IBA International Construction Projects Committee

ADR in Construction

Indonesia

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Table of Contents

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Table of Abbreviations

ADR	Alternative Dispute Resolution
Arbitration Law	Law No.30 of 1999 Concerning Arbitration and Alternative Dispute Resolution
BANI	Indonesian National Arbitration Body (*Badan Arbitrase Nasional Indonesia)*
BANI Rules	Rules and Procedures of BANI
Civil Code	Indonesian Civil Code *(Kitab Undang-undang Hukum Perdata (KUHPer) - S 1847-23)*
Construction Law	Law No. 18/1999 and Regulation No.29/2000
DAB	Dispute Adjudication Board
DRB	Dispute Resolution Board
EPC Contract	Lump-sum fixed price date certain engineering, procurement and construction contract
FIDIC	Fédération Internationale Des Ingénieurs-Conseils
ICC	International Chamber of Commerce
IPP	Independent Power Producer
Law No. 18/1999	Law No.18 of 1999 on Construction Services
Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
PLN	PT PLN (Persero) – the Indonesian state electricity utility
PPA	Power Purchase Agreement
Regulation No.29/2000	Government Regulation No. 29 of 2000 Concerning the Provision of Construction Services
SIAC	Singapore International Arbitration Centre

1. Background

1.1. Introduction – construction ADR in Indonesia

Indonesia is a civil law jurisdiction, and as such the doctrine of *stare decisis* does not exist which means that case law does not have binding force; at best it has persuasive value, and it is not uncommon for courts to arrive at opposite decisions when presented with the same facts. The promulgation of Law No.30 of 1999 Concerning Arbitration and Alternative Dispute Resolution (the "Arbitration Law") replaced Articles 615 to 651 of the Code of Civil Procedure *(Reglement op de Burgerlijke Rechtsvordering).*

Prior to the promulgation of the Arbitration Law domestic arbitration awards were enforced with few problems; however foreign-rendered awards for which enforcement was sought in Indonesia were not so fortunate. Until the advent of the Arbitration Law orders of Exequatur for foreign-rendered arbitration awards had to be issued by the Supreme Court, a process which could take several years in the normal course of things. Under the Arbitration Law enforcement of an international award by order of Exequatur is delegated to the court of first instance rather than the Supreme Court, which means that enforcement of international and domestic awards follow basically the same process.

In the oil and gas industry, arbitration is very commonly used to resolve disputes. The rules of SKKMIGAS *(Satuan Kerja Khusus Pelaksana Kegiatan Usaha Hulu Minyak dan Gas Bumi)*, the Special Task Force for Upstream Oil and Gas Business Activities, provide that an agreement for procurement of services and goods in the oil and gas sector that provides arbitration for the settlement of disputes (i) must designate Indonesia as the seat of arbitration and (ii) such arbitration must be settled pursuant to the rules of arbitration of the Indonesian National Arbitration Body (*Badan Arbitrase Nasional Indonesia* or "BANI").

In the private power sector, the power purchase agreement ("PPA") between the independent power producer ("IPP") and the state utility, PT PLN (Persero), must be governed by Indonesian law, and dispute resolution is typically by arbitration, typically pursuant to the rules of the International Chamber of Commerce ("ICC") or the Singapore International Arbitration Centre ("SIAC"), with the seat in Singapore or another neutral venue. However, for smaller power projects, e.g. mini-hydro plants, the arbitration clause often provides for an Indonesian seat and BANI arbitration. The engineering, procurement and construction works will usually be undertaken under a lump-sum fixed price date certain contract ("EPC Contract") by a consortium of domestic and foreign contractors/equipment suppliers. The EPC Contract will typically be drafted "back-to-back" with the PPA such that the dispute resolution provisions will be the same, i.e. arbitration pursuant to the rules of the ICC or the SIAC, with the seat in Singapore or another neutral venue.

With the lack of certainty in the domestic courts coupled with the multi-level appeals process, the advent of an arbitration-friendly Arbitration Law and the fact that construction contracts are becoming ever more complex with an increasing presence of foreign participants, it is not surprising that there has been a significant move towards arbitration as the final dispute resolution process in construction contracts.

1.2. Which type of dispute resolution is most often used in construction matters in your jurisdiction?

Arbitration is the preferred method of final dispute resolution for construction disputes in Indonesia, although it is common for a phased approach to be used whereby a dispute is first referred to senior management and if the dispute cannot be resolved by negotiation between such senior management, the dispute will be referred to arbitration. Occasionally, mediation may be included as an additional step in the process; and as described below, if a dispute is referred to the court for final settlement, court-annexed mediation is a mandatory first step prior to a hearing in the court.

1.3 Can you give reasons why one type of dispute resolution is preferred above another?

The alternative to arbitration is litigation in the courts, but the Indonesian judiciary is lacking in transparency and also in experience of dealing with complex construction cases.

1.4 If there have been changes in preference in the past ten years, what has caused this?

The move towards arbitration was initiated by the promulgation of the Arbitration Law which, while it does not follow the Model Law, is nevertheless arbitration-friendly and limits the jurisdiction of the courts in the arbitration process.

1.5 Are there special laws on resolving construction disputes in your jurisdiction (for example statutory adjudication)?

Law No.18 of 1999 on Construction Services ("Law No.18/1999") and implementing regulations, including Government Regulation No. 29 of 2000 Concerning the Provision of Construction Services ("Regulation No.29/2000") (together the "Construction Law") provides that construction disputes may be settled out of court by conciliation, mediation or arbitration, but there are no special regulations governing construction disputes, such as statutory adjudication.

1.6 Are there provisions in the legislation concerning civil procedure or in the civil code (if your jurisdiction has one) or other legislation that would apply to binding decisions of non-statutory dispute adjudicators?

The Construction Law provides that construction disputes settled through conciliation or mediation shall have such settlement recorded in a written agreement which shall be final and binding and shall be implemented in good faith.

In order for such agreement to have the same binding force as a court judgment or an arbitration award, it must be registered by way of filing a lawsuit to request the court to sanction the settlement agreement (*putusan perdamaian/ akte van dading*).

The procedure is as follows:

1. the parties sign a settlement agreement;
2. one of the parties files a lawsuit requesting the court to sanction the settlement agreement;
3. in the hearing, the judge will seek confirmation from the parties whether the settlement agreement:
    a. is in accordance with the mutual consent of the parties;
    b. does not violate public policy;
    c. does not cause losses to a third party;
    d. is executable; and
    e. is entered into by the parties in good faith.
4. If the judge receives the confirmation on the above, he will issue a decision to sanction the settlement agreement. The settlement decision (*putusan perdamaian/akte van dading*) will have the same effect as that of a final and binding decision of the court. This procedure is stipulated in the Supreme Court Regulation No.1/2008 on the Mediation Procedure in Court which according, to the registrar of the Central Jakarta District Court, is also applicable to an out-of-court mediation/conciliation.

"*Bindend advies*" can be deemed to be a settlement agreement if the disputing parties mutually agree to such a dispute settlement method. This also applicable to conciliation which, in the Indonesian context, is understood to be an alternative dispute resolution mechanism whereby the parties, without the assistance of a neutral third party (e.g. mediator), negotiate in order to reach a settlement. Based on Article 6 (7) of the Arbitration Law, such a settlement agreement, if it is registered with the court, will be final and binding upon the parties.

1.7 What type of binding decisions are known in your jurisdiction that are used for construction disputes (please state the names used in the language of your jurisdiction and describe the main characteristics).

There are no special types of binding decisions applicable only to construction disputes. Arbitration awards rendered in compliance with the Arbitration Law are final and binding, and as described above, settlement agreements arising from mediation or conciliation may be rendered final and binding through a specific court procedure.

A binding decision by an adjudicator or an expert is only binding as a contractual obligation. Typically, there would be an agreement between parties to appoint an adjudicator to settle their dispute, and in the agreement, it would be stipulated that the decision by the adjudicator will be registered with the court by either party. Thus, if the losing party refuses to register the decision of the adjudicator, the winning party may register it. The registration of the decision with the court will make it final and binding and executable.

Unless the parties incorporate such binding decision in a settlement agreement and follow the process described above, enforcement of such binding decision against a recalcitrant party may only be accomplished through litigation or arbitration, depending upon the relevant contractual provisions.

1.8 What are the legal differences in your jurisdiction between arbitration and binding decisions (adjudication)? Are there specific procedural rules for arbitration that do not apply to binding decisions/adjudication/expert determination decisions?

As mentioned above, there are no laws which specifically apply to decisions from adjudication or expert determination; these mechanisms are creatures of general contract law. Even if a contract provides that a decision of an adjudicator or expert is final and binding, unless the parties record such decision in an agreement and obtain *putusan perdamaian/akte van dading* from the court as explained above, the enforcement of any such decision would require the same court or arbitral procedure as any other contractual claim.

The Arbitration Law recognises that arbitration awards are final and binding, subject to certain conditions which mirror those of the New York Convention, and subject to specific registration procedures, which differ between domestic awards and international awards.

1.9 Does your country have special institutions (arbitral or otherwise) dealing with construction disputes? What is the role of these institutions, for example are they supervising the proper conduct of the proceedings or involved in appointments?

There are no special institutions which deal specifically with construction disputes (i.e., there is no equivalent to the Technology and Construction Court in the UK). In construction contracts, disputes are often specified to be finally settled by binding arbitration pursuant to the rules of arbitration of BANI.

However, where construction contracts are related to a project which is financed by limited-recourse project finance from international commercial lenders and/or export credit agencies, it is much more common for such construction contracts to provide for final dispute resolution pursuant to the arbitration rules of the ICC or the SIAC, with the seat in Singapore.

The BANI arbitration panels currently comprise 69 Indonesian arbitrators and 43 foreign arbitrators, many of whom have significant experience in arbitration of construction disputes. BANI is an arbitral institution which administers those arbitration proceedings undertaken pursuant to the Rules and Procedures of BANI (the "BANI Rules"), and is also involved in the appointment of arbitrators.

1.10 How prevalent is mediation for construction disputes in your country? What other forms of non-binding dispute resolution for construction disputes are used in your country (for example dispute recommendation boards)? Are hybrid forms of dispute resolution used for construction disputes (for example recommendations that become binding after some time if not contested).

Mediation is not commonly included in construction contracts as a step in the dispute resolution process; however, Article 45 of the Arbitration Law provides that on the day of the first hearing, the arbitral tribunal shall endeavour to encourage the parties to reach an amicable settlement. Article 20 of the BANI Rules also provides that the arbitral tribunal shall endeavour to encourage the parties to achieve an amicable resolution either on their own or with the assistance of an independent mediator or facilitator or with the assistance of the arbitral tribunal. In the event that a settlement is reached, the arbitral tribunal shall memorialise it in a consent award, which is final and binding and enforceable in the same manner as an award of the arbitral tribunal. There are no hybrid forms of dispute resolution.

If a construction contract does not contain an arbitration agreement and the parties do not agree to refer a dispute to arbitration, or if there is an express provision that disputes shall be settled finally through litigation in the domestic court, Indonesian law provides for mandatory court-annexed mediation prior to a hearing in the court of first instance. Supreme Court Regulation No.1 of 2008 provides that such court-annexed mediation may only be conducted by mediators who have participated in training organised by an entity accredited by the Supreme Court.

1.11 Would FIDIC Red Book type DAB decisions be considered valid evidence in subsequent arbitration or court proceedings in your jurisdiction? What would the role of these DAB decisions be for further proceedings?

A DAB decision would be considered to be a contractual right/obligation and could be introduced as evidence by the party wishing to enforce the provisions of such DAB decision in court proceedings or arbitration proceedings. If a party wished to challenge the DAB decision and open up the dispute for a final decision by the court or by an arbitral tribunal, the DAB decision would be admissible as evidence in such proceedings.

1.12 What form of ADR is considered to be cost effective for construction disputes in you jurisdiction? Please explain what type of costs is usually allocated to which party and how this compares to court litigation.

Typically, the parties in dispute will make every attempt to resolve the dispute through negotiation, often going up through several management levels of their companies. Occasionally, the parties may agree, either in the dispute resolution clause or on an *ad hoc* basis, to attempt to settle the dispute by mediation.

Although arbitration is more expensive than court litigation, the majority of participants in the construction sector prefer arbitration as the final dispute

resolution method because (i) the judiciary is lacking in transparency and experience in complex construction disputes; and (ii) the appeals process from the court of first instance (State Court) through the High Court and to the Supreme Court may take years longer than arbitration proceedings.

Under BANI arbitration, normally each party will be responsible for its own legal costs, except that where the claim was frivolous or where one party has caused innumerable delays or difficulties in the proceedings, the arbitral tribunal may award costs against such party. The arbitral tribunal has the authority to allocate the costs of the arbitration, and typically, such costs are allocated in proportion to the success of each party's claim.

2. Dispute resolution agreements

2.1 What are the requirements for a valid arbitration agreement and a valid multi-party arbitration agreement? Would clause 20.6 of the FIDIC Red Book be considered a valid arbitration clause? Would this clause prevent a party from seeking interim measures from a competent court?

Article 1 (3) of the Arbitration Law provides that an

> *"Arbitration agreement shall mean a written agreement in the form of an arbitration clause entered into by the parties before a dispute arises, or a separate written arbitration agreement made by the parties after a dispute arises."*

There are no specific provisions under the Arbitration Law or under BANI Rules regarding multi-party arbitration agreements; however, Article 10(5) of the BANI Rules provides that in multi-party arbitrations, for the purposes of nomination of arbitrators, all parties acting as the claimant shall be considered as a single party claimant and all parties being claimed against shall be considered as a single party respondent.

Clause 20.6 would be considered to be a valid arbitration agreement under the Arbitration Law and the BANI Rules. A party would be prevented from seeking interim measures from the court since under prevailing civil procedure rules a party cannot file a stand-alone application for interim measures as an application for injunctive relief must be filed with the claim on the merits of the case, but not from the arbitral tribunal. Article 3 of the Arbitration Law expressly provides that the court shall have no jurisdiction to try disputes between parties bound by an arbitration agreement, and Article 11 states that the existence of a written arbitration agreement prohibits the right of the parties to seek resolution of disputes through the court.

Article 32 of the Arbitration Law and Article 20(5) of the BANI Rules provides that the arbitral tribunal may make interlocutory decisions as it deems appropriate, and the BANI Rules goes one step further and gives the arbitral tribunal authority to impose

sanctions on a party which fails or refuses to comply with any ruling made by the arbitral tribunal.

2.2 Are there any restrictions on enforceability or validity of arbitration clauses regarding standard forms of contracts, including consumer protection laws or similar laws? Is this the same for other forms of ADR?

With respect to contracts not involving a consumer, there is no legislation restricting the enforceability or validity of an arbitration clause in any commercial contract, provided that the arbitration clause complies with the requirements of the Arbitration Law, and the dispute is arbitrable.

Law No. 8 of 1999 on Consumer Protection gives consumers the right to choose out-of-court resolution of disputes through the Consumer Dispute Settlement Agency (through ADR including arbitration) or through litigation in the courts.

2.3 In the standard conditions that are mostly used for construction projects in your country, is there a clause on arbitration? If so, is reference made to an arbitral institution and the rules of this institution? Are other forms of dispute resolution more common in these standard conditions?

There are no standard forms of contract in Indonesia that are equivalent to those in other jurisdictions, such as Singapore or the UK, although occasionally the FIDIC Red and Yellow Books are used. In some sectors, such as the oil and gas sector, it is common for an owner to utilise its in-house standard form of contract, and almost invariably, these include a clause on arbitration, and even where international contractors may be involved, reference is often made to the BANI Rules.

In the energy sector, the development of independent power producer plants most often are undertaken under bespoke engineering, procurement, construction turnkey-type contracts, and final dispute resolution is invariably through arbitration in accordance with the procedural rules of one of the international bodies, such as the SIAC or ICC with the seat outside Indonesia.

Apart from a preliminary step of negotiation aimed at an amicable settlement as a pre-requisite to final resolution by arbitration, it is rare for any other form of ADR to be included in these contracts.

2.4 May arbitration agreements bind non-signatories (for example subcontractors)? If so, under what circumstances? Is this different for other forms of ADR?

Arbitration agreements do not bind non-signatories unless such persons expressly agree in writing to be so bound. However, the concept of "piercing the corporate veil" is to be found in Law No. 40 of 2007 on Limited Liability Companies, and although there are no precedents of corporate veil piercing in Indonesia, it is possible that an

arbitration clause could bind a non-signatory if the conditions for veil piercing were satisfied.

With respect to the participation of third parties in arbitral proceedings, Article 30 of the Arbitration Law provides that:

> *"Third parties outside the arbitration agreement may participate and join themselves into the arbitral process, if they have related interests and their participation is agreed to by the parties in dispute and by the arbitrator or arbitration tribunal hearing the dispute."*

2.5 If expert determination is not supported by legislation and the binding nature of expert determination derives solely from the agreement of the parties to submit their dispute to the expert, is this process mandatory and is any resulting determination binding on the parties? What needs to be in the contract to ensure this?

If the parties have agreed to submit a dispute to binding expert determination, then such agreement has the same force as any other contractual obligation. However, the determination of the expert cannot be enforced in the same manner as an arbitral award unless the parties incorporate the determination in a settlement agreement and obtain *putusan perdamaian/akte van dading* from the court.

The dispute resolution clause should expressly provide that the determination of the expert will be binding on the parties; however, if *putusan perdamaian/akte van dading* is not obtained from the court, and one party refuses to comply with the expert determination, then the only recourse for the other party is to seek enforcement of such contractual obligation through the court or arbitration, depending upon the final dispute resolution provisions of the contract.

2.6 Construction contracts may contain dispute resolution clauses requiring several tiers of dispute resolution processes typically culminating in arbitration or court litigation. In your jurisdiction, would a party be allowed to skip one or more tiers before starting litigation or arbitration? How would a contractual multi-tiered dispute resolution process be characterized in your jurisdiction? Is the multi-tiered dispute resolution clause common in construction contracts and if so, are there problems with the use of this type of clause?

A party would only be permitted to skip one or more tiers in the dispute resolution process with the express agreement of the other party to the dispute. Before moving from one tier to the next, the parties would be required to comply with the specific provisions with respect to activities and time periods for such activities. If a party were to initiate arbitration or litigation before satisfying the conditions precedent prescribed in the clause, the other party would have a right to challenge the jurisdiction of the arbitral tribunal or the court to hear the dispute.

Multi-tiered dispute resolution clauses are quite common, usually requiring escalation of the process through two levels of management, and occasionally

including mediation as a step in the process. There are no problems with a tiered approach, provided that the clause expressly provides for specific time periods for each step before moving to the next step.

3. ADR and jurisdiction

3.1 Are there disputes that can only be decided by a court or by an administrative law tribunal/court? What type of disputes regarding construction projects cannot be subjected to ADR? (For example, are disputes relating to decennial liability arbitrable?) Is there a restriction on the matters that may be the subject of a binding expert determination or other binding third party decision?

Arbitration and other forms of ADR (including expert determination) are only applicable to commercial disputes (which include disputes under construction, oil & gas and similar contracts) or those within the full legal authority of the parties to determine. A dispute with a state owned enterprise is also a commercial dispute. When a state owned enterprise or even the state itself engages in a commercial contract with another party, it acts in a private capacity and is therefore subject to any arbitration clause/agreement under such contract. Disputes which fall outside the aforementioned definitions can only be settled in the courts

3.2 Are there any restrictions on the type of arbitral awards or binding decisions that may be issued (For example, may a FIDIC Red Book type DAB rule on questions of fact only or also on questions of law and are there any restrictions on the issues that this DAB may decide)?

Provided that the dispute falls within the parameters described above, there are no restrictions on the type of arbitral award or binding decision that may be issued; however, the enforcement of a binding decision as distinct from an arbitral award is subject to the provisions described in previous sections, i.e. such decision will only be considered final and binding and enforceable in the same manner as an arbitral award if the parties have obtained *putusan perdamaian/akte van dading* from the court.

3.3 Are public entities barred from settling disputes by ADR (arbitration, DAB/DRB and/or mediation)?

Public entities are permitted to settle disputes through arbitration and other forms of ADR.

3.4 Do state parties enjoy immunities in your jurisdiction? Under what conditions?

There is no clear national legislation with respect to state immunities from legal proceedings. However, as a member of the international community, Indonesia also

has the obligation to comply with international law and/or international customary law. Therefore, in principle, it can be inferred that state entities enjoy immunity under "*the act of State doctrine*", insofar as their actions are considered to be "*jure imperii*" (an act of a sovereign body). However, if the action of the state falls within the definition of "*jure gestiones*" (an act based on private law or commercial transaction), the doctrine of state immunity is not applicable.

3.5 Can procurement disputes be decided by ADR? If so, are there special requirements for this type of dispute or is only arbitration allowed?

Procurement disputes, provided that they are commercial disputes or fall within the full legal authority of the parties of the parties to determine, may be decided by arbitration or other forms of ADR, and there are no other special requirements for such disputes.

3.6 In the FIDIC Red Book, Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated "*The Employer and the Contractor empower the DAB, among other things to (b) decide upon the DAB's own jurisdiction and as to the scope of the dispute referred to it,*". In your jurisdiction, in a situation where there are several interrelated contracts between the employer and the contractor (not all with a DAB clause), would the DAB be allowed to decide on issues outside the contract with the DAB clause? If the DAB purports to make a decision on a matter not referred to it, will that decision be deemed to have been made outside its jurisdiction?

Without the agreement of both parties, the DAB would not be allowed to carry over its role to an issue on another interrelated contract not containing a DAB clause. If a DAB purports to render a decision on a matter not referred to it, it is likely that such decision would be deemed to have been made outside the DAB's jurisdiction.

4. Arbitrators, adjudicators, dispute board members, mediators

4.1 Are there special rules on arbitrator appointment or the appointment of tribunals or entities issuing binding decisions (like for example DAB's) regarding construction disputes in your jurisdiction? Do arbitrators, adjudicators etc. need to have special qualifications?

The BANI Rules provide for certain rights of the Chairman of BANI with respect to the appointment of arbitrators as follows:

(i) for a 3-person tribunal each party may appoint an arbitrator and the party-appointed arbitrators may nominate the chairman;
(ii) the Chairman of BANI has the right to appoint the chairman of the tribunal, taking into account the nominations of the party-appointed arbitrators;

(iii) if a party fails to appoint an arbitrator within the specified time, the Chairman of BANI shall appoint such arbitrator;

(iv) for a sole arbitrator tribunal, the claimant may nominate a candidate, and if the respondent agrees with such nomination, with the approval of the Chairman of BANI such person shall be appointed;

(v) if the parties cannot agree on the nomination of a sole arbitrator, then the Chairman of BANI shall appoint the arbitrator; and

(vi) only arbitrators listed in the BANI panel (Indonesian and foreign) may be appointed as arbitrators, provided that, if special expertise is required to properly adjudicate the dispute, and such expertise does not reside with a member of the BANI panel, then a person not listed in the BANI panel may be appointed, provided that such person meets certain qualification criteria, and subject to the approval of the Chairman of BANI.

There are no special rules or laws relating to the appointment or the qualifications of adjudicators, mediators (except for court-annexed mediation) or experts; these issues are entirely at the discretion of the parties to a dispute.

4.2 If there are special arbitral institutions for construction arbitrations, do these have a system of lists with names of arbitrators? Do these institutions appoint the arbitrators or do the parties appoint the arbitrators? Do the parties have to choose from these lists or are they free to have arbitrators that are not on the list? How are these lists composed? Is there a difference with other forms of ADR?

Refer to the response above. To be included in the BANI panel, applicants must satisfy the Governing Board with respect to qualifications and experience

4.3 In your jurisdiction, do arbitral tribunals and tribunals issuing binding decisions regarding construction disputes usually include a lawyer? If not, are there requirements that the secretary added to the tribunal must be a lawyer? Would the presence of a lawyer, either as member of the tribunal or as secretary added to the tribunal, be required if these tribunals are to rule on issues of law?

It is common for 3-person arbitral tribunals to include a lawyer, but there are no specific requirements that a lawyer must be included in the tribunal except that Article 9(5) of the BANI Rules requires that where a dispute is governed by Indonesian law, at least one arbitrator shall be a law graduate or practitioner who knows Indonesian law well and resides in Indonesia.

4.4 In construction industry arbitrations, how often do arbitrators belong to the engineering/construction profession? Are panels integrated both by lawyers and construction professionals possible/common? Is there a difference with other forms of ADR?

There are no regulations with respect to the composition of the arbitral tribunal, except the provision of Article 9(5) of the BANI Rules referred to above. It is common

for arbitral tribunals deciding construction disputes to comprise construction professionals and lawyers, or dual-qualified arbitrators. With other forms of ADR (except for court-annexed mediation) the choice very much depends on the dispute itself and the preference of the parties.

4.5 Are arbitrators and tribunals issuing binding decisions allowed to use their own technical expertise without consulting the parties regarding the results of using this expertise?

There are no express provisions addressing this issue either in the Arbitration Law or the BANI Rules; however, it is accepted practice that while technical expertise may help the arbitral tribunal to understand and evaluate the evidence, the arbitral tribunal should not use it to fill any gaps in the evidence, nor should the arbitral tribunal use it as a substitute for the admitted evidence.

4.6 Do the most used rules for construction arbitrations contain a rule for the tribunal to apply the rules of law to the merits of a case or do these rules contain a rule that the tribunal decide "ex æquo et bono", as "amiable compositeur", or in "equity"? Is there a difference with other forms of ADR?

Article 15(3) of the BANI Rules provides that the arbitral tribunal may only decide “ex aequo et bono” or assume the powers of an “amiable compositeur” with the agreement of the parties. Other forms of ADR are not regulated, and the procedures adopted are determined by the parties.

5. ADR procedure

5.1 Are arbitrators and others making binding decisions required to follow any minimum due process rules? Does a party usually have a right to have legal representation?

Article 19(2) of the Arbitration Law provides that an arbitrator or arbitral tribunal shall render an award fairly, justly, and in accordance with the prevailing law and the provisions of the contract, and Article 29(1) of the Arbitration Law requires that the parties to the dispute shall have the same right and opportunity to put forward their respective cases.

Article 13(3) of the BANI Rules provides that subject to the BANI Rules and applicable law, the arbitral tribunal may conduct the proceedings in any manner it considers appropriate, provided that the parties are treated equally and that at any stage of the proceedings each party is given a fair and equal opportunity to present its case.

Parties have the right to have legal representation; however, Article 5(2) of the BANI Rules requires that if a party is represented by a foreign advisor and the governing law of the dispute is Indonesian law, the foreign advisor may only attend hearings if accompanied an Indonesian advisor.

The Arbitration law makes no distinction with respect to legal counsel, save that such counsel shall require a special power of attorney.

5.2 Is the focus in the arbitral procedure and the procedure for tribunals issuing binding decisions on written submissions or on oral presentations?

The Arbitration Law and the BANI Rules both call for the arbitral proceedings to be conducted on written submissions; however, they both also provide that oral hearings may take place if the parties agree or if the arbitral tribunal deems oral hearings necessary. In practice, there is invariably a preliminary hearing, and all but the most straightforward disputes will entail oral hearings.

5.3 Are there rules on evidence in the laws of your country and/or the arbitration rules and/or the rules for tribunals issuing binding decisions most commonly used or is this left to the discretion of the tribunal?

The Arbitration Law provides that the parties shall be given the opportunity to explain their respective positions in writing and to submit supporting evidence for such positions. Articles 49 and 50 of the Arbitration Law set out procedures for summoning and utilisation of fact witnesses and expert witnesses. Article 37(3) provides that examination of witnesses shall be carried out in accordance with the provisions of the Indonesian Civil Code ("Civil Code").

A party arguing that he has a certain right or seeking to establish facts to support such right, or deny the other party's right, must present evidence of the existence of such right or facts. Evidence comprises written evidence, witness testimony, inference, acknowledgements and oath.

Article 1867 of the Civil Code distinguishes between notarised written evidence and non-notarised written evidence. Notarised written evidence is evidence made before notary public and shall be considered as undeniable evidence in respect of matters contained therein. Rebuttal is allowed, although for notarized evidence there are only limited actions available. For example, notarized evidence can only be challenged if it can be proven that there was fraud or forgery.

The BANI Rules basically adopt the rules of evidence as stipulated in the civil procedure rules. However, there is certain flexibility under the BANI Rules in considering evidence submitted by the parties. Article 1878 of the Civil Code provides that non-notarial evidence which is contested shall be examined by the court. Article 21(3) of the BANI Rules provides that it is up to the tribunal to determine the admissibility, relevance, materiality and weight of the evidence offered by the parties, including both notarized and non-notarized evidence. Notarized evidence in the form of a notarial deed shall be considered true formally and materially. For example, if in a notarial deed "A" admitted that it borrowed money from "B", then no further evidence is required to prove that "B" has claim for payment from "A".

5.4 Is a hearing mandatory for all forms of ADR?

Oral hearings are not mandatory for any form of ADR, including arbitration, except that in the case of court-annexed mediation, Supreme Court Regulation 1 of 2008 provides for oral hearings and caucusing; caucusing being a meeting between the mediator and each party, separately.

5.5 In the FIDIC Red Book Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated (c) *conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and these Rules*,". Under your jurisdiction, would the DAB still be bound to conduct a hearing according to rules of "natural justice"? If so, what would this mean for conducting the hearing?

Under Indonesian law, there are no mandatory rules of procedure with respect to alternative dispute resolution proceedings. Basically, insofar as there is mutual consent of parties with respect to the proceedings of certain type of alternative dispute resolution (including adjudication), and the result of such proceeding is acceptable by both parties to be sanctioned by the court as a settlement decision (*putusan perdamaian/akte van dading*), there is no obligation for the DAB to conduct a hearing.

5.6 What type of experts are mostly used in construction arbitrations (for example, technical experts, delay and disruption experts etc.)? Is there a difference on this topic between arbitration and court litigation in your jurisdiction? Are experts used in the same manner in procedures for tribunals issuing binding decisions?

Experts that are normally involved in construction arbitrations are those with technical expertise (i.e. to determine the cause of delay or disruption, the amount of damages, etc.). There is no significant difference in the involvement of experts in arbitration and litigation.

The use of DABs in construction in Indonesia is not common, and it is likely that where a DAB is used, the parties would expect the DAB itself to have the requisite expertise rather than retaining additional experts.

5.7 Are these experts mostly party appointed or appointed by the tribunal? Is there a difference as to the evidential value? How are the costs of experts allocated?

Articles 49 and 50 of the Arbitration Law provide that upon instruction of the arbitrator or a request of either party, an expert can be called to give his/her expert testimony.

However, despite the fact that, procedurally, experts can be presented upon the instruction of the arbitral tribunal, in practice BANI always relies on the initiative of

the disputing parties to present their own experts at their own expense. Theoretically, if the expert is presented based on the instruction of the arbitral tribunal, the costs shall be allocated equally between the parties.

5.8 Is the expert supposed to be independent to the parties/counsel? Does the expert normally give written evidence or oral evidence?

The expert must be independent of the parties and their counsels. In a proceeding before a BANI arbitral tribunal, the expert normally will give oral evidence, although it is considered helpful if the expert also submits a written affidavit.

5.9 Can the tribunal ignore the expert statements in its decision, even if the tribunal has appointed the expert? Does the tribunal need to give reasons for following or not following the statement of an expert? Can part of the decision by the tribunal be "delegated" to the expert?

Theoretically, the role of an expert is to help the arbitral tribunal to understand certain subject matter. With respect to experts, there is no specific legislation on their position in court litigation, but Indonesian judges will normally remind experts to provide truthful opinion since their function is to assist the court (and not the party who pays their fees).

In certain circumstances where the testimony of an expert is illogical or biased toward a certain party, the arbitral tribunal may ignore such testimony by providing its own analysis to explain why the testimony of the expert cannot be accepted. The arbitral tribunal may use expert testimony as the basis for its consideration, but the arbitral tribunal cannot "delegate" its decision to the expert, since basically, the opinion of the expert is required only to support or confirm the arbitral tribunal's own consideration.

5.10 Is "hot tubbing" (this involves experts from the same discipline, or sometimes more than one discipline, giving evidence at the same time and in each other's presence) a feature in construction arbitrations or procedures of tribunals issuing binding decisions in your jurisdiction?

Although "hot tubbing" is commonly practiced either in international arbitration under ad hoc or other institutional rules, to the best of our knowledge, BANI has never used "hot tubbing" with respect to hearing expert testimony. There is no restriction against the use of "hot tubbing" in BANI arbitration proceedings insofar as such procedure is mutually agreed upon by the disputing parties.

However, since Article 37(3) of the Arbitration Law provides that witnesses or experts shall be heard in accordance with the prevailing civil procedure rules, it is possible that the use of "hot tubbing" may potentially be used as a basis to seek a court order for the invalidation or the non-enforceability of the award by the losing party by arguing that "hot tubbing" is a violation of Article 37(3) of Arbitration Law since the Civil Code does not recognise it.

5.11 Are site visits by the arbitral tribunal and tribunals issuing binding decisions regulated by the laws of your country and/or by the arbitration and other rules most used in your country? If not, are they allowed/mandatory?

Article 37(4) of the Arbitration Law provides that site visits are permitted insofar as the arbitral tribunal deems them necessary.

5.12 Do all parties need to be present during the site visit and be given an opportunity to comment on the findings of the tribunal?

Article 37 of the Arbitration Law provides that if the arbitral tribunal considers it necessary, it will summon the parties to attend the site visit. In practice, site visits are normally conducted in the presence of the parties.

5.13 How common and how important are generally witness testimonies in construction arbitrations and other forms of ADR in your jurisdiction? Under the rules most often used in your jurisdiction for construction disputes, are there any restrictions on either not admitting testimony, or not giving value to the declaration of witnesses that are employees or consultants of the party presenting their testimony?

Based on the provision of Article 37(3) of the Arbitration Law, the hearing for witness testimonies shall be conducted in accordance with the relevant provisions of the Civil Code. Under the Civil Code, there is no restriction on employees or consultants testifying in a case involving their company or clients. However, considering the potential for conflict of interest, testimonies of employees or consultants which are not consistent with testimonies of other witnesses and/or written evidence, will be given less weight or even no value by the arbitral tribunal.

5.14 Under the rules most often used in your jurisdiction for construction disputes, what degree of discretion do the arbitrator(s) or tribunals issuing binding decisions have in weighing evidence, including balancing potentially contradictory pieces of evidence or disregarding any piece of evidence? Are there any rules on valuation of evidence in the law or in such rules?

Article 1908 of the Civil Code provides that in evaluating the testimonies of witnesses, the court must consider the consistency of the statements of a witness with those of other witnesses. The background, dignity, and lifestyle of the witnesses shall also be considered in deciding whether the witnesses are credible and can be trusted or not. Such evaluation of the integrity of the witnesses will determine the value of their testimonies. Article 21(3) of the BANI Rules provides that it is up to the tribunal to determine the admissibility, relevance, materiality and weight of the evidence offered by the parties.

6. Interim measures and interim awards

6.1 Are measures devoted to preserving a situation of fact or of law, to preserving evidence or ensuring that the ultimate award in a case will be capable of enforcement allowed in your jurisdiction? Are these measures usually decided by the arbitral tribunal or by a judge?

Article 32 of the Arbitration Law provides that upon the request of a party, the arbitral tribunal can issue both provisional and interlocutory awards, including security attachment or ordering the deposit of goods to a third party or ordering the selling of perishable goods pending the final decision of the arbitral tribunal.

There are no sanctions provided under the Arbitration Law for failure of a party to comply; however Article 19(6) of the BANI Rules does provide the arbitral tribunal authority to impose sanctions, but it is likely that enforcement of such sanctions against a party refusing to comply would require court intervention.

6.2 In the FIDIC Red Book Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated *(g) decide upon any provisional relief such as interim or conservatory measures (...)* The FIDIC Red Book has no explicit provisions for DAB decisions that have a provisional nature. It is not clear if, how and when these should be followed by decisions that are meant to be final and binding. Would this lead to problems in your jurisdiction?

As has been described in other sections, a decision of a DAB only has the same binding force as any other contractual obligation, unless such decision is incorporated in a settlement agreement and *putusan perdamaian/akte van dading* has been obtained from the court. This would apply to any decision of the DAB, whether provisional or final.

The function of registering a settlement agreement with the court is to make it executable through the court system. Thus, a provisional decision that has been registered will also be executable if a party refuses to comply with such provisional decision.

7. Awards, decisions, recommendations, negotiated agreement

7.1 Is a binding decision (for example the decision of a DAB) enforceable in your country? If not directly enforceable, what steps must be taken to get a binding decision enforced? Would FIDIC Red Book clause 20.7 allow enforcing a DAB decision directly through court in your jurisdiction (skipping the arbitration)?

A binding decision (whether from an expert or a DAB) cannot be enforced in the same manner as an arbitral award unless the parties incorporate the determination in a

settlement agreement and obtain *putusan perdamaian/akte van dading* from the court.

The dispute resolution clause should expressly provide that the decision of the expert/DAB will be binding on the parties; however, if *putusan perdamaian/akte van dading* is not obtained from the court, and one party refuses to comply with the decision, then the only recourse for the other party is to seek enforcement of such contractual obligation through the court or arbitration, depending upon the final dispute resolution provisions of the contract.

On its own, FIDIC Red Book Clause 20.7 would not allow the enforcement of a DAB decision directly through the court – in order for the decision to be enforced and to avoid arbitration, *putusan perdamaian/akte van dading* must be obtained.

7.2 Does the award or binding decision have to be reasoned?

The Arbitration Law is silent on this, but the BANI Rules call for the arbitral award to be reasoned unless the parties agree otherwise. Since a binding decision is a creature of contract, the requirement for it to be reasoned is not legislated.

7.3 Are dissenting opinions in arbitral awards allowed in your jurisdiction and if so, can they be added as a separate opinion to the award? Are they allowed in other forms of ADR?

The Arbitration Law does not address this issue, but the BANI Rules allow for the award to be rendered based on the decision of a majority of the arbitrators, and a dissenting opinion may be stated in the award. In the event that there is no majority decision on the award, the BANI Rules provide that the chairman of the arbitral tribunal shall decide. There is no legislation governing dissenting opinions in other forms of ADR.

7.4 Can an award or (binding) decision be corrected, clarified or reconsidered? If so, can the tribunal do this on its own accord or only if parties request it to do so?

Both the Arbitration Law and the BANI Rules provide that within fourteen (14) days of receipt of the award, the parties have the right to request corrections of any administrative errors and/or to make additions or deletions to the award if a matter claimed has not been dealt with in the award.

The Arbitration Law and the BANI Rules are silent as to whether the tribunal may take the initiative with respect to making corrections of any administrative errors and/or to making additions or deletions to the award.

8. Enforcement of and challenges to awards and decisions

8.1 What steps would a party have to take to get to the enforcement of binding third party decisions in your jurisdiction?

In order for such decision to have the same binding force as a court judgment or an arbitration award the procedure is as follows:

1. the parties sign a settlement agreement incorporating the terms of the third party binding decision;
2. one of the parties files a lawsuit requesting the court to sanction the settlement agreement;
3. in the hearing the judge will seek confirmation from the parties whether the settlement agreement:
    a. is in accordance with the mutual consent of the parties;
    b. does not violate public policy;
    c. does not cause losses to a third party;
    d. is executable; and
    e. is entered into by the parties in good faith.

If the judge receives the confirmation on the above, he will issue a decision to sanction the settlement agreement. The settlement decision (*putusan perdamaian/akte van dading*) will have the same effect as that of a final and binding decision of the court. This procedure is stipulated in the Supreme Court Regulation No.1/2008 on the Mediation Procedure in Court which according, to the registrar of the Central Jakarta District Court, is also applicable to an out-of-court mediation/conciliation.

If the procedure above is not followed, then the process for enforcement would be the same as any other contractual dispute – either arbitration or litigation in the courts, depending on the provisions for dispute resolution in the contract. If the decision is not registered with the court as an *akte van dading*, then it can only be enforced through litigation on the merits of the case. Thus, it is imperative to register any decision and/or settlement agreement with the courts.

8.2 In your opinion, would the New York Convention allow recognition and enforcement of FIDIC Red Book DAB-type awards deemed to be the equivalent to arbitral awards through contractual arrangement?

No, a FIDIC Red Book DAB-type award would not be recognized and enforced as being equivalent to an arbitral award.

8.3 Would your country allow the enforceability of a foreign arbitration award which in turn enforces a FIDIC Red Book type DAB decision?

Yes, provided that the country of the seat of arbitration was a signatory to the New York Convention, and recognized and enforced awards rendered in Indonesia, and

provided that the award complied with the requirements of the Arbitration Law with respect to the enforcement of international arbitral awards.

8.4 Are there any remedies (which possibly cannot be waived) to challenge a FIDIC Red Book type DAB decision in case of fraud, failure to follow minimum due process or other serious irregularity? Will these remedies make a DAB decision unenforceable in court without first having to go through arbitration (clause 20.6 FIDIC Red Book)?

As described in earlier sections, a FIDIC Red Book type DAB decision is not enforceable absent *putusan perdamaian/akte van dading*, therefore any challenge would be undertaken in the same manner as any other proceeding to enforce a contractual obligation.

8.5 Would a binding expert determination be subject to review on the merits by the law courts on your jurisdiction?

If *putusan perdamaian/akte van dading* has not been obtained for the expert determination and assuming that litigation in the courts is the prescribed method of final dispute resolution, it is probable that the court would review such expert determination on the merits in enforcement proceedings.

9. Trends and developments

9.1 Please comment on any new trend or developments relating to ADR in construction in your country.

No comments.

10. Other Important Issues

10.1 Please comment on any other important topics affecting ADR in construction in your jurisdiction.

Independent power projects and some other types of infrastructure projects are typically funded via limited recourse project finance. Such financing is most often provided by international lenders and a condition of such financing is that the project will be designed and constructed under an EPC contract. In order to benefit from certain tax exemptions, typically such EPC contract is split between an offshore equipment supply and services contract and an onshore construction contract with different parties, and in order to maintain the "turnkey" nature of the contracts required by lenders, the onshore and offshore contracts are "wrapped" with a coordination agreement to bring the situation back to the equivalent of a true EPC contract.

In order to be in compliance with the Construction Law, the onshore construction contract must be governed by Indonesian law; however, typically, lenders will require the offshore equipment supply and services contract and the coordination agreement to be governed by English law or New York law. In addition, for a power project where electricity is being sold to PLN, the Indonesian state utility, the power purchase agreement ("PPA"), the PPA will also be governed by Indonesian law.

There is the potential for mismatch between the PPA and the EPC contract. For example, where the various agreements contain references to "reasonable" which is a term that has specific legal connotations under English case law, Indonesian law does not have a similar concept of "reasonable" and therefore, an arbitrator determining what is reasonable in the context of the PPA may come to a different conclusion when determining what is reasonable in the context of the EPC contract. There are other examples where there is potential for misapplication – the doctrine of good faith is expressly provided for in the Civil Code and does not need to be expressly provided for in the contract, while such a doctrine is not implied under English law. Indonesia is a civil law jurisdiction while English law is based on common law. So there is a risk of different outcomes under certain circumstances (e.g. enforcement of delay liquidated damages).