Kluwer Arbitration Blog

# Indonesian Arbitration Law Turns 21: A Timely Metamorphosis?

Albertus Aldio Primadi (Asian International Arbitration Centre) and Rizki Karim (KarimSyah Law Firm) · Monday, August 24th, 2020 · Asian International Arbitration Centre (AIAC)

12th August 2020 marks the 21st anniversary of the Indonesia's Law Number 30 Year 1999 on Arbitration and Alternative Dispute Resolution ("Arbitration Law").[1)] Culture wise, many countries, especially Indonesia, venerate 21 years of age as the start of adulthood, which leads to change. There have been calls on the amendment of the Arbitration Law.[2)] The general consensus is that it is about time to revise the Arbitration Law to keep up with the current arbitration trends and practices, and to accommodate the ever-changing demands in the dispute resolution industry.

**Significance of the Amendment to the Arbitration Law to Indonesia**

Ensuring an up-to-date arbitration legal framework is crucial as it affects the confidence of the users, particularly foreign parties, to have arbitration seated in that jurisdiction. The 2018 International Arbitration Survey by the Queen Mary University of London concludes that arbitration users prefer to choose a seat that has favourable 'formal legal structure', which consists of "*general reputation and recognition of the seat*", "*neutrality and impartiality of the local legal system*", and "*national arbitration law*". The latter is particularly relevant here because a national arbitration law serves as the primary framework and bedrock upon which an arbitration takes place.

Familiarity of an arbitration law is one factor to consider – which could explain how 3 out of top 5 seats of arbitration in the world have adopted the UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006 (the "Model Law"). To date, the Model Law has been adopted by 83 states. Such figure is a testament to the success of the Model Law in establishing uniformity of procedural law on a worldwide scale.

Indonesia has not adopted the Model Law, which was not necessarily a bad thing. The Arbitration Law – which is primarily inspired by the mid-19th Century Dutch-originated code of civil procedure but which also took references from a number of other sources, including the Model Law itself – was considered to be more culturally and legally apt for Indonesian legal framework at the time. Notwithstanding that, the fact that it has not been revised for over two decades means the Arbitration Law could use some amendments for it to keep up with current international arbitration

practices and be more appealing to international users.

This post will examine a few feasible points of amendments that Indonesia could adopt to promote itself as the next arbitration hub in the region.

## Clarifying the Grounds of Annulment of Arbitral Awards

Many national arbitration laws permit annulment of an arbitral award only on grounds analogous to those set out in Model Law, which are aligned with those grounds for non-recognition of an award under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award (the "New York Convention"). This approach is consistent with the users' desire for a neutral forum and a final and expeditious dispute resolution means.

However, the Arbitration Law's grounds for annulment of arbitral awards seem to depart from the Model Law. Article 70 of the Arbitration Law provides that an award can be annulled on three limited grounds: forgery, discovery of concealed material documents, and deceit. The exclusion of the well-accepted grounds for annulment as recognised in the Model Law, e.g. improper proceeding and overreaching jurisdiction, is a concern as it raises a red flag to international parties who are familiar with Model Law.

Further and ironically, the Arbitration Law's Explanatory Note exacerbates the vagueness of the scope on annulment by providing that the grounds for annulment arbitral awards, are '*among others'*, the three grounds listed in Article 70 of the Arbitration Law. The additional terminology of '*among others'* suggests the three grounds are merely illustrative and non-exhaustive. Indonesian Court practices have mirrored this inconsistency; with some courts upholding that Article 70 of the Arbitration Law is exhaustive in, e.g. judgments in January 2012 and May 2012,[3] while others have employed the wording of '*among others'* to explore other grounds for annulment, e.g. August 2013 judgment.[4]

A clarification is required to the above conundrum: whether Indonesia wishes to maintain the relatively strict limitations to three grounds, or if it wishes to have a non-exhaustive list, and leave it to respective courts to determine what may or may not be considered as an annulment ground. One possible solution is to mirror the well-accepted grounds for annulment of an award under the Model Law, which are already in line with the spirit of New York Convention. After all, the Model Law seeks to ensure a pro-enforcement regime for both domestic and foreign arbitral awards.

## Judiciary Assistance to Enforce Tribunal-Ordered Interim Measure

Despite a strong historical tendency towards voluntary compliance with arbitral awards and orders, tribunal-ordered interim measures are not always complied with.[5] Accordingly, judicial enforcement of a tribunal's interim measures may be essential to effectuate the tribunal's direction. Otherwise, obtaining an interim measure from an arbitral tribunal will be in vain.

Unfortunately, this is the case in Indonesia, where arbitral tribunals are empowered to issue interim measures, yet judicial assistance relating to the enforcement of tribunal-ordered interim measures

is not available to enforcing parties. Parties may only seek judicial assistance for the appointment of arbitrator, determination on the challenge of arbitrator, and the enforcement of the final award.

In contrast some jurisdictions have enacted specialised legislation providing for judicial enforcement of tribunal-ordered provisional measure.[6] Similarly, the Model Law is designed to permit specialised enforcement of "orders" of provisional relief. Adopting a similar approach would certainly be helpful to increase the efficacy of arbitration in Indonesia.

**Facilitating the Enforcement of Foreign Arbitral Awards**

As a contracting state to the New York Convention, Indonesia has committed to *"encourage recognition and enforcement of awards in the greatest number of cases as* possible".[7] While, over the years, foreign arbitral awards have been generally recognised and enforced in Indonesia, there is room for improvement to streamline the process and further remove certain stumbling blocks for enforcement.

*First,* foreign arbitral awards are only enforceable upon the issuance of exequatur by the Head of Central Jakarta's District Court. The Arbitration Law, however, does not determine any time limit for such issuance. Practitioners have concluded that the issuance of exequatur could take 3 months to 18 months from registration. For legal certainty, a time limit is certainly desirable.

*Second,* the Arbitration Law requires any arbitral awards – both domestic and foreign – to be registered by the respective arbitrators or their proxies. This has proven to be an obstacle and rather contradictory to the fact that a tribunal is deemed to be *functus officio* following the final award's issuance. Mandating tribunals to be responsible for the enforcement phase is a hassle, especially in cases involving foreign arbitrators. Even when a proxy is used, the process would still require a power of attorney from the arbitrators that have to undergo a verification and legalisation process in the arbitrators' respective country of residence; the complications of such process varied in each country. Ideally, the parties should be able to register the awards without reference to the arbitrators.

*Third*, the Arbitration Law requires enforcement of foreign award to be accompanied with a certification from the Indonesia's diplomatic representative confirming the reciprocity of enforcement of foreign arbitral award between Indonesia and the country where the arbitration is seated. In other words, it requires a confirmation that Indonesia and that other country are signatories to the New York Convention. While this requirement might have been relevant back in 1999, nowadays such confirmation can be easily verified and monitored through others means, such as the internet.

**Conclusion**

As the Arbitration Law steps into "adulthood", it is worth considering certain amendments to keep up with the current landscape of international arbitration practices. The above-mentioned points of amendments are by no means exhaustive; other features should also be considered, such as legalisation/regulation on third-party funding, introduction of emergency arbitrator, clarification on

the definition of the other forms of alternative dispute resolutions, and possible synchronisation with Singapore Mediation Convention.

Indonesia has been dubbed as the “Sleeping Tiger” of Asia, an embodiment to its exponential growth and hidden potential. Hopefully, by amending the Arbitration Law, users will more likely perceive Indonesia as an emerging dispute resolution hub in the region – let the tiger awake!

---



References

**?1** Any comments/views expressed in this article are those of the authors only. They do not reflect the views of KarimSyah Law Firm or AIAC unless otherwise stated.

**?2** Jakarta Post, *Lawyers, business players call for revision of business dispute resolution law*, 2019

**?3** Supreme Court, Judgement No. 268 K/Pdt.Sus/2012 (25 May 2012), page 43; Supreme Court Judgement No. 709 K/Pdt.Sus/2011 (24 January 2012), page 18.

**?4** See for example, Supreme Court Judgment No. 367 K/Pdt.Sus-Arbt/2013 (26 August 2013), page 46.

**?5** Gary B. Born, International Commercial Arbitration (2nd Edition, 2014), page 2511.

**?6** See for example, Section 19(H) of Malaysia Arbitration Law 2005 (as amended in 2011 and 2018).

**?7** Official Published Text of New York Convention, page 2.

This entry was posted on Monday, August 24th, 2020 at 8:00 am and is filed under Annulment, Enforcement, Indonesia, Interim measures, New York Convention, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UNCITRAL Model Law
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.