

Chapter V

ALTERNATIVE DISPUTE RESOLUTION

A. ARBITRATION

The History

Arbitration has existed in Indonesia since the time of the Dutch colonial government. The Dutch brought arbitration to Indonesia along with other elements of their national legal system in an attempt to govern its new colony. The implementation of this ‘foreign’ legal system ultimately resulted in a dual legal system; namely, laws and regulations for Europeans and laws and regulations for non-Europeans. The primary premise for this development of the dual system was to ensure that, at least the Europeans and the Asians were segregated into different legal groups and subject to different laws.

One of the laws was the *Het Indonesische Reglement* (HIR). The HIR only applied to indigenous Indonesians living in Java and Madura. Complimenting the HIR was the *Burgelijke Reglement op de Rechtsvordering* (RV) which applied exclusively to Europeans. Consequently, many of these segregating legal features were incorporated into the arbitration procedures as well as a number of laws and regulations. For instance, the RV covers regulations regarding arbitration from section 615 to section 651 and section 377 of the HIR also contains an arbitration clause similar to section

705 of the *Rechtsreglemen Buitengewesten* (RBG), which applied only to Indonesians resident outside of Java and Madura.

This dualistic system was abolished at the same time as the European Court in Indonesia was terminated. The abolition is usually marked as when the laws were replaced by the HIR as the sole source of regulation. Therefore, the HIR assumed a more dominant role in the settlement of disputes through arbitration, but this transition was not without its problems. The HIR was promulgated with the intent of resolving simple disputes and matters and it was quickly evident that the simplicity envisaged in the HIR was not in accord with the increasing complex disputes arising in commercial matters. To overcome the deficiencies of the HIR in this respect the RV continued to be used to resolve more complex issues of business and commerce. The use of the RV persists in that many of the provisions of the RV are still in force to this present day.

After independence was gained on 17 August 1945, the arbitration system continued to be used, and arbitration principles were reinforced, albeit indirectly, with the enactment of Law No. 14 of 1970 on Judicial Powers. The Judicial Powers law did not expressly regulate arbitration as a process of alternative dispute resolution (ADR) but the Elucidation of Section 3(1) did stipulate that non-court dispute mechanisms were acceptable and permissible. The Elucidation has traditionally been interpreted as an endorsement of arbitration as a means to achieve a mutually acceptable resolution to a dispute without the need to resort to litigation.

In the post independence period another law that served to strengthen the use of arbitration was Law No. 1 of 1950 on the Supreme Court, particularly Sections 15 and 108 which acknowledged that the Supreme Court was an appellate institution for the purposes of arbitration. This law encouraged people to utilize arbitration as a means to resolve commercial disputes.

The most recent attempt to codify all the disparate arbitration laws and regulations into one law was Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (the “Arbitration Law”). This is the primary source of law for the arbitration system in Indonesia.

In addition to the Arbitration Law disputes in Indonesia use a variety of traditional and customary dispute resolution mechanisms. Although these adat dispute resolution mechanisms are available it is important to note that they do not maintain uniform application and are relevant only to the local communities that subscribe to the relevant customary and traditional practices. Just about every adat community in Indonesia recognizes some form of traditional dispute resolution mechanism. Examples of these mechanisms can be found in cultures of the Tuha Puet people of Aceh and the Kerapatan Adat Negeri people of Minangkabau. These traditional dispute resolution mechanisms have been in force for a considerably longer period than the modern forms of arbitration that most people are familiar with. The primary method for achieving resolution resides in the musyawarah mufakat system. Essentially, the system relies on discussions between the affected parties with a view to reaching a mutually acceptable consensus on suitable punishment or compensation. It is believed that this system leads to win-win solutions for all the relevant parties as there is no resolution to the dispute until both parties agree on the terms and conditions of any settlement.

The win-win scenario is a primary motivating force in the development of court based arbitration systems. Traditionally, court based arbitration provides a win-lose result where the parties cannot reach some form of mutually acceptable resolution before resorting to litigation. In a win-lose scenario it is likely that the losing party will feel aggrieved at their loss and appeal to the next level of the judicial hierarchy. Although this is the right of the party it often results in considerable expense and is time consuming where extended delays can have serious negative repercussions on the

success of a business. To avoid excessive costs and time delays most business are prepared to entertain ADR mechanisms as a means to substantially reduce costs and time in achieving mutually acceptable dispute resolution outcomes.

This need is recognized in the Arbitration Law and any settlement reached through an ADR mechanism is given the full force of the law and as such is legally binding and enforceable against the relevant parties to the agreement.

Arbitration and Alternative Dispute Resolution

The Arbitration Law is a compilation of all the existing and disparate arbitration laws and regulations in force at the time of its enactment. The intent in codifying all of these disparate regulatory frameworks into one definitive arbitration law was to provide legal certainty. This legal certainty was not only for the benefit of foreign investors but also for local investors who also regularly fell foul of the prevailing laws and regulations. The legal protection of large-scale investments has always been a significant impediment to continued investment as the risks quite often outweighed the benefits as even where the law may have been sufficiently clear to determine the matter the resulting enforcement mechanisms were not as certain.

Arbitration according to the Arbitration Law is defined as a mechanism of dispute resolution commenced prior to pursuit of a court based litigation process. The most notable feature of arbitration is the agreement between the parties to pursue arbitration as the foundation for resolving their outstanding dispute. Any agreement to pursue arbitration should be in the written form and signed by all parties to the agreement. The Arbitration Law stipulates that it is only commercial disputes that are to be resolved through this mechanism however any other substantive issues that are to be resolved through arbitration are to be agreed by the parties. In the event the parties elect to pursue arbitration they waive their

right to litigate this matter through the General Court system until such time the parties agree that they cannot resolve the dispute through arbitration.

The procedures and methods of arbitration are set out in the Arbitration Law as applicable guidelines to be followed by arbitration bodies and any other *ad-hoc* institution engaged in arbitration matters. The guidelines cover substantive procedural matters such as closed examination, language, time limits, election between national and international arbitration, administrative procedures, witnesses, and evidence, among others. A closed examination is simply a method of protecting the identity of the witness providing testimony as well as the protection of any confidential business information such as trade secrets which may be the source of the dispute. The guidelines are also specific on the appointment of arbiters, particularly that both parties must agree on the appointment. In the event one party does not agree to the arbiter they may veto the appointment. Nevertheless, it is important that a party cannot utilize a veto to purposefully frustrate the arbitration process.

The time limits are clearly stipulated in the Arbitration Law and arbiters are required to comply with these time limitations to ensure that the parties resolve the dispute in a timely fashion or seek a settlement through some other ADR or court mechanism. The time limit stipulates that an arbiter must examine the case within 180 days to ensure that not only is the process efficient and effective but also to facilitate the pursuit of justice. The Arbitration Law allows the Parties to determine whether any dispute that arises is subject to national or international arbitration institutions to resolve the dispute. However, once an arbitration system and institution is elected and agreed by the parties then they are bound by the prevailing rules and regulations of the agreed institution. The Law also permits arbiters to call witnesses and experts to provide testimony in pursuit of a mutually acceptable settlement agreement.

The responses to arbiter questions will normally be written testimony however where deemed necessary the arbiter may choose to hear this testimony orally. Once the arbiter is satisfied that they have heard and received all the necessary evidence to issue a decision then the arbiter may issue that decision. Any decision issued by the arbiter is final and binding and as such no appeal may be made to any court for judicial review of the decision of the arbiter. The decision must be registered at the District Court and if one of or both parties demand an execution order then the Chief of the District Court will issue the requisite order. Despite the final and binding nature of the arbiter's decision in the event that one of the parties is able to submit and prove that false testimony or forged documents were entered into evidence then it is possible for the decision to be annulled.

A request for annulment must be submitted to the Chief of the District Court within 30 days of the decision being registered with the District Court Bailiff. An annulment can take one of two forms; namely, a full annulment of the decision or a partial annulment of only the affected provisions and this decision must be handed down by the District Court within 30 days of the request being submitted. Once the arbiter's decision has entered the General Court system then it is possible to appeal an adverse determination of the District Court with respect to the arbiter's decision. However, it is the District Court decision that is being appealed and not the decision of the arbiter and appellate courts strictly interpret the law to ensure that only the affected provisions of the original request are the subject of the appeal. Any appeal must be determined by the relevant appellate court within 30 days of the appeal being accepted by the court.

In the event that parties elect to have the dispute resolved through international arbitration, then the parties must accept that it is not possible to immediately enforce a foreign judgment or arbitral award. Once an award has been made the party seeking to enforce that award in Indonesia must first register the foreign judgment at

the District Court of Jakarta to secure the necessary recognition of the award and then to apply for the relevant execution order. The Arbitration Law stipulates that the District Court of Central Jakarta may only issue a recognition order and the subsequent execution order is to be issued by the Supreme Court only where the country issuing the original foreign judgment is a party to either a bilateral or multilateral agreement providing reciprocal recognition of judgments. Even in the event that the relevant country is a party to an applicable bilateral or multilateral agreement the District Court will only issue the necessary recognition order if the foreign judgment is related to commercial business activities and the enforcement of any such judgment will not disrupt public order or offend public morals. The Supreme Court will only issue an execution order once the recognition order is registered at the court by the Bailiff. It is important to note that there is no mechanism for appeal with respect to the issue of foreign awards within Indonesia.

A foreign award seeking recognition must be submitted to the District Court in its original form with a certified translation in Indonesian, a copy of the original agreement that formed the basis of the dispute including a certified translation in Indonesian, as well as a statement letter from the Indonesian mission in the jurisdiction where the judgment was issued. In the event that the District Court refuses to recognize the foreign judgment then the holder of the foreign judgment may appeal to the Supreme Court. This appeal would be in the form of cassation and the general rules regulating cassation applications apply. The cassation application must be lodged within 90 days of the District Court's decision on the matter.

Arbitration Institution

Arbitration in Indonesia is possible within one of the four recognized arbitration institutions; namely, *Badan Arbitrase Nasional Indonesia* (BANI or the Indonesian National Arbitration Board), *Badan Arbitrase Muamalat Indonesia* (BAMUI or the

Indonesian Muamalat Arbitration Board), and *Pusat Perselisihan Bisnis Indonesia* (P3BI or the Indonesian Business Dispute Resolution Center). BANI was founded in December 1977 and was the first arbitration institution in the country. Badan Arbitrase Muamalat Indonesia (BAMUI) was established in October 1993 with a specific mandate to resolve matters pertaining to commercial activities based on the principles of Islam. Finally, the Pusat Perselisihan Bisnis Indonesia (P3BI) was established in February 1996. A recent development has been the establishment of the Badan Arbitrase Pasar Modal Indonesia (BAPMI or the Indonesian Capital Market Arbitration Board). The establishment of BAPMI has coincided with the demand for a specific arbitration authority to resolve complex and specific securities related disputes. The establishment of BAPMI is recognition of the very technical and complex disputes that arise as a result of activities on the capital market that would exceed the skills and resources of the other recognized arbitration boards.

Each arbitration board or authority has its own procedural rules. An example is BANI, BANI requires that the parties to the dispute agree to have their dispute resolved under the auspices of BANI. BANI further requires the parties to act in good faith and have a commitment to the amicable resolution of the dispute.

In addition to the recognized arbitration boards and authorities noted above there are also a number of non-court based dispute resolution institutions. These institutions are normally integrated parts of government Departments and are restricted to subject matter directly related to the services they provide. Several prominent examples include the Panitia Penyelesaian Perselisihan Perburuhan Pusat (P4P or the Central Committee for the Settlement of Labor Disputes) and the Panitia Penyelesaian Perselisihan Perburuhan Daerah (P4D or the Regional Committee for the Settlement of Labor Disputes) both of which are part of the Department of Labor and Transmigration designed specifically to resolve labor disputes. A further example is the Majelis

Pertimbangan Pajak (MPP or the Tax Review Authority) which is tasked with resolving all tax related matters and complaints.

Other examples include the Badan Pertimbangan Kepegawaian (BPK or Public Servant Review Board), the Mahkamah Pelayaran or the Maritime Court, and the Consumer Dispute Resolution Body (Badan Penyelesaian Sengketa Konsumen/ “BPSK”) as mandated in the Consumer Protection Law.

B. MEDIATION and CONCILIATION

The Arbitration Law regulates not only arbitration but also other alternative methods of dispute settlement including those specifically stated in Chapter 2 of the Law. Interestingly the Arbitration Law itself does not specify the ADR mechanisms that may be utilized by parties in dispute however the Elucidations to the Law do state that mechanisms such as consultation, negotiation, mediation, conciliation or expert judgment may be used in an attempt to resolve a dispute. The mechanism noted above are not that far removed from traditional adat means of dispute resolution noted earlier, particularly the concept of the *musyawarah mufakat*.

In mediation and conciliation the parties are required to find solution for their disputes on their own. There is not usually a third independent or impartial party appointed to oversee the process. In the event a mediator is used it is important to note that the mediator’s role is simply to facilitate the discussion process and to assist the parties in reaching an agreement or resolution. The role of the mediator is not to adjudicate or resolve the dispute for the parties. This is distinct from the role of an arbiter appointed as part of an arbitration process. In arbitration, the arbiter is appointed by the parties to decide and make decisions about the dispute, and the result is potentially a win-lose solution. Nevertheless, some parties

still prefer arbitration to adjudication as the parties still maintain some control of the process. Clearly, any control the parties have during mediation, conciliation, or arbitration is lost in the court based litigation process.

The Arbitration Law sets out the guidelines that are to be used in the ADR process from the commencement of an action to the issue of a mutually agreed settlement. The most essential element of the ADR process is that the parties participate in good faith. The initial step involves the parties coming together in a face-to-face meeting with a view to achieving settlement and a written agreement to the parties expressing the terms and conditions of the agreement concluded. There are no specific guidelines or rules on how the meeting should be conducted nevertheless the parties have only 14 days to reach a settlement. In the event the parties do not reach settlement in 14 days they may request the assistance of an independent and impartial third party to assist them through the process for a further 14 days.

In the event that the parties and the independent and impartial third party after a period of 28 days is unable to reach a mutually acceptable agreement, then the parties can seek to enter formal mediation or arbitration. Once a mediator is appointed the process should commence within 7 days and must be completed within 30 days of being commenced. Any decision is final and binding on the relevant parties once they have signed the documents indicating their respective agreement to the terms and conditions of the settlement. The settlement agreement reached between the parties is to be registered at the District Court within 30 days of agreement and any enforcement order will be issued within 30 days of registration of the settlement agreement.