Reconciling the Conciliators: The BANI Split in Indonesia

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Increased investment in South East Asia has led to a growth in the supply and demand for dispute resolution services in the region. Indonesia is no exception, with disputes increasingly submitted to the *Badan Arbitrase Nasional Indonesia* ("BANI") – the country's most popular and well recognised arbitration centre.

Recently however, BANI has seemingly split into two entities; the original entity created in 1977 ("BANI Mampang") and a new entity formed in 2016 that calls itself *BANI Pembaharuan* ("BANI Sovereign"). These two centres have been battling it out across the Indonesian court system to determine which entity has the legitimacy to call itself "BANI". Meanwhile, parties have been left not knowing which institution should be administering their disputes. This brings further uncertainty to a jurisdiction which should be embracing arbitration as an essential tool to support the rule of law.

The Arbitral Mitosis

BANI was established in 1977 as an independent body to promote the use of out of court dispute resolution. Its foundation was initiated by the Indonesian Chamber of Commerce and Industry and driven by three renowned Indonesian legal experts: Professor Raden Soebekti, Mr. Haryono Tjitrosoebono, and Professor Priyatna Abdurassyid.

In late 2016, former BANI arbitrator Anita Kolopaking established BANI Sovereign as a successor organisation to BANI, supported by high-profile names in the Indonesian arbitration circle. BANI Mampang immediately denounced BANI Sovereign as illegitimate, claiming that it had conducted an unlawful act by establishing an organization with the same name as BANI Mampang. BANI Sovereign however argued that BANI was set up as a civil partnership as defined under Article 1618 of the Indonesian Civil Code and therefore the founding partners have the right to bequeath the organization to their heirs. BANI Sovereign further argued that as it is supported by the heirs of 2 of BANI's 3 founders, BANI Sovereign was in fact the rightful heir to BANI and that BANI Mampang's current officers and management are illegitimate.

BANI Sovereign subsequently obtained legal entity status through a decision of the Ministry of Law and Human Rights ("MOLHR Decision") and set up offices in South Jakarta – not far away from BANI Mampang's offices.

These events put BANI Mampang and BANI Sovereign onto a direct collision course. To date, we understand that BANI Mampang and BANI Sovereign are engaged in three ongoing court proceedings and police proceedings, with neither side backing down.

Round One – the South Jakarta District Court

In September 2016, BANI Sovereign submitted a claim to the South Jakarta District. By August 2017, the District Court had ruled in favor of BANI Sovereign. Among other things, the Court decided that although BANI was founded as a non-profit organisation, it had become a for-profit organisation and could therefore be regarded as a civil partnership. As a result, the organisation could and indeed had (indirectly) been bequeathed to the heirs of the founders. The Court also declared that BANI Sovereign's officers were the rightful officers of BANI and that the current BANI Mampang officers were illegitimate. BANI Mampang's officers were therefore ordered to hand-over management of BANI to BANI Sovereign. BANI Mampang has appealed this decision and it is currently under review by the Jakarta High Court.

Round Two – the State Administrative Court

In December 2016, BANI Mampang submitted a claim to the State Administrative Court, arguing that the MOLHR Decision that approved the establishment of BANI Sovereign should be revoked. In July 2017 the State Administrative Court found in favour of BANI Mampang and revoked the MOLHR Decision. The official copy of the decision is not yet publicly available, but media statements indicate that BANI Mampang argued that it is the original, internationally known BANI institution, and that BANI Sovereign's use of the name "BANI" infringes on BANI Mampang's rights. BANI Sovereign has appealed this decision and through a decision dated 21 November 2017 it won the appeal. The State Administrative High Court considers the nature of the dispute to not be an administrative law dispute but a civil law dispute, therefore the State Administrative High Court does not have jurisdiction over the issue and the State Administrative Court's decision therefore must be revoked.

Round Three – the Jakarta Commercial Court

In July 2017, BANI Sovereign submitted a claim to the Jakarta Commercial Court, arguing that BANI Mampang's trademark registration of the brand "BANI" should be revoked. In September 2017, the Jakarta Commercial Court found in favour of BANI Mampang and declared BANI Mampang as the rightful owner of the trademark over the brand "BANI". On 10 November 2017, BANI Mampang issued a statement saying that this decision has become final and binding, because no appeal was filed by BANI Sovereign, therefore making BANI Mampang the only rightful party to use the name "BANI" and "*Badan Arbitrase Nasional Indonesia*".

Round Four – Police Report

Publicly available sources also suggest that a police report was filed by BANI Mampang against BANI Sovereign for misuse of the BANI trademark. Under Indonesia's Law No. 20 of 2016 on Trademark and Geographical Indications, using a registered trademark belonging to another is punishable by imprisonment of up to 5 years and/or a fine of up to IDR 2 billion (approximately USD 147,000). However, as of the date of this article, there do not seem to have been any developments on this report and no suspect has been named.

The Way Forward

Although not identical, BANI's current situation shares similarities with CIETAC's situation following the 2012 split of its Shanghai and Shenzhen sub-commissions to form the Shanghai International Economic and Trade Arbitration Commission ("SHIAC") and South China International Economic and Arbitration Commission ("SCIA"). Following the sub-commissions' departures, the Chinese courts issued conflicting "pro-CIETAC" and "pro-sub commission" decisions, which made it difficult for parties with CIETAC arbitration clauses to know whether their arbitration was being dealt with by the correct

institution. Clarity only returned in 2015 when the Supreme People's Court specified which institutions could administer which cases. The Supreme People's Court issued a Reply, a judicial interpretation that took effect on 17 July 2015. In the Reply, The Supreme People's Court established the "Golden Rule", which set out that for a party considering commencing arbitration proceedings in connection with an arbitration agreement affected by the split, the key date for consideration is when the relevant sub-commission changed its name. Further analysis on this issue is provided by Matthew Townsend in his August 2015 post in the Kluwer Arbitration Blog.

Parties caught in the current crossfire between BANI Mampang and BANI Sovereign face similar problems depending on the nature of the arbitration agreements.

For parties whose arbitration agreements are still being negotiated, there is the (slight) benefit of knowing about the existence of this ongoing dispute. If those parties are obliged to opt for a local arbitration institution, one option is to keep the reference specific by referring to the exact BANI institution that the parties intend to engage. For example, the parties could do this by stating the address of the BANI institution. The risk of this approach is that a future court could find that either BANI Mampang or BANI Sovereign has no legitimacy, leaving parties, which have specified the illegitimate arbitration centre with problems.

However, if parties cannot agree on a specific BANI institution and prefer to safeguard their arbitration agreement from future courts declaring one of the BANIs to be illegitimate, another option would be to keep the reference vague by simply referring to "BANI" arbitration, and then going to either BANI Mampang or BANI Sovereign when the dispute arises. The risk of this approach is that when the dispute arises, the parties could continue to disagree on which BANI should administer the dispute. The parties could separately decide to proceed before their preferred BANI, leading to concurrent proceedings and potentially contradictory awards.

For parties already subject to "BANI" arbitration clauses drafted before the establishment of BANI Sovereign, there are also no easy answers. Arguably as a matter of Indonesian contract law, the parties can only be said to have considered arbitrating before BANI Mampang, given that BANI Sovereign did not exist at the time of their contract. However, this argument requires one to temporarily put aside BANI Sovereign's argument that it is the successor of BANI, and therefore the entity that should inherit all arbitration agreements that simply provide for "BANI" arbitrations. Again, there are no easy answers.

In any case, given the increasing investment in South East Asia through China's One Belt One Road Initiative and the increase of cases being examined by BANI Mampang, alternative dispute resolution methods, especially arbitration should thrive in Indonesia. Clarifying this matter should therefore be a priority for the Indonesian government and relevant stakeholders. Even though there are rumours that the Indonesian Chamber of Commerce and Industryis trying to settle the fight between BANI Mampang and BANI Sovereign, the fight is nowhere close to the final bell.