legal entity status.

BANI Mampang also won the intellectual property dispute in the first instance as the Commercial Court at the Central Jakarta District Court rejected BANI Sovereign's claim and stated that BANI Mampang was proven to possess the legal capacity when it submitted the registration of "BANI" trademark back in 2002 and therefore is the valid holder of the "BANI" trademark.

Despite BANI Mampang's victory in the state administrative dispute, this does not resolve the duality issue. The existence of the Supreme Court Decision does not necessarily mean that BANI Mampang is officially the prevailing arbitral institution as opposed to BANI Sovereign. Even though the Supreme Court Decision caused the MOLHR decree to be revoked, BANI Sovereign will remain in existence as the validity of its deed of establishment was not questioned. The Supreme Court Decision does not prevent BANI Sovereign from accepting cases that are submitted to them, which does not change the fact that there exist two practicing arbitral institutions in Indonesia using the name BANI.

To complicate matters even more, there is also an ongoing civil dispute involving the board of BANI Mampang. The civil dispute started when the heirs of BANI founders filed an unlawful act claim against BANI Mampang's governing board, arguing that the appointment and designation of BANI's board were not in accordance with BANI's statute and therefore the governing board members are not BANI's valid administrators.

The South Jakarta District Court, in the first instance, decided that the plaintiffs were proven to be the valid heirs of BANI founders and therefore they are 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. It remains to be seen how this decision will affect BANI Mampang.

To date, the duality issue and the existential struggle between BANI Mampang and BANI Sovereign has yet to be resolved. This surely has implications, especially for parties who choose BANI as their dispute settlement forum.

The uncertainty as to which BANI should prevail in the event that parties choose BANI as the dispute resolution forum is reflected in the following case between a capital management company (“Company”) and a certain International Bank (“Bank”).⁵

B.1 *Company v. Bank* [2018]

The essence of the dispute between the Company and the Bank is a breach and unilateral termination of the Conditional Sales and Purchase Agreement (“CSPA”). The CSPA provides arbitration as the dispute settlement method and BANI as the chosen dispute settlement forum.

The dispute was filed for arbitration at BANI Sovereign by the Company where the dispute was then tried and an award was rendered (“BANI Sovereign Award”). However, the dispute was also filed for arbitration at BANI Mampang by the Bank which also resulted in an arbitral award (“BANI Mampang Award”). This shows that there is a competing jurisdiction between BANI Mampang and BANI Sovereign over the same case.

The Company then filed a request to annul the BANI Mampang Award to the Central Jakarta District Court. The judges decided to reject the Company’s annulment request (“Annulment Decision”). In the Annulment Decision, the judges stated that they avoided deliberating on whether BANI Mampang or BANI Sovereign is valid as this case is about a request for an annulment and not a claim as to which BANI is valid.

⁵ For the purpose of this article, the names of the parties have been redacted.



The judges viewed that the reasons for an annulment must be taken from what is inside the decision (i.e., the merits of the case) rather than the circumstances surrounding it. They stated that the reasons for an annulment of an arbitral award are limited to the ones listed under article 70 of the Arbitration Law, which does not include the validity of the arbitral institution rendering the award.

article 70 provides that a party can request an annulment of an arbitral award if there is an indication that: (i) after the award was rendered, a party finds that the letters or documents submitted in the proceedings are false or declared false; (ii) after the award was rendered there are decisive documents that have been concealed by the opposing party; or (iii) the award was a result of fraud committed by one of the parties during the arbitration proceedings.

Further, the judges deciding the Annulment Decision also did not provide their opinion on which arbitral institution is valid (i.e., BANI Mampang or BANI Sovereign).

The Annulment Decision raises the question on the enforcement of both the BANI Mampang Award and the BANI Sovereign Award, especially if the substance of the awards are contradictory.

As it currently stands, until there is certainty on the duality issue, there will continue to be a risk of competing jurisdictions and potential complications in the enforcement of BANI awards, particularly in the case that the awards are conflicting.