TRADITIONAL AND ONLINE ARBITRATION IN INDONESIA

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FOREWORD

Business is one of the factors driving the improvement of a country's economic growth (Saragih, 1999). Therefore, countries in the world, including Indonesia as a developing country, continue to encourage their nationals to participate actively in business activities nationally and internationally. Nationals of Indonesia have engaged in bilateral and multilateral commercial relationships for many years. The Indonesian government has taken serious measures to improve economic sectors, which is evidenced through the recent issuance of the Economic Policy (*Paket Ekonomi Jilid 8*). The government has also been improving political stability by reforming the Indonesian national laws and strengthening their legal certainty (Rajagukguk, 2000).

Disagreements in commercial relationships may occur at any time, resulting in legal disputes (Harpole, 2003) and Indonesian nationals who participate in commercial relationships may be aware of this possibility. Hence, parties to commercial disputes generally stipulate, or at least anticipate, a method of dispute resolution (Suherman, 2002). Litigation may be one of the dispute resolution methods chosen by the parties to settle their commercial disputes, but in the context of business, litigation may not be advisable for a number of reasons (Wolski, 2001). Litigation in courts may be slow (Leahy and Bianchi, 2000; Gautama, 1999) and their

decisions lack confidentiality since they may be published (Berger, 2000). Furthermore, foreign judgments are not enforceable in Indonesia based on Article 436 of the Indonesian Code of Civil Procedures *(Kitab Undang-Undang Hukum Acara Perdata)*. Not all countries wish to enforce foreign judgments in their national territories. Therefore, it may be beneficial for the disputing parties to settle their disputes through arbitration rather than by resorting to litigation. Arbitration is less formal than litigation (Fitch, 1989) because the proceedings are usually not open to the public, and the confidentiality of disputes is generally assured (Budidjaja, 2002). Furthermore, not only domestic arbitration awards but also international ones are enforceable in Indonesia. This is because Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (*Undang-Undang No. 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa*) (hereinafter referred to as the Arbitration Legislation) regulates both the enforcement of domestic and international arbitration awards. In addition, Indonesia is a member state of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958 (hereinafter referred to as the New York Convention) governing the enforcement of foreign arbitration awards.

The key success of arbitration does not depend merely on the effectiveness and efficiency of the proceedings, but more importantly it depends on the enforceability of the awards. In other words, although the entire arbitral proceedings might run smoothly, they are meaningless if the winning parties cannot enforce their arbitration awards (Leahy and Bianchi, 2000).

The scope of arbitration is also broad since it is not merely confined to questions of whether a dispute between parties is capable of being settled by arbitration, how to select arbitrators, or how to enforce arbitration awards. The scope of arbitration may be divided into three phases as follows:

Phase 1: Prior to arbitral proceedings. A number of issues arise in this stage, for example, the capacity of parties to enter into an arbitration agreement, the existence and validity of the arbitration agreement, and the enforceability of the arbitration agreement (Smit and Pechota, 2000).

Phase 2: During arbitral proceedings. The issues may embrace the power of arbitrators to settle disputes, the representation and the legal assistance, the basic standards of due process in arbitral proceedings, and the issuance of awards (Smit and Pechota, 2000).

Phase 3: Post-arbitral proceedings. The issues may cover the recognition and enforcement of arbitral awards, the law governing the recognition and enforcement process, the formal conditions, and the recognition and enforcement proceedings (Smit and Pechota, 2000).

Nowadays, electronic commerce and the Internet offer unprecedented opportunities for business people to expand their businesses. Online arbitration is one of the mechanisms that can be used to settle business disputes. However, business people may encounter a number of challenges in using online arbitration in Indonesia because the Arbitration Legislation does not specifically deal with online arbitration. This book discusses both traditional arbitration and online arbitration. It reveals that the Arbitration Legislation should be interpreted more widely to cover traditional and online arbitration. This is because it contains no provisions to prohibit online arbitration proceedings and hearings, as long as they are conducted based on the principles of equality, transparency and due process. The book concludes that both traditional and online arbitration can be utilized by business people in Indonesia, since the relevant Indonesian laws support their use.

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CHAPTER 1

THE CONCEPTS OF ARBITRATION

Arbitration is not a new field of law because this legal process existed even before Christ (Sharkey and Dorter, 1986). Today, arbitration can be categorized into several types depending on its purpose, such as commercial arbitration, industrial arbitration, or arbitration for sports (Moens and Gillies, 1998). In addition, arbitration can be court-ordered or entered into by agreement between parties (Astor and Chinkin, 1992). Furthermore, arbitration is not only intended to settle disputes between private parties or between states, but also between private parties and a state (Toope, 1990).

Bagheri defines arbitration as 'a consensual process executed in a judicial manner, whereby a dispute between two or more persons is finally resolved by an arbitrator's decision' (Bagheri, 2000). Similarly, Suraputra contends that arbitration constitutes a dispute resolution mechanism selected by parties in order to obtain a final and binding award that is decided by impartial arbitrators chosen by the parties (as cited in Kansil and Kansil, 1999). These definitions point out that arbitration is a private method of solving disputes (Leahy and Bianchi, 2000), since it is conducted by private persons (arbitrators) (Sanders, 1974-1975).

Mann, however, argues that there is no international arbitration in a real sense because all arbitration is conducted in a state and governed by a state's national laws (Mann, 1986), and consequently arbitration is

merely domestic. Fourchard questions whether there is real international arbitration in addition to domestic and foreign arbitration, or whether this term is merely a synonym for foreign arbitration (Fourchard, 1970). Hill (1998) asserts that true international arbitration exists if disputes between states or their entities are settled before an arbitrator by using public law. He adds that arbitration between states and nationals of other states or between nationals of different states may also be categorized as international. Yet, these types of arbitration are international because they involve more than one country (Hill, 1998). Hill also points out that some legal systems even make a distinction between international and domestic arbitration in order to limit courts' intervention in international cases (Hill, 1998). Similarly, Saville argues that although states do not differentiate between 'domestic' and 'international' arbitration in their legislation, the distinction between the two appears when it comes to the process of enforcing arbitral awards (Saville, 1997). Bagheri also emphasises that the distinction between these two types of arbitration is important for the recognition and enforcement of arbitral awards (Bagheri, 2000). Taniguchi explains that international arbitration is different from its domestic counterpart, and therefore the former should be even more free from domestic complications (Taniguchi, 1998). Wyld and Nurney suggest that if states are seeking to promote international trade and are willing to create a more favourable legal environment for foreign parties, they must have more liberal international arbitration law (Wyld and Nurney, 1996). To achieve this purpose, Devaird suggests that states should adopt the Model Law (*Devaird Committee Report*, 1989) because it aims to achieve harmonization in international commercial arbitration (*Secretariat Study on the New York Convention*, 1979). Yet Huleatt and Gould argue that this objective may be difficult to achieve since the Model Law is only a model, not a convention, and consequently states are not obliged to adopt the law in its entirety (James and Gould, 1999).

Nowadays, arbitration has become one of the most popular mechanisms for settling disputes. Nevertheless, history records that earlier arbitration was very simple because it only dealt with existing disputes. In addition, the establishment of the process was to settle disputes among relatives or neighbours and the parties were not bound by certain arbitral

rules (Adolf, 2002). This simple form has developed dramatically because arbitration today (referred to as 'modern arbitration') has been utilized by business people to resolve not only their existing disputes but also any disputes that may arise among them in the future. Due to the development of business, 'modern arbitration' has also dealt with commercial disputes both in the context of domestic and international relationships (Leahy and Bianchi, 2000).

Parties to arbitration may choose to settle their disputes before an ad hoc arbitral panel if they think this process is suitable. Ad hoc arbitration is established to deal with an individual arbitral dispute, so it is not permanent in nature since it ceases to operate after the arbitration award is rendered (O'Keefe, 1975). There are some reasons why disputing parties select ad hoc arbitration. First, the parties wish to control their own arbitral processes (Caster, 1989). Hence, although the parties to ad hoc arbitration stipulate in their agreement that their arbitration will apply partly or entirely the rules of an arbitral institution in the proceedings, it does not mean that they want the arbitral institution to get involved in controlling the processes (O'Keefe, 1975). Secondly, ad hoc arbitration is cheaper than involving an arbitral institution because the place of arbitration, the administrative costs and communication with the parties and arbitrators are arranged directly by the chairperson of an ad hoc panel or by a sole arbitrator (Arkin, 1987).

However, a number of difficulties may also arise from selecting ad hoc arbitration because both parties must agree to the rules and the procedures of arbitration that will govern their dispute. In this regard, both parties must agree to the seat of arbitration, the language to be used, the number of arbitrators, the law or the rules for the arbitral procedures, the time limits and the method of making the awards. Agreement between the parties may not be easy to achieve, especially if they arrange their arbitration agreement after their dispute has occurred. The disputing parties may suspect each other's motives since they are still in conflict (O'Keefe, 1975). In order to avoid these difficulties, Graving suggests that parties who select ad hoc arbitration should, when making their arbitral agreement, refer to the United Nations Commission on International Trade Law (UNCITRAL)

Arbitration Rules (UAR) adopted by the United Nations General Assembly in 1976, and designed specifically for ad hoc arbitration, or the rules of well-established arbitral institutions (Graving, 1984). Similarly, Caster suggests that it may be wiser to entrust international commercial disputes to settlement by an arbitral institution whose arbitral rules have been well established (Caster, 1989).

The use of ad hoc arbitration in Indonesia is acknowledged by Article 6(9) of the Arbitration Legislation, stating that 'parties, based on a written agreement, may submit the matter to resolution by an arbitral institution or ad hoc arbitration' (Budidjaja, 2002). Ad hoc arbitration has a number of advantages because disputing parties may design their own arbitration rules or adopt the UAR. The parties may also directly select their own arbitrator(s). However, a problem frequently arises in relation to the selection of arbitrator(s) and, in most cases in Indonesia, disputing parties cannot come to a consensus about this. In this circumstance, the involvement of the Chief Judge of the District Court cannot be avoided, particularly because such involvement is permitted by Article 13(2) of the Arbitration Legislation to avoid delays in arbitration processes.

In addition to ad hoc arbitration, the use of an arbitral institution has become popular among the business community (Coulson, 1981) because it provides a number of facilities to smooth the process, such as a set of established rules and procedures, arbitrator candidates, proceedings schedules, translators and hearing rooms. Nevertheless, the administrative cost of an arbitral institution may be higher than ad hoc arbitration. Today, a number of major arbitral institutions deal with international commercial disputes, such as the International Chamber of Commerce (ICC) in Paris, the London Court of International Arbitration (LCIA), the American Arbitration Association (AAA) in New York City, and the Regional Centre for Arbitration in Kuala Lumpur (KLRCA), to name a few (Jacobs, 1992).

The use of an arbitral institution is also recognized in Indonesia in Article 34(1) of the Arbitration Legislation which explicitly states that 'a dispute may be resolved through arbitration making use of national or international arbitral institutions with the agreement of the parties' (Jacobs, 1992). An 'arbitral institution' in Indonesia is defined by Article 1(8) of

the Arbitration Legislation as 'a body chosen by the parties in dispute to give an award with regard to a particular dispute. This institution may also give a binding opinion on a particular legal relationship where a dispute has not yet arisen' (Budidjaja, 2002). This provision defines the two main duties of an arbitral institution, namely to render arbitral awards and to give binding opinions. Accordingly, an arbitral institution has two functions in Indonesia, namely as a private court, because it settles disputes, and as an advisor, because it may provide a binding opinion.

A. Legislative framework on arbitration

Arbitration has existed in Indonesia since 1847 through Articles 615-651 of the *Civil Procedure Rules for Europeans (Reglement op de Burgerlijke Rechtsvordering/BRv)* (Gautama, 1998) that were introduced by the Dutch Colonial Government. However, these provisions pursuant to Articles 163 and 131 of the *Dutch Colonial Constitution* (Gautama, 1998) were only intended for 'Europeans' and 'Foreign Oriental Chinese' who resided in Indonesia.

The arbitral regulation for native Indonesians was expressed by Article 377 of the *Renewed Indonesian Rules (Herziene Inlandsch Reglement/HIR) 1941* and was intended to apply specifically to the native people who lived on the islands of Java and Madura. The other provision was stipulated in 1927 by Article 705 of the *Procedural Rules for Areas Outside Java and Madura (Rechtsreglement Buitengewesten/RBg)*. This provision was imposed on native Indonesians who lived outside the islands of Java and Madura (*Law No. 30 of 1999* Article 81).

In addition, the Government of the Netherlands in 1931 extended the implementation of the *Geneva Convention 1927 on the Execution of Foreign Arbitral Awards* (hereinafter referred to as the Geneva Convention) to Indonesia (previously called the Netherlands Indies) because of the ratification of the Geneva Convention on 12 August 1931. However, the Geneva Convention used to raise a controversial issue because it was uncertain as to whether it continued to be binding in Indonesia. In 1983 the Supreme Court of the Republic of Indonesia (*Mahkamah Agung Republik Indonesia*) in *Navigation Maritime Bulgare, Varna v. PT Nizwar* (Decision No.

2944 K/Pdt/1983) held that 'Indonesia is no longer bound by treaties acceded to during the colonial time' (Gautama, 1998). In that case, the Supreme Court did not accept the principle of state succession that aims to implement automatically any international treaty ratified by colonial states in their colonies (Gautama, 1998).

After Indonesian independence, the Government of Indonesia ratified two international conventions pertaining to international arbitration, the International Centre for Settlement of Investment Disputes (ICSID) Convention and the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958 (the New York Convention). The former was ratified through *Law No. 5 of 1968 (Undang-Undang No. 5 Tahun 1968)*. Although the ratification was conducted in 1968, Indonesia was summoned before ICSID arbitration for the first time in 1981 in *Amco Asia Corporation, Pan American Development Limited and PT Amco Indonesia v. the Republic of Indonesia (Kartika Plaza* case) (Case ARB81/1).

The New York Convention was ratified through *Presidential Decree No. 34 of 1981 (Keputusan Presiden No. 34 Tahun 1981)*. Yet, the Convention could not be enforced in Indonesia in the absence of an implementing regulation. Hence, the Supreme Court issued *Supreme Court of the Republic of Indonesia Regulation No. 1 of 1990 (Peraturan Mahkamah Agung Republik Indonesia No. 1 Tahun 1990)*. This Regulation contains the conditions and procedures for the recognition and enforcement of foreign arbitral awards in Indonesia.

On 12 August 1999 the Indonesian Government enacted *Undang-Undang Republik Indonesia Nomor 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa* (*Law No. 30 of 1999)* to complete all of the regulations concerning arbitration in Indonesia. This legislation not only deals with arbitration but it also governs other types of alternative dispute resolution, such as consultation, negotiation, mediation, conciliation and expert assessment (*Law No. 30 of 1999* Article 1(10)).

B. Arbitral Institutions

The Indonesian National Board of Arbitration *(Badan Arbitrase Nasional Indonesia/BANI)* is an arbitral institution that designs its rules according to the Indonesian Civil Law system (Gautama, 1998). This

institution was established on 3 December 1977 on the initiative of the Indonesian Chamber of Commerce and Industry *(Kamar Dagang dan Industri Indonesia/KADIN)* with the aim of rendering justice and quick resolutions pertaining to civil disputes in the matters of commerce, industry and finance, both national and international (*BANI Constitution* Article 1). A question frequently arises as to whether BANI is impartial in conducting its arbitral proceedings and in deciding its awards if a member of KADIN is one of the disputing parties. In this regard, Article 1 (2) of the BANI Constitution stipulates that BANI is an independent and autonomous body, and consequently its work is not to be corrupted by any institution, including KADIN (Sumarsha, 1985).

Although BANI is a national arbitral institution, it does not merely deal with domestic disputes. BANI has also settled international disputes (Suditomo, 1994), but awards rendered by the institution are categorized as 'pure domestic arbitral awards' in the context of international commercial arbitration (Green, 1999), because 'international arbitral awards' under the Arbitration Legislation are referred to as 'foreign-rendered awards'.

BANI also renders binding opinions, as its rules provide that 'in the absence of any dispute, both parties in a contract can ask BANI for a binding opinion regarding questions arising from that contract' (Abdurrasyid, 2002). This rule is compatible with Article 52 of the Arbitration Legislation, which states that 'the parties to an agreement have the right to request a binding opinion from an arbitral institution on a particular legal point in the agreement'. According to the BANI rules, 'binding opinions' may constitute 'the interpretation of ambiguous provisions in the contract, the formulation of new provisions or the revision of old provisions to meet changing circumstances, etc.'. The BANI rules also determine that 'once BANI has given its opinion, the parties are bound to it and whoever acts in contravention of it, will be considered as having committed a breach of contract'.

The Indonesian *Muamalat* Board of Arbitration *(Badan Arbitrase Muamalat Indonesia/BAMUI)* is an arbitral institution that implements the rules of Islamic Law. This institution was established on 21 October 1993, or 5 *Jumadil Awwal* 1414 *Hijriah* according to the Islamic calendar. The

establishment of BAMUI constitutes progress in Indonesian arbitration law since 'the application of arbitration law can also be solved according to Islamic rules; accordingly courts have a new partner in upholding the supremacy of the law' (Gandasubrata, 1994).

BAMUI's name was changed to the *Syariah* National Board of Arbitration *(Badan Arbitrase Syariah Nasional/Basyarnas)* on 24 December 2003. The alteration aimed to change the image of BAMUI, since it was frequently referred to as an Islamic arbitral institution that was established to settle disputes of the *Muamalat* Bank of Indonesia *(Bank Muamalat Indonesia/BMI)*. The name *Basyarnas* also aims to improve the functions of the Islamic arbitral institution based on *Syariah* or Islamic law.

Although BAMUI applies Islamic rules, arbitration awards rendered by the board have to be submitted to the general courts (Article 10(1) of Law No. 14 of 1970) for their recognition and enforcement. Similar to the BANI awards, arbitration awards made by BAMUI are also categorized as 'pure domestic awards' in Indonesia.

CHAPTER 2

SOURCES OF ARBITRATION LAW

A. Arbitration Legislation

The official name of the Arbitration Legislation is *'Undang-Undang Republik Indonesia Nomor 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa'* (Law of the Republic of Indonesia Number 30 of 1999 regarding Arbitration and Alternative Dispute Resolution). Although the Arbitration Legislation was issued on 12 August 1999, the academic draft of this Legislation was prepared by Sudargo Gautama twenty years previously (Gautama, 1999) at the request of the National Law Development Centre *(Lembaga Pembinaan Hukum Nasional)*. The draft was discussed and approved by the Inter-Departmental Team chaired by the Director of the Civil Matters Department *(Direktur Perdata Departemen Hukum)*. However, the draft was never submitted to the House of Representatives *(Dewan Perwakilan Rakyat Republik Indonesia)* since the State Secretariat *(Sekretariat Negara)* gave priority to political bills and economic matters (Gautama, 1999).

After a few years of postponing discussion on the Arbitration Bill, the Economic Law and Improved Procurement Systems/ELIPS Project Team (*Proyek Pengembangan Hukum Ekonomi dan Penyempurnaan Sistem Pengadaan)* sponsored by the USA was assigned to design a new bill on arbitration for Indonesia (Gautama, 1996). However, this bill was not utilized because

the Legislation Section of the Department of Justice that led the Inter-Departmental Committee decided to use Sudargo Gautama's proposal (Gautama, 1996). On 1 July 1999, the Indonesian House of Representatives accepted the Bill on Arbitration, which was enacted to be the Arbitration Legislation on 12 August 1999. The issuance of the Arbitration Legislation repealed a number of arbitration regulations in Indonesia that were originally derived from the Dutch laws (*Law No. 30 of 1999* Article 81). Hence, it can be said that the Arbitration Legislation is the first national legislation on arbitration produced by Indonesian legislature.

The Arbitration Legislation does not merely govern arbitration but also contains provisions on alternative dispute resolution (Article 1(10)). It consists of 11 chapters and 82 articles, but only Chapter II, comprising 9 provisions, deals with alternative dispute resolution, and the remaining provisions deal with the issues of arbitration. Hence, it is logical to say that it focuses more on arbitration than alternative dispute resolution.

The Arbitration Legislation governs both domestic and international arbitration, but only the second part of Chapter VI Articles 65-69 specifically deals with international arbitration. Although the term 'international arbitration' appears under the heading of the second part of Chapter VI, none of the provisions under Chapter VI or other chapters defines the term 'international arbitration'. The provisions contained in Chapter VI of the Arbitration Legislation merely deal with the recognition and enforcement of 'international (foreign-rendered) arbitral awards' in Indonesia (Gautama, 2000). These facts indicate that the Arbitration Legislation is not a complete set of regulations for international arbitration, since it fails to govern the entire aspect of international arbitration. For example, it does not explain clearly the connection between the court and arbitration regarding the implementation of interim measures of protection (Harahap, 2002), or define 'international arbitration'.

B. The method of interpreting the Arbitration Legislation

The Arbitration Legislation is supplemented by the Elucidation with the objective of clarifying the provisions of this Legislation. This Elucidation embraces the general and specific elucidations. Although the specific

elucidations purport to clarify and to provide the interpretation of each provision or term under the Arbitration Legislation, they fail to achieve this aim since a number of terms and provisions are left undefined. Hence, when the Elucidation of the Arbitration Legislation gives no clues regarding a specific term or provision, other valid relevant laws as stipulated by Article 2 of the Decision of the People's Consultative Assembly No. III/MPR/2000 *(Ketetapan Majelis Permusyawaratan Rakyat/MPR) No. III/MPR/2000)* may be used as references. Yet it may be the case that these relevant laws are also silent and unclear in explaining certain matters relating to arbitration, and in this circumstance other sources of law, such as international conventions, ratified by the Indonesian Government or acknowledged in Indonesia, may be used as references.

It is significant to explain here that none of the provisions of the Arbitration Legislation permits the use of the extrinsic material (the legislative history) of this Legislation for interpretation. Hence, although the extrinsic material of the Legislation suggests that bankruptcy cases may be settled by arbitration (Gautama, 1999), the Supreme Court in *PT Basuki Pratama Engineering and PT Mitra Surya Tata Mandiri v. PT Megarimba Karyatama, (*Decision No. 019 K/N/1999) and in the case of *PT Enindo v. PT Putra Putri Fortuna Windu cs (*Decision No. 4 K/Pailit/1999/PN.Niaga. Jkt.Pst.) held that bankruptcy cases cannot be settled by arbitration. The Supreme Court in deciding the two cases did not examine the extrinsic material of the Arbitration Legislation since Article 280(1) of Law No. 4 of 1998 declares that bankruptcy is not arbitrable and it falls within the absolute competence of the commercial court.

C. International treaties

According to international law, treaties may be divided into 'law-making treaties' and 'treaty-contracts' (Ichsan, 1993). The main difference between the two is that a 'law-making treaty' is a direct source of international law, whereas a 'treaty-contract' merely aims to impose special obligations on parties to the treaty, and therefore it is not a direct source of international law (Ichsan, 1993). A treaty may be established by two states (bilateral treaty) or more than two states (multilateral treaty)

(Ichsan, 1993). Furthermore, the membership of a treaty may be 'open' in the sense that any party may become a member of the treaty. A treaty may also be established for certain parties only, and therefore parties have to sign or ratify the treaty to become members (Ichsan, 1993)

Most, if not all, regulations regarding international commercial arbitration are established in the form of a 'treaty-contract' rather than a 'law-making treaty' (Ichsan, 1993). Two treaty-contracts play significant roles in the implementation of international commercial arbitration in Indonesia. They are the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the ICSID Convention) and the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958 (the New York Convention). These Conventions constitute multilateral and open treaties; therefore, the Indonesian Government had to ratify them in order to give them legal force in Indonesia. As a result of the ratification of the ICSID Convention and the New York Convention, they are not only applicable in Indonesia but also become written sources of Indonesian law concerning international commercial arbitration. In addition, Indonesia is a signature state of Resolution 31/98 that established the UNCITRAL Arbitration Rules (UAR), and therefore the UAR also constitutes an Indonesian legal source of international commercial arbitration.

1. The ICSID Convention ratified by Law No. 5 of 1968

Law No. 5 of 1968 was enacted on 28 September 1968 to ratify the ICSID Convention, the aim of which was to encourage foreign investors to invest in Indonesia (Gautama, 1989). In addition, this ratification purports to guarantee that foreign investors will not be treated unfairly if conflicts between foreign investors and the Indonesian Government arise, since they may submit their investment disputes before the ICSID Centre (Gautama, 1996). A classic example of the eligibility of foreign investors to sue the Government of Indonesia can be found in the leading case of *Amco Asia Corporation, Pan American Development Limited and PT Amco Indonesia v. the Republic of Indonesia* (*Kartika Plaza* case) (Case ARB81/1).

Although the arbitral proceedings held by the ICSID Centre treated both parties in the *Kartika Plaza* case (Case ARB81/1) fairly, the Indonesian

government was still dissatisfied with the implementation of the ICSID Convention in this case. The reason was that the arbitral proceedings took 12 years before a final award was made, and consequently the cost of arbitration became very expensive (Gautama, 1996). The arbitral proceedings took such a long time because of the annulment of the award. As a result, the dispute in this case had to be settled again by a new tribunal of the ICSID Centre and the arbitral proceedings were conducted twice in Washington, DC.

2. The method of interpreting *Law No. 5 of 1968*

Law No. 5 of 1968 implements the ICSID Convention in its entirety in Indonesia; therefore, to decide the method of interpreting it Article 64 of the Convention must be referred to. This provision provides three methods of interpreting the Convention and they are all applicable in Indonesia. The first method involves Indonesia negotiating the interpretation of the Convention with other contracting states. If this approach fails, Indonesia may apply the second method by requesting that the International Court of Justice (ICJ) provide the interpretation. If this method also fails, Indonesia and the other contracting states may agree among themselves to adopt an appropriate method of interpreting the Convention.

3. The New York Convention ratified by Presidential Decree No. 34 of 1981

On 5 August 1981, the President of the Republic of Indonesia issued Presidential Decree No. 34 of 1981 *(Keputusan Presiden No. 34 Tahun 1981)* to ratify the New York Convention. Through the Decree, Indonesia has incorporated the New York Convention into its national law, and therefore the country is obliged to implement the New York Convention in its entirety. The ratification of the Convention was significant in encouraging foreign parties to conclude commercial contracts with Indonesian nationals (Harahap, 1999). In practice, foreign parties are usually reluctant to enter into contracts in the absence of arbitral clauses (Harahap, 1999; Wahid, 1999) because of their lack of familiarity with Indonesian laws. Most foreign parties trust the neutrality of the international commercial arbitration mechanism, but they still doubt whether arbitral awards rendered under

this mechanism are enforceable in Indonesia (Nienaber, 2000). The enforceability of the New York Convention in Indonesia is deemed to diminish such doubts.

Since Article 1(3) of the New York Convention permits the making of reciprocity and commerciality reservations, Indonesia applies them and declares the implementation of such reservations in Presidential Decree No. 34 of 1981. The declaration reads as follows:

> Pursuant to the provisions of Article 1(3) of the Convention, the Government of the Republic of Indonesia declares that it will apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State, and that it will apply the Convention only to the differences arising out of legal relationships whether contractual or not, which are considered as commercial under the Indonesian law (Gautama, 1996).

When Presidential Decree No. 34 of 1981 came into operation, it was expected that foreign arbitral awards would be enforceable in Indonesia. However, the Supreme Court in *Navigation Maritime Bulgare, Varna v. PT Nizwar (*Decision No. 2944 K/Pdt/1983) refused to enforce the foreign arbitration award on the grounds that:

> In accordance with Indonesian practice, it would still be necessary for the Government to promulgate implementing regulations. And those regulations should be observed both when a request to enforce a foreign award should be made to a District Court (and if so, which District Court) or when such request should be made directly to the Supreme Court for a determination as to whether the award is contrary to Indonesian public policy (Gautama, 1995).

The Supreme Court took the position that, although Presidential Decree No. 34 of 1981 ratified the New York Convention, foreign arbitration awards could still not be enforced in Indonesia in the absence of an implementing regulation regarding the methods of executing foreign awards (Harahap, 2001). This proposition raised controversy among Indonesian scholars, some of whom agreed with it while others were against.

Askin Kusumaatmadja agrees with the proposition of the Supreme Court. He asserts that an implementing regulation was required for Presidential Decree No. 34 of 1981 because foreign arbitral awards introduced by the New York Convention were new for Indonesia; consequently a special regulation was necessary to facilitate the enforcement of the awards (Kusumaatmadja, 1998). Similarly, Sunarti Hartono states that 'it [is] quite necessary that some legislation (whether as a special law on the recognition and enforcement of foreign awards, or inserted in the Private International Law Bill or in the Civil Procedural Law) be promulgated as soon as possible' (Kusumaatmadja, 1998).

Sudargo Gautama argues that, although formal implementing regulations may be required by some Indonesian laws for them to be effective, this is not normally a condition for the treaties that are adhered to by Indonesia (Gautama, 1995). Presidential Decree No. 34 of 1981 does not stipulate that an implementing regulation is necessary for it to be effective; therefore, an implementing regulation is not needed (Gautama, 1986). Gautama further argues that Article III of the New York Convention explicitly requires that the recognition and enforcement of foreign arbitral awards shall be treated in the same manner as the execution of domestic arbitral awards (Gautama, 1995). Consequently, the answer to the question raised by the Supreme Court regarding which court has to deal with the enforcement of foreign arbitral awards is that it should be the same court that handles the execution of domestic arbitral awards (Gautama, 1995).

Yahya Harahap agrees with Gautama and he elucidates that Article III of the New York Convention contains a 'personality principle'. This principle indicates that the New York Convention constitutes a self-executing regulation, and consequently it does not need an implementing regulation. Article III of the Convention requires that the execution of foreign arbitral awards should be in accordance with the rules of procedures of enforcing states; therefore, the procedures of enforcing foreign arbitral awards in Indonesia should be the civil procedures governed by the Renewed Indonesian Rules *(Reglemen Indonesia Yang Diperbaharui/HIR)*. Based on this argument, Harahap argues that it is wrong to refuse the execution of foreign arbitral awards simply because the implementing regulation for the Presidential Decree has not been established (Harahap, 2001).

Radhi (Gautama, 1986) is also of the opinion that foreign arbitral awards can be enforced in Indonesia in the absence of an implementing regulation for Presidential Decree No. 34 of 1981. He argues that it is significant to differentiate between self-executing and non-self-executing conventions. According to him, the New York Convention falls within the category of a self-executing convention since it contains the executorial force as provided by the New York Convention (Article 1(1) of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958)*. As a result, the implementing regulation is not needed by a member state when ratifying the New York Convention because the state has to implement the Convention in its entirety. The controversial opinions regarding the issue of an implementing regulation for Presidential Decree No. 34 of 1981 did not come to an end until the Supreme Court issued Regulation No. 1 of 1990 concerning the procedure for the enforcement of foreign arbitral awards.

4. The method of interpreting Presidential Decree No. 34 of 1981

Although Presidential Decree No. 34 of 1981 contains the text of the New York Convention and the declaration of reciprocity and commerciality reservations to the Convention, the Decree does not stipulate the method of interpreting the Convention. Hence, a question arises as to what approaches should be used by Indonesian courts to interpret the New York Convention.

As elucidated previously, the appropriate way of interpreting the New York Convention is to apply the comparative case law method (Van Den Berg, 1981). This method compares and analyzes the approaches of various judicial decisions from different contracting states to the New York Convention, and consequently a uniform judicial decision obtained from this method may be compatible with the intentions and the spirit of the Convention. Although the method may be considered as a proper approach to the interpretation of the New York Convention, it depends on whether contracting states to the Convention want to apply it or not. This is because there is no single provision under the New York Convention determining the interpretation method of this Convention. As a result, Indonesia applies its own method of interpretation. It is evidenced that

the Supreme Court of Indonesia has made a number of judicial decisions pursuant to the application of the New York Convention, but some of the decisions have applied approaches different from those of the uniform judicial interpretation of the Convention. For example, in *Trading Corporation of Pakistan Ltd v. PT Bakrie & Brothers* (Decision 64/Pdt/G/1984/PN.Jkt.Sel; Decision No. 512/PDT/1985/PT DKI; Decision No. 4231 K/Pdt/1986), the Supreme Court held that the lower Courts were correct when they interpreted that the award could not be enforced because of the application of the reciprocity reservation. This is because, although the arbitral award was rendered in England (the United Kingdom), which ratified the New York Convention in 1975, and enforcement was sought in Indonesia (the New York Convention, 1981), the parties were Pakistani and Indonesian companies. Pakistan was not a member state of the New York Convention, and therefore the award was not enforceable in Indonesia, based on the application of the reciprocity reservation of the Convention.

The Supreme Court and the lower Courts in *Trading Corporation of Pakistan Ltd v. PT Bakrie & Brothers* obviously misinterpreted the application of the reciprocity reservation under the New York Convention. According to the Convention, the reservation shall be imposed between the rendition state and the enforcing state, not the parties' states. Yet, this case could be taken as a classic example evidencing that Indonesian courts have not adopted the approach of the uniform judicial interpretation of the New York Convention. The decisions of the courts in this case would be different if, prior to making their judgments, they had analyzed judicial decisions of other contracting states pursuant to the application of the reciprocity reservation. Since the Indonesian courts frequently interpret the New York Convention differently from other contracting states, Indonesia is often criticized for violating its obligations under international law (Hornick, 1985; Mills, 2002; Adolf, 2001).

5. Supreme Court Regulation No. 1 of 1990

Supreme Court Regulation No. 1 of 1990 was issued on 1 March 1990 in order to end the controversial opinions as to whether Presidential Decree No. 34 of 1981 on whether the adhesion to the New York Convention

needs an implementing regulation or not (Gautama, 1991). The objective of Supreme Court Regulation No. 1 of 1990 appears under the Consideration part of this Regulation that reads as follows:

> With the ratification of the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (New York Convention 1958) by the Decree of the President of the Republic of Indonesia No. 34 Year 1981 dated 5 August 1981, it is considered necessary to decree a regulation concerning the procedure for enforcement of a foreign arbitral award (Gautama, 1991).

Although Supreme Court Regulation No. 1 of 1990 was successful in ending the divergent opinions among legal scholars in Indonesia, the issuance of this Regulation apparently reconfirmed the position of the Supreme Court concerning the impossibility of enforcing foreign arbitral awards in the absence of an implementing regulation for Presidential Decree No. 34 of 1981.

It is questionable how the Supreme Court had the authority to issue an implementing regulation if Presidential Decree No. 34 of 1981 did not stipulate that an implementing regulation was needed for its operation. The question may only be answered after examining the legislative history of Supreme Court Regulation No. 1 of 1990, since it shows which authorities were relied upon by the Supreme Court for the establishment of the Regulation. Prior to the issuance of Supreme Court Regulation No. 1 of 1990, a panel of the Supreme Court examined Law No. 14 of 1970 concerning Judicial Authority and Law No. 14 of 1985 regarding the Supreme Court. Article 10(4) of Law No. 14 of 1970 specifically points out that the highest control over other courts is in the hands of the Supreme Court. Article 39 of Law No. 14 of 1985 and its Elucidation stipulate that the Supreme Court may also deal with issues such as those of arbitration. Based on the contents of the two articles, the Supreme Court decided to issue Regulation No. 1 of 1990. Hence, it may be concluded that Law No. 14 of 1970 and Law No. 14 of 1985 grant authority to the Supreme Court to issue Regulation No. 1 of 1990 (Harahap, 2001).

Since Supreme Court Regulation No. 1 of 1990 is merely the implementing regulation for Presidential Decree No. 34 of 1981 on

adhesion to the New York Convention, some of the provisions under this Regulation reproduce the provisions of the Convention. Yet, Supreme Court Regulation No. 1 of 1990 is simpler than the New York Convention because the Regulation consists of only six chapters with nine articles. Chapter I contains the general principles regarding the recognition and enforcement of foreign arbitral awards. Chapter II determines which court has the authority to grant an execution of foreign arbitral awards. Chapter III regulates the procedures for obtaining an exequatur. Chapter IV governs the procedures for attachment and enforcement of foreign arbitral awards. Chapter V focuses on the costs of an exequatur. Chapter VI deals with matters that have not yet been regulated by the Supreme Court Regulation. Chapter VII contains the declaration of the effectiveness of the Supreme Court Regulation (Harahap, 2001).

6. Similarities between Supreme Court Regulation No. 1 of 1990 and Law No. 30 of 1999 (Arbitration Legislation)

Although Supreme Court Regulation No. 1 of 1990 specifically deals with the procedures of executing foreign arbitral awards, a number of the provisions of this Regulation appear under the Arbitration Legislation. For example, the content of Article 2 of the Supreme Court Regulation is very similar to Article 1(9) of the Arbitration Legislation. Article 2 of Supreme Court Regulation No. 1 of 1990 reads as follows:

> What is meant by a foreign arbitral award is an award rendered by an arbitral tribunal or a sole arbitrator outside the legal territory of the Republic of Indonesia, or an award rendered by an arbitral tribunal or a sole arbitrator which according to the laws of the Republic of Indonesia is considered as an enforceable foreign arbitral award pursuant to Presidential Decree No. 34 of 1981, State Gazette No. 40 of 1981 dated 5 August 1981.

Article 1(9) of the Arbitration Legislation states:

> International Arbitration Award means an award handed down by an arbitral institution or individual arbitrator outside the jurisdiction of the Republic of Indonesia, or an award by an arbitral

institution or individual arbitrator which, under the provisions of Indonesian law, is deemed to be an international arbitration award (Budidjaja, 2002).

The language of the two provisions is very similar and it may be said that Article 1(9) of the Arbitration Legislation is a reproduction of Article 2 of Supreme Court Regulation No. 1 of 1990. The only significant difference is that Supreme Court Regulation No. 1 of 1990 adopts the term 'foreign arbitral awards', whereas the Arbitration Legislation uses the term 'international arbitral awards'.

The other similarity between Article 2 of Supreme Court Regulation No. 1 of 1990 and Article 1(9) of the Arbitration Legislation is that these two provisions contain the principle of 'executorial force' of foreign awards (Harahap, 2001). Based on this principle, foreign arbitral awards shall be treated on the same footing as court decisions in the sense that similar to court decisions, such awards have to be recognized and enforced in Indonesia (Harahap, 2001). Nevertheless, the application of this principle is not absolute in the sense that arbitral awards may also be refused if one of the conditions under Article 3 of Supreme Court Regulation No. 1 of 1990 is not met. This provision contains a number of principles relating to the execution of foreign arbitral awards that are similar to those under Article 66 of the Arbitration Legislation.

Article 3(1) of Supreme Court Regulation No. 1 of 1990 adopts the principle of reciprocity for the enforcement of foreign arbitral awards. The provision states:

> A foreign arbitral award is only recognized and enforceable in the territory of the Republic of Indonesia if it fulfils the following conditions:
>
> > The award is rendered by an arbitral tribunal or a sole arbitrator in a country with which the Republic of Indonesia participates in an international convention concerning the Recognition and Enforcement of a Foreign Arbitral Award. The enforcement is based on the principle of reciprocity.

Based on the application of the principle of reciprocity, only arbitral awards made in a state, that has bilateral or multilateral relationships with Indonesia on the recognition and enforcement of foreign arbitral awards, are enforceable in Indonesia (Harahap, 2001). The application of the reciprocity principle is also recognized by Article 66(a) of the Arbitration Legislation.

Article 3(2) of Supreme Court Regulation No. 1 of 1990 stipulates:

> A foreign arbitral award is only recognized and enforceable in the territory of the Republic of Indonesia if it fulfils the following conditions:
>
> > Foreign arbitral awards which are stated in the paragraph above are limited to judgments which according to Indonesian law are within the scope of commercial law.

The provision limits the scope of arbitration; therefore, it adopts 'the principle of limitation' (Harahap, 2001). Yet the term 'the principle of arbitrability' may be more appropriate since Article 3(2) of Supreme Court Regulation No. 1 of 1990 deals with arbitrable subject matter. This principle is not only adopted by this provision but also by Article 66(b) of the Arbitration Legislation.

Article 3(3) of Supreme Court Regulation No. 1 of 1990 states:

> A foreign arbitral award is only recognized and enforceable in the territory of the Republic of Indonesia if it fulfils the following conditions:
>
> > Foreign arbitral awards which as stated in paragraph 1 above are enforceable in Indonesia are limited to awards which are not contrary to public policy.

The provision adopts the principle of 'public policy'. The principle is also adopted by Article 66(c) of the Arbitration Legislation. It is clear here that the principles relating to the recognition and enforcement of foreign awards under Supreme Court Regulation No. 1 of 1990 are similar to those of the Arbitration Legislation.

7. Dissimilarities between *Supreme Court Regulation No. 1 of 1990* and Law No. 30 of 1999 (Arbitration Legislation)

Although both *Supreme Court Regulation No. 1 of 1990* and the Arbitration Legislation grant authority to the Central Jakarta District Court *(Pengadilan Negeri Jakarta Pusat)* to handle issues concerning the recognition and enforcement of international (foreign-rendered) arbitral awards, they apply different methods in the process of execution. The main difference between them is that Supreme Court Regulation No. 1 of 1990 involves the Supreme Court in the process of executing foreign arbitral awards. The method of recognizing and enforcing foreign arbitral awards under the Regulation may be summarized as follows:

a. A party who seeks the recognition and enforcement of a foreign arbitral award has to register his/her arbitral award at the Registrar's Office of the Central Jakarta District Court (Article 5(1) of *Supreme Court Regulation No. 1 of 1990*).
b. The party's application for the recognition and enforcement of the award is submitted to the Supreme Court via the Chairman of the Central Jakarta District Court in order to obtain a fiat for execution (an exequatur) (Article 5(2) of *Supreme Court Regulation No. 1 of 1990*)
c. The Chairman of the Central Jakarta District Court passes the application to the Registrar/Secretary General of the Supreme Court who subsequently passes the application to the Chairman of the Supreme Court.
d. The Chairman of the Supreme Court may grant or refuse the application. The decision of the Chairman of the Supreme Court will be sent back to the Chairman of the Central Jakarta District Court to execute the decision of the Supreme Court (Article 6(1) of *Supreme Court Regulation No. 1 of 1990*).

It is arguable that the procedures to obtain an exequatur under Supreme Court Regulation No. 1 of 1990 are not efficient, as well as being costly and time-consuming (Harahap, 2001) because of the involvement of the Supreme Court. Yet, the Supreme Court opines that the procedures are

effective in avoiding complications in dealing with foreign arbitral awards. It argues that lower courts do not challenge the decisions of the Supreme Court on foreign arbitral awards anymore, since this Court is the highest in the Indonesian legal system. As such, the Supreme Court requires that its decisions are final in the sense that reviews of its decisions are not available.

In contrast to the execution procedures under Supreme Court Regulation No. 1 of 1990, the Arbitration Legislation eliminates the role of the Supreme Court in providing an exequatur. The only role given to the Supreme Court by the Arbitration Legislation is when the Chairman of the Central Jakarta District Court refuses the recognition and enforcement of international (foreign-rendered) arbitral awards. In this particular circumstance, an appeal may be filed before the Supreme Court (Article 68(2) of Law No. 30 of 1999).

It is questionable which of the two different procedures for obtaining an exequatur is valid in Indonesia. One of the weaknesses of the Arbitration Legislation is that this Legislation does not declare the invalidity of Supreme Court Regulation No. 1 of 1990 (Rajagukguk, 2001). Based on the research in the Central Jakarta District Court and the Supreme Court, the applicable procedures for obtaining an exequatur are those stipulated by the Arbitration Legislation. Accordingly, the Legislation has repealed the applicability of Supreme Court Regulation No. 1 of 1990 in this regard (Budidjaja, 2002).

D. UNCITRAL Arbitration Rules

The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (UAR) have been adopted by Indonesian arbitration law due to the participation of Indonesia in signing Resolution 31/98 (Harahap, 2001). The UAR were specifically established by UNCITRAL for optional use in ad hoc arbitration (Gautama, 1996). The UAR are deemed to be used worldwide since they were designed to be accepted in all types of legal systems, such as capitalist, socialist, common law and civil law systems (Sanders, 1977). Furthermore, the UAR may also be applied both in developed and developing countries (Sanders, 1977).

The first draft of the UAR was published on 4 November 1974 and it was sent to the United Nations Economic Commission and 75 international commercial arbitration centres for comment (Longdong, 1998). This first draft was also discussed in the Fifth International Arbitration Congress in New Delhi, India. The first draft of the UAR together with its comments were discussed further in the Eighth Session of UNCITRAL in Geneva 1-17 April 1975. After analyzing the first draft, the Secretary General of UNCITRAL was requested to design a new draft for the UAR (Longdong, 1998). This draft was published on 7 December 1975 (Longdong, 1998) and it was discussed in great detail in the Ninth Session of UNCITRAL. The UAR were accepted by UNCITRAL on 28 April 1976 and adopted by the United Nations General Assembly on 15 December 1976 through Resolution 31/98 (Longdong, 1998).

E. Jurisprudence (judicial decisions)

Although the Indonesian legal system falls within the civil law system where the theory of binding precedent is not applied, generally judicial decisions made by the Supreme Court that are regarded as 'good, appropriate and fair' (referred to as 'jurisprudence') will be followed by lower courts, namely District and Appeal Courts. For example, the Central Jakarta District Court in *ED & F Man (Sugar) Ltd v. Yani Haryanto (*Decision No. 499/Pdt/G/VI/1988/PN.JKT.PST; Decision No. 486/Pdt/1989/PT DKI; Decision No. 1205 K/Pdt/1990) held that the Court had no competence to try the case because of the arbitral clause included by the disputing parties. This decision was made by the Central Jakarta District Court after examining the approaches of the Supreme Court in *Ahyu Forestry Company Limited v. Sutomo (*Decision No. 2924 K/Sip/1981), *PT Maskapai Asuransi Ramayana v. Sohandi Kawilarang (*Decision No. 455 K/Sip/1982), and *Lioe Liang Tang v. Union Des Transport Aerigns (UTA) (*Decision No. 117/1983 G). The Supreme Court in these cases ruled that the general courts (the District and Appeal Courts) have no authority to try lawsuits before them if disputing parties select an arbitration to settle their disputes.

Because of the significance of jurisprudence, the Supreme Court of Indonesia compiled a number of judicial decisions regarding arbitration and

issued the 'Jurisprudence of the Supreme Court on Arbitration' in August 1989 (*Intermanual Himpunan Putusan Mahkamah Agung Tentang Arbitrase*, 1989). The particular purpose of the issuance of this jurisprudence is to fill the lacuna in the area of arbitration in Indonesia because prior to the enactment of the Arbitration Legislation, the Indonesian arbitration laws were derived from the Dutch colonial laws. According to the Supreme Court, the Dutch colonial laws needed to be adjusted with the development of law in Indonesia. Yet it does not mean that after the issuance of the Arbitration Legislation jurisprudence is no longer needed. Jurisprudence is still significant as a written source of arbitration law, particularly because the new legislation may not regulate certain arbitration issues. Jurisprudence also plays an important role in giving interpretation to the provisions of the Arbitration Legislation in case its Elucidation fails to provide such interpretation. The issuance of the jurisprudence on arbitration is really helpful to understand comprehensively the approaches of the Supreme Court regarding the implementation of arbitration in Indonesia.

Jurisprudence discussed here is derived from national decisions (Indonesian court decisions), and consequently it may be questioned whether international judicial decisions, inter alia decisions of other countries, may also become jurisprudence in Indonesia. If the answer to this question is in the affirmative, then it may be said that international judicial decisions also constitute a source of international commercial arbitration law in Indonesia. The answer to this question remains an issue (Ichsan, 1993) since none of the Indonesian courts' decisions on arbitration up to now explicitly rely on international judicial decisions.

The Central Jakarta District Court in *ED & F Man (Sugar) Ltd v. Yani Haryanto* (Decision No. 499/Pdt/G/VI/1988/PN.JKT.PST; Decision No. 486/Pdt/1989/PT DKI; Decision No. 1205 K/Pdt/1990) put forward the proposition that foreign (international) judicial decisions cannot be enforced in Indonesia, yet such decisions have to be recognized or at least respected. Since international judicial decisions are not enforceable, they cannot become a source of jurisprudence in Indonesia. As a result, international judicial decisions do not constitute the source of international commercial arbitration law in the country. However, such decisions may

become the source of knowledge for judges and arbitral institutions when approaching arbitration disputes (Ichsan, 1993).

F. Doctrines (juristic works)

Doctrines or juristic works may be defined as written opinions of legal scholars pertaining to certain legal issues (Ichsan, 1993). In Indonesia, doctrines have made a significant contribution to the development of international commercial arbitration. Such a contribution becomes very apparent when other legal sources of international commercial arbitration fail to provide clear interpretations to certain issues on arbitration. For example, the meaning of the term 'public policy' is defined by the Indonesian legal scholars rather than stipulated by legislation. Sudargo Gautama opines that international (foreign-rendered) arbitral awards violate 'public policy' if such awards infringe the principles of the ideology of Indonesia *(Pancasila),* the 1945 Constitution, and the fundamental principles of Indonesian laws (Gautama, 1989). Rajagukguk states that 'public policy' may be defined as 'order, welfare and security' or it may be the same as 'legal order' or the synonym of 'fairness' (Rajagukuguk, 2001).

The opinion of Rajagukguk was quoted and relied on by the Central Jakarta District Court in making the decision in *Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina) & PT PLN (Persero) v. Karaha Bodas Company LLC (*Decision No. 86/PDT.G/2002/PN.JKT.PST). Hence, it is apparent that doctrines are significant to fill the vacuum of arbitration law; therefore, they constitute a written source of Indonesian arbitration law.

G. International custom and general principles of law

In the context of arbitration, Indonesia has its own unwritten law (*Adat*) to settle disputes that are submitted by disputing parties before an *Adat* arbitral institution (Fuady, 2000). Unfortunately, according to the Survey of Indonesian Economic Law (1973), the unwritten law is only capable of resolving simple disputes arising in communities in villages and consequently it may not be suitable for the use of international commercial arbitration, since disputes in the latter type of arbitration are

more complicated. However, it does not mean that the arbitration law of Indonesia neglects the use of unwritten law in the sphere of international commercial arbitration. In fact, Indonesian arbitration law, through the Arbitration Legislation, acknowledges that unwritten law in the form of international customs or the general principles of law, such as justness and fairness *(ex aequo et bono),* may also be used to govern arbitration. Article 56 (1) of the Arbitration Legislation provides that 'the arbitrator or arbitration tribunal will base their decision on the provisions of the law or on justice and decency' (Budidjaja, 2002).

According to Sudargo Gautama, 'justice and fairness (*ex aequo et bono*)' constitute the main elements of unwritten law (Gautama, 1989) and they become an integral part of the practices of international commercial arbitration (Gautama, 1989). Hence, he proposed in his academic drafts of the Arbitration Legislation to permit arbitrators to apply *ex aequo et bono* although parties do not stipulate its use in their agreement (Gautama, 1989). Gautama's proposal was not adopted by the Arbitration Legislation because the Elucidation of Article 56(1) of the Arbitration Legislation determines that arbitrators may decide *ex aequo et bono* only if disputing parties agree with its application.

Obviously, the Elucidation of Article 56(1) of the Arbitration Legislation suggests that unwritten law is also a legal source of arbitration in Indonesia, but it is questionable what constitutes *ex aequo et bono* according to this Elucidation. Trakman explains that the term *'ex aequo et bono'* is derived from commercial practices or customs called *'Lex Rhodia',* that have existed in the Mediterranean since 300 BC (as cited in Adolf, 2002). *'Lex Rhodia'* is now known as *'Lex Mercatoria'* and according to Bernard Audit, 'the *Lex Mercatoria* is a body of "spontaneous" law created by standard commercial practices and arbitral decisions' (Carbonugau, 1990). Based on this explanation, *'ex aequo et bono'* may be referred to as *'lex mercatoria'* (merchant law). In other words, when arbitrators are given the authority to decide based on *ex aequo et bono,* it means the arbitrators may apply *lex mercatoria.*

Fuady (2000) disagrees that the term *'ex aequo et bono'* is similar to the term *'lex mercatoria'*. He argues that the principles and sources of *lex mercatoria* are well established and clearer than those of *ex aequo et bono*.

He asserts that *ex aequo et bono* does not have clear legal sources, and consequently it is merely based on the abstract principles of 'justice and fairness'. According to him, when arbitrators are requested to decide disputes based on *ex aequo et bono*, the arbitrators have authority to interpret the abstract principles of 'justice and fairness' (Fuady, 2000) subject to the basic principles of morality and justice and the rules of international public policy (Hirsch, 1993).

H. Arbitration agreement

It is frequently questioned whether arbitration agreements may be categorized as a source of international commercial arbitration law in Indonesia. Widjaja (2001) and Harahap (2001) merely mention that the Arbitration Legislation (Law No. 30 of 1999), the international treaties (the ICSID Convention and the New York Convention), the UNCITRAL Arbitral Rules and Supreme Court Regulation No. 1 of 1990 are the Indonesian legal sources of commercial arbitration law. Apparently, Widjaja and Harahap limit the legal sources of commercial arbitration to the written legal sources that require a formal process of making or adopting them. This approach is narrow because it neglects the use of unwritten law as a legal source in Indonesia (Article 1(2) of the Decision of the People's Consultative Assembly No. III/MPR/2000).

Ichsan suggests adopting a broad approach to identifying the legal sources of international arbitration in Indonesia. He contends that they should be similar to those of international private law (conflict of laws) (Ichsan, 1993; Tetley, 2004). In this regard, the legal sources of international commercial arbitration should be extended to cover all sources of international private law, namely national legislation, international treaties, judicial decisions, doctrines, unwritten law (international customs and general principles of law) and parties' agreements (Ichsan, 1993; Tetley, 2004). This approach may be compelling and compatible with Article 1(2) of the Decision of the People's Consultative Assembly No. III/MPR/2000, since it includes unwritten law (international customary law) as a legal source of international commercial arbitration. Based on this approach, parties' agreements to arbitrate may constitute a legal source of commercial arbitration in Indonesia.

CHAPTER 3

THE NATURE OF COMMERCIAL ARBITRATION

A. The nature of 'commercial'

The term 'commercial' appears under Articles 5(1) and 66(b) of the Arbitration Legislation. The former states:

> The only disputes which may be settled by arbitration are disputes in the commercial sector concerning rights, which in the law and regulations have the force of law and are fully controlled by the parties in dispute (Budidjaja, 2002).

The latter stipulates that international arbitration awards are limited to those matters falling within the scope of 'commercial nature' pursuant to Indonesian law (Sriro, 2000).

The Arbitration Legislation does not define the term 'commercial' in the body of the text of this Legislation. Instead, the Elucidation of Article 66(b) of the Arbitration Legislation provides that 'matters deemed to be commercial in nature under Indonesian Law include, among other fields, trade and commerce, banking, finance, investment, industry and intellectual property' (Sriro, 2000). Although the Elucidation of Article 66(b) of the Arbitration Legislation provides a non-exhaustive list of commercial activities as a guideline, this Elucidation does not provide a

clue as to what is meant by 'commercial nature'. Hence, it is questioned as to what constitutes 'commercial nature' according to the arbitration law of Indonesia.

1. The meaning of 'commercial nature' under the Revised Indonesian Commercial Code (RICC)

The Commercial Code of Indonesia originated from the Dutch Commercial Code of 1848 and it was implemented in Indonesia by the Dutch government on 1 May 1848 (Kansil, 2001). This Code was revised in 1938 for the purpose of eliminating sections 2-5 of the Indonesian Commercial Code of 1848 (Gautama, 1995; *State Gazette of 1938 No. 276*). The distinction between the old and the revised Codes is that the terms 'traders' and 'non-traders' in the old Commercial Code are eliminated and they are replaced by new terms, namely 'business enterprises' and 'business acts' (Gautama, 1995). The issue here is whether the terms 'business enterprises' and 'business acts' may determine the criterion of 'commercial nature'.

The term 'business enterprises' in the Revised Indonesian Commercial Code (RICC) is not defined clearly by the legislature because this specific term has been left to be interpreted by jurisprudence or case law (Gautama, 1995). Nevertheless, the Dutch Minister of Justice, during debates in the Parliament regarding the implementation of this Code, stipulated four conditions to clarify the term 'business enterprises'. These conditions are as follows:

a. The person has to conduct continuous acts;
b. The acts prescribed must be done openly;
c. The acts must also be performed in a specific manner;
d. The acts purport to obtain profits.

How to prove that a person has fulfilled these conditions of a 'business enterprise' may be questioned. The answer is found in Article 6 of the Indonesian Commercial Code of 1938 (hereinafter referred to as the Revised Indonesian Commercial Code/RICC) which requires business people who own business enterprises to make records of their activities (bookkeeping).

Article 6 paragraph 1 of the RICC states that 'everyone operating a business is obliged to keep records in accordance with the requirements of his/her business, his/her financial position, and everything that concerns his/her business, in such a manner that cognisance at all times be taken of these records regarding his/her rights and obligations' (Gautama, 1995). The records (balance sheets) have to be produced within the first six months of every year in accordance with the requirements of the business, and be retained for 30 years. Telegrams and letters, including their copies, must be retained for ten years. Accordingly, the records contained in the bookkeeping may be utilized to prove the existence of a business enterprise (Gautama, 1995).

In addition, the registration of business enterprises in the Indonesian Chamber of Commerce and Industry *(Kamar Dagang dan Industri Indonesia), e*stablished in 1968, may also be used to prove the establishment of business enterprises (Gautama, 1995). Business people are also obliged to become members of a trade association. The profiles and activities of business people may be accessed from the association to prove that they have met the conditions for the establishment of 'business enterprises'.

Similarly to the term 'business enterprises', the term 'business acts' is not defined in the RICC either. Yet, acts may fall within the categorization of the term 'business acts' if they are performed by 'business enterprises' (Ichsan, 1976). Hence, it may be concluded that any act or relationship conducted by 'business enterprises' has a 'commercial nature'. Also, any matter regulated by the RICC is automatically considered as having a 'commercial nature'.

However, it is arguable that the scope of 'commercial nature' may be narrow if only the criteria stipulated by the RICC are used to define the meaning of 'commercial nature'. The Arbitration Legislation does not merely rely on the RICC for the determination of the criterion of 'commercial nature', otherwise this Legislation could not keep up with the development of the business world (*Law No. 30 of 1999* Consideration). In order to extend the scope of 'commercial nature' under the Arbitration Legislation, this Legislation also relies on other laws or regulations that deal with commercial matters.

The RICC is not the only codification dealing with commercial matters since the provisions of the Indonesian Civil Code of 1848 (hereinafter referred to as the Indonesian Civil Code) also deal with these matters (Gautama, 1991). According to Article 1 of the RICC, 'the Civil Code, insofar as it has not been specifically deviated from by the Code [the Commercial Code], shall be applicable to the subjects dealt with by this Code [the Commercial Code]'. It is clear that the Indonesian Civil Code is also applicable to the regulation of commercial matters, and consequently this Code may also provide the meaning of the term 'commercial nature' for the application of the Arbitration Legislation.

2. The meaning of 'commercial nature' under the Indonesian Civil Code

The Indonesian Civil Code was derived from the Dutch Civil Code of 1848, but its implementation today is merely treated as a guideline for judges to make decisions (Gautama, 1995). Judges in a number of their judgments (District Court No. 52/1966 G and 178/1966 G) have made new interpretations regarding the provisions of the Indonesian Civil Code. Although the new Civil Code (the provisions of the Indonesian Civil Code of 1848) has not been established, law reform in the area of civil matters continues to develop through the process of the interpretation of the Indonesian Civil Code in order to respond to the economic, social, political and cultural developments in Indonesia (Gautama, 1995).

The RICC has a close link with the Indonesian Civil Code since the latter supplements the Commercial Code. The link between the two Codes becomes more apparent when the general principles of contracts and obligations in Book III of the Indonesian Civil Code are applied to govern the subject matters of the RICC. In addition, a number of provisions in Book III of the Indonesian Civil Code contain provisions for matters of a 'commercial nature', such as contracts of sale, hire, agency and representation, and personal partnership (Gautama, 1995). 'Franchise business' is one of the classic examples to prove the link between the two Codes.

'Franchise business' is not specifically regulated by the RICC since it is a new type of business. Yet, this does not mean that franchise business

does not fall within the category of 'business acts', because this type of business has a commercial nature (Harahap, 1991). In order to prove the commercial nature of 'franchise business', Harahap applies an analogous approach between the contract of 'franchise business' and the contract of 'agency'. According to him, 'franchise business' is closely related to lease matters. This proposition may be correct because in order to establish a franchise business, the franchiser has to enter into a contract with the franchisee. The contract confers the right on the franchisee to operate a local branch of the parent company (the franchiser's company). The relationship between the two parties has characteristics of a 'lease contract' that is governed by the provisions under Book III of the Indonesian Civil Code.

The entire discussion here suggests that the term 'commercial nature' should be interpreted in a broad sense (Widjaja and Yani, 2000) for the application of arbitration in Indonesia. This approach is adopted by the Arbitration Legislation because this Legislation aims to keep up with development of activities of a new commercial nature (Harahap, 1996). For example, in *Bankers Trust Company and Bankers Trust International, Plc v. PT Mayora Indah, Tbk*. (Decision No. 001/Pdt/Arb.Int/1999/PN.JKT.PST vide No. 002/Pdt/Arb.Int/1999/PN.JKT.PST. vide No. 02/Pdt.P/2000/PN.JKT.PST; Decision No. 02 K/Ex'r/Arb.Int./Pdt/2000), the Court held that the 'currency transaction and the interest rate swaps' were of a 'commercial nature', hence the dispute was arbitrable according to the Arbitration Legislation.

B. The nature of 'arbitration'

Article 1(1) of the Arbitration Legislation provides that 'arbitration means a means of settling civil disputes outside the general courts, based on an arbitration agreement made in writing by the parties to the dispute' (Budidjaja, 2002). This article contains three significant elements namely:

1. arbitration deals with civil disputes only;
2. arbitration is conducted outside the jurisdiction of general courts;
3. arbitration is based on a written agreement.

1. The first element of arbitration

The draft of Article1(1) of the Arbitration Legislation actually did not contain the words 'civil disputes'. The first draft of this provision only stated that 'arbitration is a method of settling disputes outside the general courts based on a written arbitration agreement made by disputing parties' (Gautama, 1999). Yet, the United Development Faction *(Fraksi Persatuan Pembangunan)* proposed adding the word 'civil' before the word 'disputes'. The proposal of this faction was accepted and the word 'civil' was inserted into the text of Article 1(1) of the Arbitration Legislation (Gautama, 1999). The additional word 'civil' has a great impact on the scope of arbitration, the very consequence of it being that arbitration may only resolve disputes that fall within the 'civil category'. The limited scope of arbitration also indicates that the jurisdiction of arbitration is not as broad as the jurisdiction of the general courts since they may try both public and civil disputes.

'Civil disputes' in relation to arbitration may be defined as conflicts of private rights. These are rights that are fully controlled by persons (natural or legal persons) and have no connection with public policy and the public interest (Hadisuprapto, 2000). Some examples of private rights relating to public policy and the public interest are matters relating to divorce, the status of 'child', and the recognition of 'child' (Purwosutjipto, 1992). These matters cannot be arbitrated according to the Arbitration Legislation.

2. The second element of arbitration

Article 1(1) of the Arbitration Legislation clearly points out that 'arbitration' constitutes a dispute resolution mechanism outside the jurisdiction of general courts. This language indicates that arbitration conducted either by ad hoc arbitration or an arbitral institution (Harpole, 2003) has its own competence to settle disputes. The competence of arbitration is no longer a contentious issue in Indonesia because the Supreme Court of Indonesia has established a firm position that arbitration has absolute competence to settle a dispute when disputing parties select arbitration as their method of dispute resolution (*Guong cs v. PT Timber Ltd*: Decision No. 225 K/Sip/1976).

A similar position was also implemented by the Supreme Court in a number of cases (*Company Limited v. Sutomo/Direktur Utama PT Balapan Jaya:* Decision No. 2924 K/Sip/1981; *PT Indrapura v Kawilarang:* Decision No. 794 K/Sip/1982; *Jenny v. PT.Surabaya Land:* Decision No. 3145-K/Pdt/1999), but the Supreme Court decided differently from its own position in *S M Pardede v. Syafei Juremi cs* (Decision No. 70/Pts.Pdt/1982/PN.P.Bun). In that case, the Supreme Court decided that the District Court of Pangkalanbun *(Pengadilan Negeri Pangkalanbun)* and the Appeal Court of Central Kalimantan *(Pengadilan Tinggi Kalimantan Tengah)* had the competence to try the case, although Article 21 of the parties' contract contained an arbitration clause stating that any disputes that could not be settled amicably should be submitted to the National Arbitration Board of Indonesia *(Badan Arbitrase Nasional Indonesia/BANI)*. The Supreme Court reasoned that an arbitration clause was merely a formality of a contract and the parties were free to submit their dispute either to a court or to arbitration.

The position of the Supreme Court in the *S M Pardede* case was not adopted in subsequent cases. In *PT Arpen Pratama Ocean Line v. PT Shore Mas* (Decision No. 3179/K/Pdt/1984), the Supreme Court went back to the position that general courts did not have authority to try a dispute if disputing parties included an arbitration clause in their contract. This position has been confirmed by the Supreme Court in its other decisions concerning the competence of arbitration, for example in *PT Panata Tama Inter Instalasi Indonesia v. PT Kolifri Tekindo Pratama* (Decision No. 1155 K/Pdt/1997). In that case, the Supreme Court rejected and cancelled the decision of the Appeal Court. The Supreme Court held that the Appeal Court was mistaken in applying the law, since it was evidenced that both parties had included an arbitration clause in their dealership agreement, and stipulated that the Court would be the last resort to settle the parties' dispute. The Supreme Court pointed out that the Court could only try the case if the parties failed to settle their dispute through arbitration. Since both parties had not referred their dispute to arbitration, the Court had no jurisdiction to try the case. The decision of the Supreme Court in *PT Panata Tama Inter Instalasi Indonesia v. PT Kolifri Tekindo Pratama* (Decision No. 1155 K/Pdt/1997) also overruled the previous approach of the Supreme Court to the competence of arbitration in *SM Pardede v. Syafei Juremi cs* (Decision No. 70/Pts.Pdt/1982/PN.P.Bun).

It is clear from the previous discussion that the Supreme Court has taken a firm position that arbitration has absolute competence to resolve parties' disputes if the disputing parties select arbitration as their dispute resolution mechanism. In this regard, it may be questioned whether the absolute competence of arbitration is able to set aside the competence of all types of ordinary (general) courts. The answer is in the affirmative since Article 1(1) of the Arbitration Legislation stipulates that arbitration has absolute competence over the jurisdiction of general court (ordinary court).

In addition to 'ordinary court' (Based on Article 3 of *Law No. 2 of 1986)*, an extra-ordinary court may be established in the jurisdiction of an ordinary court (*Law No. 2 of 1986* Article 8). Articles 280(1) and 280(2) of Law No. 4 of 1998 point out that 'commercial court' is a chamber of 'ordinary court' that specifically has an exclusive legal capacity to deal with insolvency, the failure to pay debts as they fall due, and the suspension of payments. It may be argued that if 'commercial court' is an integral part of 'ordinary court', then the absolute competence of arbitration shall prevail over the competence of 'commercial court'. Yet, this argument has not been adopted by the Supreme Court of Indonesia.

In *PT Basuki Pratama Engineering and PT Mitra Surya Tata Mandiri v. PT Megarimba Karyatama (*Decision No. 019 K/N/1999), the Supreme Court took the position that the method of dispute resolution through arbitration cannot set aside the rights of creditors to submit their cases regarding bankruptcy before an extra-ordinary dispute resolution, inter alia 'commercial court'. The Supreme Court examined the contents of Articles 280(1) and 280(2) of Law No. 4 of 1998 to come to this decision. The Supreme Court stated that it was correct to say that 'commercial court' is an integral body of 'ordinary court' by virtue of Article 280(1) of *Law No. 4 of 1998*. Yet, Article 280(2) of Law No. 4 of 1998 specifically confers the legal status and the capacity on 'commercial court' to try issues relating to bankruptcy, the failure to pay debts as they fall due and the suspension of payments. The Supreme Court was of the opinion that 'commercial court' constitutes 'an extra-ordinary court', and hence the dispute regarding bankruptcy in *PT Basuki Pratama Engineering and PT Mitra Surya Tata Mandiri v. PT Megarimba Karyatama (*Decision No. 019 K/N/1999) fell within the

absolute competence of 'commercial court' according to Article 280(1) of Law No. 4 of 1998.

The Supreme Court also examined the status and the competence of arbitration and 'ordinary (general) court'. It asserted that the legal status and capacity of arbitration (the absolute competence of arbitration) only supersede the status and capacity of 'ordinary court'. Therefore, although the issue of insolvency is derived from a loan agreement in which an arbitration clause is included, arbitration may not be used as a dispute resolution, since the issue of insolvency is the absolute competence of 'commercial court' as an 'extra-ordinary' court. It is clear that the Supreme Court in *PT Basuki Pratama Engineering and PT Mitra Surya Tata Mandiri v. PT Megarimba Karyatama (*Decision No. 019 K/N/1999) took the position that arbitration may only settle disputes that do not fall within the absolute competence of an extra-ordinary court, inter alia 'commercial court'.

The same position was adopted in *PT Enindo v. PT Putra Putri Fortuna Windu cs* (Decision No. 4 K/Pailit/1999/PN.Niaga.Jkt.Pst). The Commercial Court of Central Jakarta held that it had no jurisdiction to try the case since the parties had included an arbitration clause in their contract. However, the Supreme Court cancelled this decision and ruled that the Commercial Court had authority to try the case of bankruptcy. The Supreme Court established its decision based on the substance of Article 280(1) of Law No. 4 of 1998. This Court held that the absolute jurisdiction of the Commercial Court includes the issue of bankruptcy, and therefore, although the parties agreed to select arbitration to resolve their dispute, arbitration had no jurisdiction to resolve the issue.

The position of the Supreme Court in the two cases confirms that disputes are not eligible for arbitration if they can be referred to an extra-ordinary court. Hence, it may be concluded that the competence of arbitration under Article 1(1) of the Arbitration Legislation is limited to the commercial disputes that may be brought before 'ordinary (general) courts' only.

3. The third element of arbitration

The third element of arbitration under Article 1(1) of the Arbitration Legislation is that arbitration is established by the written agreement of disputing parties (Widjaja and Yani, 2000). Article 1(3) of the Arbitration Legislation stipulates:

> Arbitration agreement means an agreement in the form of an arbitration clause set out in a written agreement made by the parties (Based on Article 1(2) of *Law No. 30 of 1999)* before the dispute arose, or a separate arbitration agreement made by the parties after the dispute arose (Budidjaja, 2002).

The Arbitration Legislation recognizes two types of arbitration agreement. The first type is referred to as an 'arbitration clause' and the second type is a 'submission agreement'. Yet, a mere agreement to arbitrate does not automatically make disputing parties eligible to refer their disputes to arbitration because Article 1(3) of the Arbitration Legislation contains a condition stipulating that the agreement must be in written form. This condition is also emphasized by Article 9(1) of the Arbitration Legislation.

> Article 9(1) of the Arbitration Legislation states:
>
> Should the parties choose resolution of the dispute by arbitration after the dispute occurs, their consent must be given in a written agreement, signed by the parties.

It may be argued that the language of this provision merely imposes the written condition on a 'submission agreement' rather than on an 'arbitration clause'. Basically, the Arbitration Legislation imposes a written condition on both as it is clearly stipulated under Article 1(3) of this Legislation. The written condition required by Article 9(1) of the Arbitration Legislation specifically ensures that parties are truly willing to arbitrate their disputes after they have occurred (Gautama, 1999). It may be difficult to prove the intention of disputing parties to arbitrate when they are in a situation of conflict because one of them may deny the existence of their submission agreement. Hence, the very function of Article 9(1) of the Arbitration Legislation is to prove the existence of a submission agreement.

Yet, it does not mean that the signatures of parties as is required by Article 9(1) of the Arbitration Legislation is the only way of proving the existence of a submission agreement. This is because Article 9(2) of the Arbitration Legislation stipulates that 'if the parties are unable to sign a written agreement, as contemplated in paragraph (1), the written agreement must be made in the form of a notarial deed' (Budidjaja, 2002). This provision anticipates the situation where parties cannot sign a submission agreement because of their inability to write (Gautama, 1999).

In addition to the condition under Articles 9(1) and 9(2) of the Arbitration Legislation, Article 9(3) of the Arbitration Legislation also requires that a submission agreement to arbitrate must contain:

a. The matter in dispute;
b. The full names and addresses of the parties;
c. The full name and place of residence of the arbitrator or the arbitration tribunal;
d. The place where the arbitrator or arbitration tribunal will make their decision;
e. The full name of the secretary;
f. The period for resolution of the dispute;
g. A statement of assent by the arbitrator; and
h. A statement of the assent from the disputing parties that they will bear all costs necessary for the resolution of the dispute through arbitration.

The failure to include one of these requirements makes a submission agreement null and void.

C. International arbitration

Although the Arbitration Legislation contains no single definition of what constitutes 'international arbitration' (Abdurrasyid, 2001), it does not mean that the drafters of this Legislation were of the opinion that the definition of the term 'international arbitration' was not significant. Based on the legislative history of the Arbitration Legislation, two factions, the

United Development Faction (*Fraksi Persatuan Pembangunan* (FPP)) and the Utilized Development Faction (*Fraksi Karya Pembangunan* (FKP)) during the process of the drafting of this Legislation in the House of the Representatives (*Dewan Perwakilan Rakyat* (DPR)) proposed defining the term 'international arbitration' (Gautama, 1999). The representatives of the FPP proposed adding a new provision that specifically determined the 'internationality' of arbitration. The representatives of this faction categorized arbitration as 'international' if it fulfils four criteria, namely:

a. Foreign elements exist;
b. People from different nationalities are involved;
c. Disputing objects are located outside the jurisdiction of a country in which an arbitration is held;
d. Parties have a connection with several countries.

Similarly, the FKP proposed altering the entire draft of Article 64 of the Arbitration Legislation and included the criteria of international arbitration as follows:

a. Disputing matters across the borders of a country;
b. Containing foreign elements;
c. Involving different nationalities;
d. The place of arbitration is outside the jurisdictions of parties;
e. Disputing objects are located outside the territory of a country in which an arbitration is held;
f. Parties have a connection with several countries.

The proposals of the two factions were not adopted by the Arbitration Legislation. Nevertheless, according to Abdurrasyid (1999), the interpretation of 'international arbitration' under the Arbitration Legislation may be referred to the Vienna Convention, the Statute of the International Court of Justice, the ICSID Convention, the New York Convention and Article 1(3) of the Model Law. This proposition which suggests that Article 1(3) of the Model Law may be used as a guideline to define 'international arbitration' under the Arbitration Legislation, is arguable because the application of this Legislation reveals that it

merely implements 'foreign territorial criteria' rather than the criteria of 'international nature', as adopted by the Model Law. As a result, any award that is issued by arbitral proceedings in Indonesia is still categorized as a 'domestic award', even though the award is governed by laws other than Indonesian law (de Fina, 2000).

The Arbitration Legislation is supplemented with an Elucidation to provide clarification for the provisions of this Legislation. Unfortunately, the Elucidation of the Legislation is also silent concerning the definition of 'international arbitration'. Hence, the Arbitration Legislation may not be adequate to govern international arbitration matters because of its failure to define the term 'international arbitration', which becomes the heart of the subject matter of international arbitration. Although the Legislation fails to define the term 'international arbitration' (Fuady, 2000), Article 1 (9) of the Legislation stipulates the meaning of 'international arbitration awards'.

It may be argued that the failure of the Arbitration Legislation to define the term 'international arbitration' does not mean this term is left completely undefined, because this Legislation is not the only source of arbitration law in Indonesia. In addition to legislation, there are other sources of law in Indonesia dealing with arbitration, for example, the ICSID and the New York Convention, Indonesian jurisprudence on arbitration, and doctrines.

Since the ICSID Convention, the New York Convention and Indonesian jurisprudence on arbitration do not provide a definition of the term 'international arbitration', the other legal source of arbitration, inter alia 'doctrines', may provide the meaning of this term. Doctrines contain the opinions and arguments of leading Indonesian legal scholars on arbitration and they play important roles in the process of making laws, since judges may base their reasons on the scholars' opinions to make their judgment if other sources of law are silent. Judge-made law is not a new approach in the Indonesian legal system because Article 2 of the General Rule of Legislation for Indonesia requires judges to try legal cases before them, even though there is no law/regulation pertaining to the cases (Rajagukguk, 2001).

Kusumaatmadja in Abdurrasyid (2002) states that 'the term "international" means all measures and principles regulating relationships

or matters between one state and another, between one state and a legal entity which is not a state, and between a legal entity which is not a state and another entity that crosses the borders of the state'. By virtue of this definition, Kusumaatmadja suggests that this territorial criterion should be used to determine the 'internationality' of arbitration. Similarly, Gautama (1999) stipulates that arbitration law in Indonesia interprets the term 'international' as outside the jurisdiction of Indonesia.

Wibowo (1997) points out that arbitration is 'international' if parties to the arbitration come from different countries. This proposition is arguable because the New York Convention that was ratified by Indonesia through Presidential Decree No. 34 of 1981 excluded a party's nationality as a determinant criterion for the applicability of the Convention (van den Berg, 1981). If Wibowo's opinion were adopted to determine the 'internationality' of arbitration in Indonesia, then Indonesia would violate its international obligation since the country would not have implemented the New York Convention in its entirety. Accordingly, this opinion should not be adopted to define the term 'international' under Indonesian arbitration law.

Hartono (1989) interprets the word 'international' in a broader sense. According to her, the meaning of 'international' relates to the facts or the materials of the relationships that have an international nature. Hence, it may be concluded that the international nature of parties' relationships is the main criterion to determine the internationality of relationships. Based on this definition, arbitration is considered as 'international' if parties' relationships have an 'international nature'. The question here is what is meant by 'international nature'.

Kusumaatmadja in Abdurrasyid (2002) establishes three characteristics of the international nature of arbitration. The first characteristic relates to organizations used for an arbitration process. For example, the ICSID Centre is an international arbitral institution; therefore, arbitration that utilizes this institution is regarded as 'international arbitration'.

The second characteristic of the international nature of arbitration relates to arbitration rules, for example the International Chamber of Commerce (ICC) or the UNCITRAL Arbitration Rules. Although parties

may hold the arbitral proceedings in their own country, if they select the UNCITRAL Arbitration Rules to govern their proceedings, the parties' arbitration is classified as 'international arbitration'. Harahap (1991) explains that arbitration may be classified as 'international' if the rules selected by disputing parties are derived from international rules or conventions because they supersede the territorial criteria.

The third characteristic of the international nature of arbitration is based on the foreign nature of parties' relationships. Parties' arbitration is 'international' if their relationships contain 'foreign elements'. Similarly, Gautama (1991) asserts that subject matters or relationships are regarded as having an international nature if such matters or relationships contain 'foreign elements'. Ichsan (1993) elucidates that parties to an international arbitration process may have the same nationalities, but if the terms of their agreement such as the subject, the object of the agreement or the formality of concluding the agreement contain 'foreign elements', then the parties' arbitration is categorized as 'international arbitration'. The emphasis on foreign elements as the main criterion to classify the 'internationality' of arbitration (Gautama, 1991) causes Fuady (2000) to consider that 'international arbitration' in Indonesia should be referred to as 'foreign arbitration'. This is because international arbitration law in Indonesia merely deals with the matters regulated by the New York Convention, namely the recognition and enforcement of foreign awards.

The broad interpretation of the term 'international' proposed by Hartono in Abdurrasyid (2002) and the characteristics of 'international nature' proposed by Kusumaatmadja in Abdurrasyid (2002) are apparently similar to the approaches of the Model Law to the interpretation of 'international arbitration'. Nevertheless, the New Arbitration Legislation does not apply the two proposals as it is evidenced that it continues to adopt territorial criteria to determine the 'internationality' of arbitration.

In *Pertamina v. Patuha Power Ltd, Perusahaan Listrik Negara (PLN) and Minister of Finance of the Republic of Indonesia (*Decision No. 271/PDT.G/1999/PN.JKT.PST), the parties stipulated in their contract that any dispute arising among them should be referred to arbitration in Jakarta using the UNCITRAL Rules if the parties failed to settle such dispute amicably. The

parties' arbitration was still classified as 'domestic arbitration' (Mills, 2002) since Jakarta (Indonesia) was selected as the seat of arbitration, although the UNCITRAL Rules were applied to the dispute. A similar approach was adopted in *Pertamina v. Himpurna California Energy Ltd, Perusahaan Listrik Negara (PLN) and the Minister of Finance of the Republic of Indonesia* (Decision No. 272/PDT.G/1999/PN.JKT.PST). Hence, it may be concluded that the parties' arbitration is 'domestic' if the seat of arbitration is Indonesia even though one of the characteristics of 'international nature' proposed by Kusumaatmadja in Abdurrasyid (2002) exists.

CHAPTER 4

ARBITRATION PRINCIPLES

A. Public policy principle

The term 'public policy' in Indonesia may be difficult to define precisely due to the country's pluralistic legal system, namely civil law, Islamic law and customary *(Adat)* law. Hence, what is considered as a violation of 'public policy' in one region of Indonesia may not be the case in others. For example, the sale of alcohol is categorized as a violation of 'public policy' in the Province of Nanggroe Aceh Darussalam since this province has adopted the Islamic Law that prohibits alcohol, but this is not the case in Jakarta. The sale of alcohol in this city is legal so long as sellers have obtained the permits to sell it (Harahap, 2001). This example evidences that the application of 'public policy' in Indonesia is 'relative according to the place'.

The relativity of 'public policy' in Indonesia also extends 'time' since what is regarded as legal today in the country, may be against public policy tomorrow, and vice versa (Harahap, 2001). For example, prior to the issuance of Presidential Decrees No. 43 of 1971 and No. 39 of 1978, the import of sugar was considered legal conduct. However, since the issuance of the two Presidential Decrees, this conduct has been declared to be against the public policy of Indonesia, and is therefore illegal. This

circumstance occurred in *ED & F Man (Sugar) Ltd v. Yani Haryanto* (Decision No. 499/Pdt/G/VI/1988/PN.JKT.PST; Decision No. 486/Pdt/1989/PT.DKI; Decision No. 1205 K/Pdt/1990).

The Supreme Court in that case ruled that the arbitral award could not be enforced since the contracts for the sale of sugar were contrary to the prevailing laws, namely Presidential Decrees No. 43 of 1971 and No. 39 of 1978, and consequently the contracts violated Indonesian public policy. In order to come to this decision, the Court examined the contents of Article 1320(4) of the Indonesian Civil Code. This provision stipulates that in order to form a valid contract, the subject matter of a contract must be legal (the cause must be permissible). The Court reasoned that the main contracts contained illegal subject matters since, based on Presidential Decrees No. 43 of 1971 and No. 39 of 1978, the import of sugar could only be conducted by the Logistics Bureau of Indonesia *(Badan Urusan Logistik/BULOG)*. Because of the violation of the two Presidential Decrees, the Court concluded that the main contracts were contrary to Indonesian public policy and consequently they were void. As a result, not only the arbitration agreement but also the awards were invalid since they were connected with the main contracts (Budidjaja, 2002).

The decision and the grounds of the decision in *ED & F Man (Sugar) Ltd* were arguable because the Court did not apply the principle of severability in examining the main contracts. The Court was of the opinion that the invalidity of the main contracts automatically caused the invalidity of the arbitration agreement. The arbitral award was also null because it was derived from the void arbitration agreement. This approach was incorrect under Indonesian arbitration law because the principle of severability is recognized in the country. This principle determines that the invalidity of a main contract does not affect the validity of an arbitration agreement (Gautama, 1999). In addition, the grounds of public policy were not appropriately used by the Court in declaring the invalidity of the main contracts, because Article 1337 of the Indonesian Civil Code clearly separates the violation of 'existing laws', 'good morals' and 'public policy'. Hence, the violation of existing laws is not automatically the same as the violation of public policy (Hawin, 1996).

The approaches of the Supreme Court in *ED & F Man (Sugar) Ltd* may no longer be appropriate in defining the principle of public policy in Indonesia because this case was decided prior to the enactment of the Arbitration Legislation. Yet, this case may be taken as an example to point out the relativity of public policy 'in time'. Since the term 'public policy' contains 'relativity in time', the term 'public policy' may not be easy to define precisely. As a result, what constitutes the term 'public policy' under the Arbitration Legislation for international arbitration in Indonesia is still not clear.

Although the Arbitration Legislation contains no definition of the term 'public policy', the definition of this term can be found under the previous Indonesian arbitration law, namely Article 4(2) of Supreme Court Regulation No. 1 of 1990. This particular provision defines the term 'public policy' with reference to 'the basic principles of the entire legal system and social system in Indonesia'. This definition may not be sufficient to determine what really constitutes 'public policy' in Indonesia since it is so broad. This is because it adopts the word 'basic' rather than the words 'the most basic'.

The interpretation of the term 'public policy' becomes a significant issue in the context of international arbitration in Indonesia, particularly because this term may be used as a defence to refuse the recognition and enforcement of international (foreign-rendered) arbitral awards according to Article 66(c) of the Arbitration Legislation. Hence, the issue here is how to interpret this term in the context of international commercial arbitration in Indonesia.

The failure of the Arbitration Legislation to define the term 'public policy' means this term may be interpreted broadly or narrowly depending on how the Indonesian courts examine each case (HukumOnline.com, 2004). However, based on the approach of the New York Convention that has been ratified by Indonesia, the term 'public policy' should not be interpreted too broadly, particularly in the context of international arbitration (*Statement of the Chairman of the Working Party No. 3,* UN Doc E/CONF.26/SR.17 (1958) to facilitate the recognition and enforcement of arbitral awards (Hawin, 1996). The question here is whether the Indonesian

courts interpret the term 'public policy' according to the approach of the New York Convention or whether they establish their own interpretations for this term.

The Indonesian courts have not established a definition of 'public policy' that best clarifies the meaning in that country (Budidjaja, 2002), but have adopted different meanings. In *Perusahaan Pertambangan Minyak dan Gas Bumi Negara & PT PLN (Persero) v. Karaha Bodas Company, LLC* (referred to as the *KBC* case) (Decision No. 86/PDT.G/2002/PN.JKT.PST), the District Court of Central Jakarta questioned whether the award made for the Karaha Bodas Company (KBC) was not against Indonesian public policy under the Arbitration Legislation.

The *KBC* case involved *Perusahaan Pertambangan Minyak dan Gas Bumi Negara* (referred to as Pertamina) that entered into a Joint Operation Contract (JOC) with KBC on 28 November 1994. The JOC required KBC to develop a geothermal-powered electricity plant in the Telaga Bodas area in West Java, Indonesia (referred to as the Project). At the same time, KBC also concluded an Energy Supply Contract (ESC) with Pertamina and PT PLN (Persero). Under the ESC, it was agreed that PLN would purchase the electricity produced by the Project. However, the Project was suspended by the Indonesian Government through Presidential Decree No. 39 of 1997 as part of the Government's agreement with the International Monetary Fund (IMF) following the monetary crisis on 1 November 1997. Yet, the Project was resumed based on Presidential Decree No. 47 of 1997, but by virtue of Presidential Decree No. 5 of 1998 it was eventually suspended.

On 30 April 1999, due to the suspension of the Project, KBC commenced the arbitration proceedings against Pertamina, PLN and the Government of Indonesia in Geneva, Switzerland. On 18 December 2000, the arbitration awarded in favour of KBC and determined that Pertamina and PLN had to compensate KBC (US$ 261,166,654.92). Instead of voluntarily honouring the award, Pertamina attempted to contest it in the Swiss Supreme Court, but Pertamina's case was dismissed by the Court since the company did not pay the appeal costs. Meanwhile, KBC filed lawsuits to enforce the award against the assets of Pertamina in the United States, Canada, Singapore and Hong Kong. In order to prevent

the enforcement of the award, Pertamina commenced legal action before the District Court of Central Jakarta, requesting that the Court annul the award made in Geneva.

On 27 August 2002 the District Court of Central Jakarta annulled the KBC award against Pertamina and PLN. The Court held that the international (foreign-rendered) arbitral award could be annulled by the Indonesian Court because it was contrary to the fundamental principles of Indonesia, namely the public policy principle. The Court reasoned that the Indonesian Government's decision (Presidential Decree No. 39 of 1997) to postpone a geothermal-powered electricity plant project in West Java, Indonesia constituted a public policy rule because the decision was intended to overcome the burden of the monetary crisis Indonesia was experiencing. According to the Court, if the Project were to continue, it would have put more of a burden on the economy of Indonesia. The Court also reasoned that the Government's decision was related to a force majeure circumstance, and therefore, based on Indonesian law, this circumstance could be justified. By virtue of these reasons, the Court concluded that the Indonesian parties in this case (Pertamina and PLN) could not be held liable because their intention to discontinue the contracts was to obey the policy of the Government.

The District Court of Central Jakarta in the *KBC* case was of the opinion that the term 'public policy' is identical to the term 'welfare'. In that case, the Court relied on the definition of 'public policy' proposed by Rajagukguk (2000), who defines the term as 'order, welfare and security. According to him, 'public policy' is the synonym of 'justice', hence this term may also mean that judges are obliged to apply provisions of 'certain Statutes or Acts'. The Court here apparently overused the public policy defence because any matter that hampered the welfare of Indonesia could be considered a violation of public policy. It is also obvious that the interpretation of the public policy defence in this case was construed broadly and the Court did not adopt the approach of the New York Convention to the application of 'international public policy'. Hence, it may be concluded that the approach of the Court violated the approach of the New York Convention that requires a narrow interpretation of the public policy defence (referred to

as 'international public policy'). The Court was also of the opinion that the violation of existing laws in Indonesia was automatically against the public policy of that country. This interpretation may not be appropriate in the context of international arbitration because not all existing laws are 'so fundamental' that they can be categorized as 'public policy' in the context of international commercial arbitration.

In *Bankers Trust Company & Bankers Trust International Plc v. PT Mayora Indah Tbk.* (referred to as the *Bankers Trust* case) the Supreme Court in 2000 established another interpretation of the term 'public policy'. The *Bankers Trust* case relates to currency and interest rate swap transactions between Bankers Trust and PT Mayora Indah under the International Swaps and Derivatives Association (ISDA). The ISDA agreement included a Schedule that contained an arbitral clause. The Schedule was specifically incorporated into the ISDA agreement by reference. The arbitral clause stipulated that disputes of the parties would be resolved by arbitration in London based on the rules of the London Court of International Arbitration (LCIA).

In 1997 PT Mayora had defaulted on its obligation in making payments to Bankers Trust under the ISDA agreement. Although this matter was still being negotiated by the two parties, PT Mayora filed a lawsuit before the District Court of South Jakarta for the annulment of the ISDA agreement. In that case, PT Mayora alleged that it was not bound by the arbitration agreement in the Schedule since it had only agreed to the ISDA Master Agreement. Bankers Trust also filed an arbitration application before the LCIA in London, based on the arbitration clause in the Schedule to the ISDA Agreement. The District Court of South Jakarta was in favour of PT Mayora, whereas the LCIA issued awards in favour of Bankers Trust.

Bankers Trust was not satisfied with the Judgment of the District Court of South Jakarta; therefore, they appealed this judgment. At the same time, Bankers Trust filed an application in the District Court of Central Jakarta for the purpose of enforcing the awards made by the LCIA. Since there was a contradictory ruling between the District Court of South Jakarta and the LCIA, the District Court of Central Jakarta refused to enforce the awards. Bankers Trust appealed to the Supreme Court because of this and requested that they be enforced.

The Supreme Court in *Bankers Trust* denied the request for the execution of the international (foreign-rendered) arbitral awards. It reasoned that if the awards were granted, such awards would violate the 'public policy' principle as stipulated under Article 66(c) of the Arbitration Legislation. The violation of public policy in that case referred to the violation of 'the prevailing legal order', particularly 'the procedural legal order' of Indonesia. The Supreme Court adopted this proposition because while the dispute was still in the process of arbitration, PT Mayora had filed a lawsuit before the District Court of South Jakarta for the annulment of the parties' contract. The Supreme Court held that, although the South Jakarta District Court had issued its judgment, this was still not final and binding (Decision No. 03 K/Ex'r/Arb.Int/Pdt/2000) since Bankers Trust had appealed the judgment of the South Jakarta District Court. The judgement was not final and binding until all appeal routes had been exhausted. Based on the Indonesian court system, a judgment is not final if the judgment is still open for recourse to the superior courts. Hence, the Supreme Court in *Bankers Trust* upheld the decision of the Central Jakarta District Court that had refused the enforcement of the awards made for Bankers Trust (Decision No. 02 K/Ex'r/Arb.Int/Pdt/2000).

The Supreme Court in *Bankers Trust* interpreted the term 'public policy' as the violation of 'the procedural legal order'. This interpretation may not be appropriate in the context of international arbitration, because losing parties may use this interpretation as their tactic to prevent or to delay the enforcement of international (foreign-rendered) arbitral awards, simply by filing a lawsuit before the court in Indonesia (Budidjaja, 2002).

The decisions of the Courts in the two cases under discussion reveal that the term 'public policy' in Indonesia is still ambiguous because a number of different approaches have been established to interpret such a term. Instead of facilitating the enforcement of international (foreign-rendered) arbitral awards, the interpretations of the term 'public policy' adopted by the Courts may impede the process of the enforcement of the awards.

Since no clear definition of 'public policy' has been established by the Courts, a number of Indonesian legal scholars have attempted to define

the term or establish the methods for its interpretation. For example, Harahap (2001) suggests testing the principle of 'public policy' against the fundamental principles of the legal system and national interests to ascertain its meaning. This method may not be appropriate in the context of international arbitration because the scope of national interests is so broad that matters regarded as the violation of public policy may also be broad. In addition, national interests are very much influenced by political considerations, and consequently it becomes easier for the Indonesian enforcing court to refuse the recognition and enforcement of international (foreign-rendered) arbitral awards for the sake of Indonesian national interests, particularly if Indonesia or state-owned companies are the losing parties.

Gautama (2001) argues that the interpretation of public policy in the context of international arbitration should not be construed broadly because public policy functions only as a 'shield' to protect the enforcing court's fundamental principles of law (Gautama, 1989). According to him, an international (foreign-rendered) arbitral award is contrary to Indonesian public policy if the award is manifestly incompatible with the fundamental principles of Indonesian law, namely the ideology of Indonesia *(Pancasila)* and *the 1945 Constitution* (Gautama, 2001). He asserts that the application of 'public policy' should not be interpreted so that 'whatever is different from the legal concepts of Indonesia is automatically regarded as violating the Indonesian public policy' (Gautama, 1989).

Gautama's approach is correct in the sense that the principle of public policy should not be used as 'a sword', but only as 'a shield' or merely as 'an emergency brake' (Gautama, 1999) to protect the forum's fundamental principles of law. However, these principles stipulated by Gautama (2001) may not be appropriate for the violation of Indonesian public policy in the context of international arbitration.

The principles under *Pancasila* and the provisions under *the 1945 Constitution* need to be manifested by other laws and regulations. If the approach of Gautama is adopted to interpret the term 'public policy', then any violation of prevailing laws/regulations in Indonesia would be deemed to be the violation of 'public policy'. This approach may not be correct

because it also makes the application of 'public policy' in Indonesia very broad, since any matter that is different from Indonesian legal regulations may be taken to be the violation of 'public policy' in that country.

Hawin (1996) proposed two methods of interpreting 'public policy' in the context of international arbitration. First, an international (foreign-rendered) arbitral award that arises out of non-arbitrable disputes may be regarded as a violation of the principle of public policy. This proposition may not be compelling on the grounds that, although both the principles of 'public policy' and 'arbitrability' constitute mandatory rules, arbitrability rules are not identical with public policy rules (Böckstiegel, 1986). The reason is that arbitrability rules may only be categorized as public policy rules if they are 'so fundamental' (Böckstiegel, 1986). The other reason is that the New York Convention provides separate provisions for the principles of 'arbitrability' and 'public policy' (*Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1986)*; therefore, it is clear that the principle of 'arbitrability' is not the same as the principle of 'public policy'.

The second method proposed by Hawin (1996) is to impose the conditions of a valid contract on an international (foreign-rendered) arbitral award. Hawin suggests that Article 1320 of the Indonesian Civil Code, especially the requirement of a 'permissible cause', should be adopted for this method. According to Hawin, an international (foreign-rendered) arbitral award is considered to be violating 'public policy' if arbitral proceedings are established by an arbitration agreement that is contrary to the requirement of 'permissible cause'. However, he doubts whether this method is acceptable since Article 1337 of the Indonesian Civil Code clearly expresses that a 'cause' is prohibited if such 'cause' is contrary to existing laws or against good morals or public policy. This method is apparently overlapping, because the determination of whether an arbitration agreement violates 'public policy' or not, depends upon the 'cause' of such agreement. If the agreement contains an 'impermissible cause', the agreement violates 'public policy'. However, in order to ascertain whether a 'cause' is permissible or not, the test is referred back to 'public policy' in the sense that the 'cause' is not permissible if it is against 'public policy'.

Rajagukguk (2001) defines the term 'public policy' as 'order, welfare and security'. This definition is very broad because any matter that may endanger the welfare of Indonesia may be qualified as a violation of public policy. Rajagukguk also contends that the term 'public policy' is the synonym of 'justice', hence judges are obliged to apply 'certain Statutes or Acts' in order to not violate the 'public policy' restriction. This definition may not be appropriate in international commercial arbitration because although compliance with provisions of Statutes or Acts is mandatory in Indonesia, they may not be 'so fundamental' as to be categorized as 'public policy'.

The application of the principle of 'public policy' in Indonesia discussed in this chapter shows that it has been applied differently from that adopted under the New York Convention. This is because the public policy principle in Indonesia has not been divided into 'international' and 'domestic' public policy as is required by the Convention. As a result, the approaches of the principle in that country are frequently broader than the approaches of 'international public policy' adopted by the New York Convention. Up to the present, there has been no established interpretation of public policy in Indonesia since the Arbitration Legislation does not provide a definition or a clue as to what constitutes 'public policy' in the context of arbitration in that country. As a result, each court may provide its own interpretation since it has discretion to do so (HukumOnline, 2004).

B. Arbitrability principle

The principle of 'arbitrability' adopted by the Arbitration Legislation may be divided into two categories, namely objective and subjective arbitrability. 'Objective arbitrability' under this Legislation deals with subject matters of disputes that are capable of being settled by arbitration. The application of 'objective arbitrability' may not be so complicated in Indonesia because the issue only arises when it comes to the process of recognizing and enforcing international (foreign-rendered) arbitral awards. Article 66(b) of the Arbitration Legislation points out that only international (foreign-rendered) arbitral awards made for 'commercial disputes' are recognized and enforced in Indonesia.

'Subjective arbitrability' under the Arbitration Legislation specifically deals with 'parties' who are involved in arbitration, as Article 1(2) of this Legislation states that 'the parties means the legal subjects, whether in civil or public law' (Abdurrasyid, 2002). Although the Elucidation to Article 1(2) of the Arbitration Legislation states that this provision is sufficiently clear, it may be questioned whether legal entities according to public law may directly enter into an arbitration agreement similar to those under civil law. Gautama (1999) argues that in order to conclude an arbitration agreement, a legal entity under public law should obtain approval from its superior, for instance the Ministry of the entity. The discussion here does not deal with the legal entities under public law since it focuses on private parties rather than parties under public law.

The main question concerning parties to arbitration is how to prove that the parties are bound by an arbitration agreement. This question arises because an arbitration agreement may be separated from a main contract. Article 9(1) of the Arbitration Legislation precisely requires parties to sign their written arbitration agreement if they conclude the agreement after their dispute has arisen (referred to as 'submission agreements' or *'acta de compromis'*). Although parties' signatures are significant proof of their intention to arbitrate, the requirement of signatures may also be changed by notarial deed if the parties are unable to sign their written arbitration agreement (*Law No. 30 of 1999* Article 9(2)). Yet, this method is only intended for submission agreements. The Arbitration Legislation does not stipulate any method that may be used by parties to conclude a valid arbitration agreement prior to their dispute arising (referred to as an 'arbitral clause' or *'clause compromissoire'*).

The other issue is whether those who do not enter into an arbitration agreement may also become parties to an arbitration process. In this respect, Article 30 of the Arbitration Legislation provides:

> Third parties outside the arbitration agreement may participate in and join the proceedings for the resolution of disputes by arbitration, if any element of related interest is found and their participation is agreed to by the parties in dispute and by the arbitrator or arbitration tribunal examining the dispute (Budidjaja, 2002).

This provision was proposed by members of the House of Representatives (Gautama, 1999) to give an opportunity for third parties to intervene in the process of arbitration. Yet, the members of the House of Representatives also imposed a strict condition for the involvement of third parties, as is stated by Article 30 of the Arbitration Legislation, that the involvement of third parties must be agreed to not only by the disputing parties but also by the arbitrators or arbitral tribunal. Since third parties may participate in arbitral proceedings, an arbitral award may also bind the third parties. The involvement of third parties in arbitration under Article 30 of the Arbitration Legislation evidences that this Legislation adopts a liberal approach to the application of 'subjective arbitrability' because parties to arbitration are not limited to those who sign arbitration agreements.

The discussion on the application of the principle of arbitrability shows that, similarly to the New York Convention, the Arbitration Legislation also divides the principle into 'subjective' and 'objective' arbitrability. Yet, the Arbitration Legislation does not adopt a liberal approach to the proof of parties' intention to arbitrate. This is because the Legislation still requires that parties have to sign their arbitration agreement or use a notarial deed if they are not able to sign it. These methods are intended to conclude submission agreements only, whereas the Arbitration Legislation is silent regarding methods of concluding arbitral clauses.

In contrast to the Arbitration Legislation, the New York Convention adopts a liberal approach to the proof of the existence of arbitration agreements. In addition to the signatures of parties, the 'exchange of letters or telegrams' may also be used by parties to conclude an arbitration agreement under the New York Convention. These methods may be adopted by parties to conclude their arbitration agreement either in the form of *acta de compromis* or *clause compromissoire*.

However, the Arbitration Legislation does not stipulate any method to prove the existence of arbitration agreements for future disputes. In this regard, the methods provided by the New York Convention may be adopted by Indonesian arbitration law because the Convention constitutes one of the legal sources of arbitration in that country.

C. Final and binding principle

The term 'final and binding principle' under the Arbitration Legislation is formed by two separate words, namely 'final' and 'binding', but in the application of this term to the recognition and enforcement of an arbitral award, the two words are inherently connected to each other. The reason is that an arbitral award constitutes a final decision made by arbitrators, and consequently it automatically binds parties to the award (Widjaja, 2001). Article 60 of the Arbitration Legislation also stipulates that 'the arbitration award is final in nature and has absolute and binding legal effect on the parties' (Budidjaja, 2002).

It may be argued that the condition 'final and binding' under Article 60 of the Arbitration Legislation is merely imposed on domestic arbitral awards since the provision appears under the domestic arbitration regime of the Arbitration Legislation. This is one of the apparent weaknesses of this Legislation, because the location of this important provision may lead to a misunderstanding that an international (foreign-rendered) arbitral award may not be final and binding. The principle of final and binding under the Arbitration Legislation may be misplaced because this Legislation aims to impose the principle on both domestic and international (foreign-rendered) arbitral awards. This principle should be placed under 'the general provisions' rather than inserting it under the domestic arbitration regime in order to avoid misunderstanding. This suggestion aligns with the Elucidation of the Arbitration Legislation since the binding status of an award is stated in the 'General Elucidation' of this Legislation.

It may also be argued that Article 60 of the Arbitration Legislation may not be compatible with the New York Convention because the article retains the term 'final', whereas the Convention does not adopt this term in order to avoid the 'double exequatur' (Van den Berg, 1981). It should be noted here that, although the term 'final' is adopted by Article 60 of the Arbitration Legislation, this Legislation applies the same approach as that of the New York Convention because in the practice of arbitration in Indonesia, 'double exequatur' is also not adopted. The term 'final' under Article 60 of the Arbitration Legislation serves to point out that 'an arbitral

award is a final decision and hence is not subject to appeal, cassation or legal review' (Budidjaja, 2002).

It may be questioned at what moment an international (foreign-rendered) arbitral award is considered as 'final and binding' under the Arbitration Legislation. The Legislation is silent about this and the Indonesian jurisprudence on arbitration also gives no clue as to when an international (foreign-rendered) arbitral award obtains its finality and binding force. Therefore, the approach of Article V(1)(e) of the New York Convention should be adopted because this Convention is applicable in Indonesia. Accordingly, similarly to the New York Convention's approach, the binding force of an international (foreign-rendered) arbitral award is determined by the applicable law of the rendition country or the applicable law of the country selected by disputing parties to govern their arbitration.

D. Reciprocity principle

Article 66(a) of the Arbitration Legislation deals with the application of the reciprocity principle, as the provision points out that international (foreign-rendered) arbitral awards may only be recognized and enforced in Indonesia, if a rendition state and Indonesia are bound by a bilateral or multilateral treaty on the recognition and enforcement of international (foreign-rendered) arbitral awards. Accordingly, Indonesia may only recognize and enforce an international (foreign-rendered) arbitral award made in a foreign state, if that state is also willing to recognize and enforce an award made in Indonesia (Widjaja and Yani, 2000).

Although Indonesia has not concluded any bilateral agreement regarding the recognition and enforcement of an international (foreign-rendered) arbitral award with any state up to the present (Gautama, 1991), it does not mean that the award cannot be enforced in that country. This is because a rendition state may be a party to a multilateral treaty relating to the recognition and enforcement of international (foreign-rendered) arbitration awards in which Indonesia is also a contracting state, such as the New York Convention.

Article 67(2)(c) of the Arbitration Legislation also implements the reciprocity principle as it stipulates, that an application for the enforcement

of an international (foreign-rendered) arbitral award must be presented together with a statement from a diplomatic representative of Indonesia in the country where an international (foreign-rendered) arbitration award was made. The statement must contain the information that the claimant's country is bound to Indonesia by a bilateral or multilateral treaty on the recognition and execution of international arbitral awards (Budidjaja, 2002).

Article 67(2)(c) of the Arbitration Legislation determines that the application of the reciprocity principle is also imposed on the state of a party who seeks the recognition and enforcement of an international (foreign-rendered) arbitral award in Indonesia (Fuady, 2000). This approach is alien to the New York Convention, which has been ratified by Indonesia through Presidential Decree No. 34 of 1981. Although the Convention permits contracting states to apply the reciprocity reservation (the first reservation to the Convention), this merely focuses on where an arbitral award is made rather than for whom the award is made (Van den Berg, 1981). Therefore, the decisions of the Indonesian courts in the case of *Trading Corporation of Pakistan Ltd v. PT Bakrie & Brothers (*Decision No. 64/Pdt/G/1984/PN.Jkt.Sel; Decision No. 512/PDT/1985/PT DKI; Decision No. 4231 K/Pdt/1986), may be regarded as the misinterpretation of the reciprocity reservation under the New York Convention.

The Courts in that case held that by virtue of Presidential Decree No. 34 of 1981, the arbitral award made by the Federation of Oils, Seed and Fats Association Ltd in London was not enforceable in Indonesia on the grounds that the applicant was a Pakistani company and that country was not a contracting state to the New York Convention. The Courts misinterpreted the reciprocity reservation under the New York Convention because their interpretation was that the reservation was imposed on the country from which the applicant came (Pakistan), rather than on the country in which the award was made (the United Kingdom).

The decision in *Trading Corporation of Pakistan Ltd v. PT Bakrie & Brothers* was delivered prior to the issuance of the Arbitration Legislation. If that case were examined under the Arbitration Legislation, the interpretation of the reciprocity principle in *Trading Corporation of Pakistan Ltd* would

have been adopted as the correct interpretation of Article 67(2)(c) of the Arbitration Legislation. It is apparent that the application of the reciprocity principle under the Arbitration Legislation is not the same as that of the New York Convention; consequently this Legislation does not align with the Convention. Today, the impact of the application of the reciprocity principle on the enforcement of international (foreign-rendered) arbitral awards in Indonesia may be less since more countries have become members of the New York Convention (Nienaber, 2000).

CHAPTER 5

THE CLASSIFICATION OF ARBITRAL AWARDS

The Arbitration Legislation recognizes two types of arbitral awards, namely 'international' and 'domestic' arbitration awards. The term 'international arbitration award' is defined by Article 1(9) of the Arbitration Legislation, but the term 'domestic award' is left undefined. The distinction between the two awards is essential because the Arbitration Legislation applies a slightly different process to the recognition and enforcement of the awards (Mills, 2002).

A. International arbitration award

The definition of 'international arbitration award' under Article 1(9) of the Arbitration Legislation reads as follows:

> International Arbitration Award means an award handed down by an arbitration institution or individual arbitrator outside the jurisdiction of the Republic of Indonesia, or an award by an arbitration institution or individual arbitrator which, by the provisions of Indonesian law, is deemed to be an international arbitration award.

The language of Article 1(9) of the Arbitration Legislation explicitly determines that arbitral awards are 'international' if such awards are made

outside the jurisdiction of the Republic of Indonesia or categorized as 'international awards' under Indonesian laws.

The Arbitration Legislation introduces the term 'international arbitration award' to alter the previous term 'foreign arbitral award' under Article 2 of Supreme Court Regulation No. 1 of 1990. Yet, the 'territorial criteria' or the criterion of 'foreign jurisdiction' under Supreme Court Regulation No. 1 of 1990 is still adopted by the Arbitration Legislation to determine whether an award is 'international' or 'domestic'.

In *Bankers Trust Company and Bankers Trust International PLC v. PT Mayora Indah, Tbk.* (Decision No. 001/Pdt/Arb.Int/1999/PN.JKT.PST *vide* No. 002/Pdt/Arb.Int/1999/PN.JKT.PST *vide* No. 02/Pdt.P/2000/PN.JKT.PST; Decision No. 02 K/Ex'r/Arb.Int./Pdt/2000) the Central Jakarta District Court (Pengadilan Negeri Jakarta Pusat) examined whether the arbitral award seeking recognition and enforcement in Indonesia was classified as an 'international arbitration award' under the Arbitration Legislation. The Court in that case decided that the award fell within the category of international arbitration award because the award was rendered by the London Court of International Arbitration in London. In this regard, the Court determined the 'internationality' of an arbitral award according to territorial criteria. An arbitral award is 'international' because the place of issuing the award is outside the jurisdiction of Indonesia (London) and the award seeks recognition and enforcement in Indonesia. The proposition in *Bankers Trust Company and Bankers Trust International PLC v. PT Mayora Indah, Tbk.* is also applied in *PT Sinar Mas Multiartha v. Vikram Talwar and Associated LLC* (Decision No. 001/Pdt/Arb.Int/2000/PN.JKT.PST), *Noble Americas Corp v. PT Wahana Adhireksa Wiraswasta* (Decision No. 001/Pdt/Arb.Int/1999/PN.JKT.PST *vide* No. 002/Pdt/Arb.Int/1999/PN.JKT.PST *vide* No. 02/Pdt.P/2000/PN.JKT.PST; Decision No. 02 K/Ex'r/Arb.Int./Pdt/2000) and other cases (Decision No. 001/Pdt/Arb.Int/1999/PN.JKT.PST *vide* No. 002/Pdt/Arb.Int/1999/PN.JKT.PST *vide* No. 02/Pdt.P/2000/PN.JKT.PST; Decision No. 02 K/Ex'r/Arb.Int./Pdt/2000).

Since the criteria adopted by the Arbitration Legislation in defining the term 'international arbitration award' are the same as that of Supreme Court Regulation No. 1 of 1999, it may be concluded that the term

'international arbitration awards' under the Arbitration Legislation is only an alternative name for the term 'foreign arbitral awards' under Supreme Court Regulation No. 1 of 1999. Hence, the Supreme Court in *Bankers Trust Company & Bankers Trust International, PLC v. PT Mayora Indah, Tbk*. also used the term 'international arbitration award' interchangeably with the term 'foreign arbitral award', although this case was decided after the issuance of the Arbitration Legislation.

The term 'international (foreign-rendered) arbitration award' is the synonym of the term 'international arbitration award' under the Arbitration Legislation because 'international arbitration award' is identical with 'foreign award' under this Legislation. Arbitral awards in the context of international commercial arbitration today cover not only 'foreign awards' but also 'domestic awards' with an international nature (commonly referred to as 'international arbitral awards') (The New York Convention and the UNCITRAL Model Law recognize 'foreign and non-domestic' awards). The consequence of the approach of the Arbitration Legislation to the meaning of 'international arbitral award' is that disputing parties may select a foreign jurisdiction in order to obtain an international (foreign-rendered) arbitral award, although the nature of their commercial relationships is 'purely domestic' (Nienaber, 2000). This may not be beneficial for the development of arbitration in Indonesia because disputing parties may prefer to take their arbitration outside the jurisdiction of Indonesia in order to obtain international (foreign-rendered) arbitral awards.

B. Domestic arbitral award

The Arbitration Legislation recognizes not only 'international (foreign-rendered) arbitral awards' but also 'domestic awards' (referred to as 'pure domestic awards'), yet the majority of the provisions under this Legislation deal with the latter awards. One of the obvious examples in this regard is that the Arbitration Legislation specifically stipulates what conditions must be contained in a 'domestic award' for its validity. Article 54(1) of the Arbitration Legislation states that 'an arbitration award must contain:

1. A heading to the award containing the words *'Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa'* (for the sake of Justice based on belief in the Almighty God);
2. The full name and addresses of the disputing parties;
3. A brief description of the matter in dispute;
4. The respective position of each of the parties;
5. The full names and addresses of the arbitrators;
6. The considerations and conclusions of the arbitrator or arbitration tribunal concerning the dispute as a whole;
7. The opinion of each arbitrator, in the event that there is any difference of opinion within the arbitration tribunal;
8. The order of the award;
9. The place and date of the award; and
10. The signature(s) of the arbitrator or arbitration tribunal.

The Arbitration Legislation contains no provisions regulating a minimum requirement that must be included in the contents of an international (foreign-rendered) arbitral award. In addition, the process for the enforcement of 'domestic awards' under the Arbitration Legislation is far more detailed than that for 'international (foreign-rendered) arbitral awards' (Nienaber, 2000).

Although the Arbitration Legislation focuses on 'domestic arbitration', there is no specific provision under this Legislation elucidating what constitutes 'domestic arbitral awards'. Since 'foreign jurisdiction' is the only criterion to determine the 'internationality' of arbitration awards in Indonesia, arbitral awards may be considered as 'domestic' if they are made in 'the jurisdiction of Indonesia'. In *Ascom Elektro AG v. PT Manggala Mandiri Sentosa* (Decision No. 02 Pen Ex'r/Arb.Int./Pdt/1993), the Supreme Court returned all the documents to the Chairman of the Central Jakarta District Court. The letter of the Supreme Court addressed to the Chairman of the Central Jakarta District Court stipulated that the award was not an 'international award' but merely a 'domestic award'. The Supreme Court reasoned that although Article 12.2 of the agreement states that disputes

shall be settled by a sole arbitrator applying the UNCITRAL Arbitration Rules (UAR), Article 13.6 of the agreement stipulates precisely that the agreement is governed by the law of Indonesia and the choice of jurisdiction is Indonesia as well.

The Supreme Court pointed out that the choice of jurisdiction, inter alia the jurisdiction of Indonesia, determines the status of arbitration awards. Although the parties selected the UAR for their arbitral proceeding, this selection did not make the award become 'international'. The award was 'purely domestic' because it was rendered in the jurisdiction of Indonesia and enforcement would also be sought in that country.

The criterion of 'Indonesian jurisdiction' (Born, 1992) causes any arbitral award rendered, and to be enforced, in Indonesian jurisdiction to be automatically considered as a 'domestic award', although disputing parties' commercial relationships are of an 'international nature' (Mills, 2002).

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CHAPTER 6

RECOGNITION AND ENFORCEMENT OF ARBITRATION AWARDS

A. The recognition process of international (foreign-rendered) arbitration awards

The most determinative phase in the context of commercial arbitration is the recognition and enforcement of arbitration awards, because they have no legal effect in the absence of their recognition and enforcement, and the other phases of arbitration processes such as arbitral proceedings and the issuance of arbitral awards become meaningless. Winning parties also feel frustrated because they have incurred costs and time for arbitration, but their awards cannot be realized (Gautama, 1975).

Article 66 of the Arbitration Legislation states that 'international arbitration awards will only be recognized and may be enforced in the jurisdiction of the Republic of Indonesia'. The language of Article 66 of the Legislation indicates that the process of the recognition of international (foreign-rendered) awards is separate from the enforcement process. This separation is adopted by the Arbitration Legislation to follow the approaches of Indonesian courts in the recognition and enforcement of foreign judgements. Indonesian laws distinguish foreign judgements with a 'condemnatory nature' from those with a 'declaratory or constitutive nature'. Foreign condemnatory decisions cannot be executed in Indonesia

based on Article 436 of the Regulation on Civil Procedures of Indonesia that states:

> Foreign judgments cannot be executed in the territory of Indonesia with the exception of what is arranged in Article 724 of the Commercial Code and other legislative instruments.
>
> The actions may be brought anew before the judges in Indonesia for retrial.
>
> In the above-mentioned cases, no execution shall take place until an exequatur has been granted, obtainable upon request by the successful litigant according to the procedure set forth in the foregoing article, from the daily court which is to direct the execution.
>
> The court will not investigate the case anew during the exequatur procedure.

In contrast to 'condemnatory' foreign decisions, 'declaratory' or 'constitutive' foreign decisions do not require Indonesian courts to issue an exequatur because they do not need to be executed by these courts, hence these decisions can be directly recognized by the courts. The annulment of a contract, for example, does not need an act of execution because it does not contain any sanction at all. Indonesian courts generally recognize foreign declaratory or constitutive decisions, but the courts do not adopt this approach for foreign decisions of a condemnatory nature.

The approach of Indonesian courts is also adopted by the Arbitration Legislation for international (foreign-rendered) arbitral awards. As a result, most if not all such awards have been recognized in Indonesia, because the recognition of the awards does not require the Indonesian enforcing court to issue a leave for enforcement (an exequatur). The function of recognizing international (foreign-rendered) arbitral awards in Indonesia is merely to declare that the awards have the same legal effect as Indonesian courts' judgments (*res judicata),* and consequently they are closed for 'appeal, cassation or judicial review' before Indonesian courts.

It is apparent that the approach of the Arbitration Legislation to the recognition process of international (foreign-rendered) arbitral awards is in accordance with the spirit of the New York Convention which encourages

contracting states to recognize them in their jurisdictions. This approach was not newly introduced by the Arbitration Legislation because the previous arbitration Regulation (Supreme Court Regulation No. 1 of 1990) also adopted this approach. Hence, it may be said that the Arbitration Legislation merely reproduces the approach of this previous arbitration Regulation to the recognition of international (foreign-rendered) arbitral awards.

The approach of the Arbitration Legislation that facilitates this recognition is compatible with the approach to the recognition of arbitration awards in the context of international commercial arbitration.

B. The enforcement process of international (foreign-rendered) arbitration awards

Although international (foreign-rendered) arbitration awards have been recognized by the Indonesian enforcing court, thereby obtaining their *res judicata* effect, it does not mean that the awards are automatically enforceable in Indonesia. In other words, the recognition of international (foreign-rendered) arbitration awards is not always followed by their enforcement. Hence, the enforcement process of these kinds of awards constitutes the most significant phase in Indonesia because the fate of the awards, that is the question of whether they can be enforced or not, is determined in this phase.

The Arbitration Legislation contains a number of provisions relating to the process of enforcing international (foreign-rendered) arbitration awards. The provision appearing under Article 66 of this Arbitration Legislation reads as follows:

> International Arbitration Awards will only be recognized and may be enforced in the jurisdiction of the Republic of Indonesia if they fulfil the following criteria:
>
> 1. The International Arbitration Award must have been handed down by an arbitrator or arbitration tribunal in a country bound to the Republic of Indonesia by a bilateral or multilateral treaty on the recognition and enforcement of International Arbitration Awards;

2. The International Arbitration Awards contemplated in item a are limited to awards which are included within the scope of commercial law under the provisions of Indonesian law;
3. The International Arbitration Awards contemplated in item a, which may only be enforced in Indonesia, are limited to those which do not conflict with public order [public policy];
4. An International Arbitration Award may be enforced in Indonesia after obtaining an exequatur from the Head of the District Court of Central Jakarta; and
5. The International Arbitration Awards contemplated in item a, which involve the State of the Republic of Indonesia as one of the parties to a dispute, may only be enforced after obtaining an exequatur from the Supreme Court of the Republic of Indonesia, which will then delegate it to the District Court of Central Jakarta.

The provision contains the conditions that must be fulfilled by international (foreign-rendered) arbitration awards for their enforceability in Indonesia.

1. The enforcement conditions of international (foreign-rendered) awards

Article 66 of the Arbitration Legislation sets out a number of conditions that must be met by international (foreign-rendered) arbitration awards to be enforceable in Indonesia. The failure to comply with one of the conditions may cause the rejection of the awards in that country. Therefore, the contents of Article 66 of the Arbitration Legislation are essential to the enforcement of international (foreign-rendered) arbitral awards in Indonesia. However, Article 66(e) of the Arbitration Legislation, that specifically deals with the enforcement condition of awards in which the State of Indonesia is one of the disputing parties, is not discussed here because this book is limited to the implementation of international (foreign-rendered) arbitration awards made for private parties only.

The first condition of the enforceability of international (foreign-rendered) arbitration awards is provided by Article 66(a) of the Arbitration

Legislation. This condition is related to Article 67(c) of the Arbitration Legislation, since both of the provisions apply the reciprocity principle to the process of the enforceability of international (foreign-rendered) arbitration awards. According to these provisions, the Indonesian enforcing court may only enforce international (foreign-rendered) arbitral awards if the rendition state (Article 66(a) of the Arbitration Legislation) and the states of winning parties (Article 67(c) of the Arbitration Legislation) are also willing to enforce awards made in Indonesia.

The second enforcement condition can be found under Article 66(b) of the Arbitration Legislation. This condition explicitly limits the scope of international (foreign-rendered) awards because only the awards that resolve disputes of a 'commercial nature' according to Indonesian laws are enforceable in that country. This condition relates to the application of the principle of arbitrability in Indonesian arbitration law.

The third enforcement condition appears under Article 66(c) of the Arbitration Legislation. This condition requires that international (foreign-rendered) arbitral awards must not violate the principle of public policy of Indonesia, otherwise they are not enforceable in that country.

The fourth enforcement condition determines that international (foreign-rendered) arbitration awards, in order to be enforced in Indonesia, must obtain 'an exequatur' (a leave for enforcement) from the Head of the District Court of Central Jakarta. The Arbitration Legislation makes a number of provisions regarding the procedures for obtaining this exequatur. These procedures are discussed later in this book.

The enforcement conditions under the Arbitration Legislation are the same as those of the previous arbitration Regulation (Supreme Court Regulation No. 1 of 1990). The only difference between the Arbitration Legislation and the previous arbitration Regulation is that Article 66(d) of the Arbitration Legislation grants full authority to the Head of the Central Jakarta District Court to issue 'an exequatur' of international (foreign-rendered) arbitration awards. This authority used to be in the hands of the Supreme Court according to Article 3(4) of Supreme Court Regulation No. 1 of 1990. The new approach under the Arbitration Legislation to the competent authority for the issuance of an exequatur for international

(foreign-rendered) arbitral awards constitutes an improvement in the enforcement process for awards in Indonesia. The new enforcement process under this Legislation is simpler than that of Supreme Court Regulation No. 1 of 1990. The enforcement process under the Regulation was time-consuming since it consisted of a number of phases. Firstly, international (foreign-rendered) arbitration awards had to be presented before the Registrar of the Central Jakarta District Court for their registration. Secondly, the awards had to be sent to the Indonesian Supreme Court to obtain an exequatur from that Court. Finally, the awards were sent back to the Central Jakarta District Court for their enforcement.

The methods for enforcing international (foreign-rendered) arbitration awards under Supreme Court Regulation No. 1 of 1990 may not have been efficient because the same awards were handled by two different institutions, namely the Indonesian Supreme Court and the Central Jakarta District Court. The Arbitration Legislation simplifies this enforcement process by centralizing the process in one institution only, the District Court of Central Jakarta. It aligns with the objective of Article III of the New York Convention because that provision requires an enforcing state to facilitate the enforcement of foreign arbitral awards by imposing less conditions and charges on the awards.

2. The procedures for obtaining an exequatur

A prerequisite for the enforcement of international (foreign-rendered) awards in Indonesia is that the awards must obtain an exequatur from the Head of the District Court of Central Jakarta. The requirement of an exequatur is not mentioned under the New York Convention, but this does not mean that the Arbitration Legislation violates the Convention because Article III of the Convention permits enforcing states to establish their own rules of procedure regarding the enforcement of arbitral awards in their territories.

The exequatur for the enforceability of international (foreign-rendered) arbitration awards is required by the Arbitration Legislation in order to comply with Article 435 of the Indonesian Civil Code of Procedures. To obtain the exequatur, the Arbitration Legislation establishes the following stages:

a. The registration of international (foreign-rendered) arbitral awards (commonly referred to as *'deponir'*);
b. The application to enforce the awards;
c. The issuance of an exequatur by the Head of the District Court of Central Jakarta.

3. The registration of awards *(deponir)*

The first stage in the process of obtaining 'an exequatur' is the registration of international (foreign-rendered) arbitral awards before the Registrar of the Central Jakarta District Court. This stage is significant in the enforcement process for such awards because they will not be processed prior to the registration. This requirement is established by Article 67(1) of the Arbitration Legislation:

> An application to enforce an International Arbitration Award may be made after the award has been delivered to the Registrar of the District Court of Central Jakarta and registered there by the arbitrator or his/her/its proxy [legal representatives].

Although the registration of international (foreign-rendered) arbitral awards is essential in the process of enforcing the awards, the time period for the registration is not determined by the Arbitration Legislation or any other Indonesian law relevant to arbitration. This circumstance indicates that the Arbitration Legislation is more flexible in relation to enforcement procedures for international (foreign-rendered) arbitral awards than to those of domestic awards (referred to as 'pure domestic awards'). This is because the Arbitration Legislation stipulates that domestic awards must be registered within no more than thirty (30) days from the day they are rendered, otherwise they are unenforceable. It may be said that this flexibility aligns with the objective of Article III of the New York Convention, since this New Legislation does not impose more onerous conditions on international (foreign-rendered) awards than those of 'pure domestic awards'.

However, the Arbitration Legislation contains an uncertainty of law because of the language of Article 67(1) of this Legislation. The

provision states that in addition to 'arbitrators who rendered the awards', 'legal representatives of parties may also perform the registration of international (foreign-rendered) arbitral awards'. Article 67(1) of the Arbitration Legislation does not precisely emphasize that 'only legal representatives of winning parties' may register the awards. As a result, the legal representatives of losing parties may also register the awards. This circumstance occurred in *Perusahaan Pertambangan Minyak dan Gas Bumi Negara & PT PLN (Persero) v. Karaha Bodas Company, LLC* (the *KBC* case), where the legal representative of the losing party (Pertamina) filed the registration of the award.

The action of Pertamina in that case has been widely criticized because it was taken by Pertamina to enable the company to request the annulment of the award. Yet, the District Court of Central Jakarta justified Pertamina's action since the registration under the Arbitration Legislation has a dual function. It not only serves as a pre-condition for the enforcement of international (foreign-rendered) arbitral awards but also as a pre-condition for the annulment of an award under Article 70 of the Arbitration Legislation. In this respect, the Court correctly applies the provision of the Arbitration Legislation in the sense that, in the absence of the registration of arbitral awards such awards cannot be cancelled.

However, the Court misinterpreted Article 70 of the Arbitration Legislation because this provision merely applies to the cancellation of arbitral awards rendered in Indonesia (domestic awards) rather than those made overseas (international (foreign-rendered)) arbitral awards. In this regard, the annulment of an award made in Geneva may only be requested before the court of the state in which the award was rendered, namely Switzerland. Hence, the Central Jakarta District Court had no authority to annul the award. The Court also applied Article 70 of the Arbitration Legislation wrongly because it extended the exhaustive grounds for the annulment of arbitral awards under Article 70 of this Legislation. Article 70 of the Arbitration Legislation states:

> An application to annul an arbitration award may be made if the award is alleged to contain the following elements:

a. Letters or documents submitted in the hearings are admitted to be forged or are declared to be forgeries after the award has been handed down;
b. Documents are found after the award has been made which are decisive in nature and which were deliberately concealed by the opposing party; or
c. An award is made on the strength of a fraud committed by one of the parties to the dispute being examined.

The Court in *KBC* included the violation of Indonesian procedural law as an element of Article 70 of the Arbitration Legislation, even though the element is not included under this provision. The Court accepted Pertamina's argument that KBC had violated the procedural law of Indonesia because the award made for KBC was enforced outside the jurisdiction of Indonesia prior to the registration of the award in that country.

The ambiguity of Article 67(1) of the Arbitration Legislation may be used as a tactic for losing parties to apply for the annulment of awards as is evidenced in the *KBC* case. In order to avoid this tactic, the registration of international (foreign-rendered) arbitral awards in Indonesia should be automatically considered as the request for recognition and enforcement of the awards. If this proposed approach were adopted, any losing party would be reluctant to register an award that was not made in his/her favour because the registration of the award would disadvantage him/her. In addition, the enforcement process would be more efficient because winning parties would no longer need to lodge an enforcement application after the registration of their awards as the registration would automatically contain the application.

4. The enforcement application for awards

Article 67(1) of the Arbitration Legislation stipulates that only after the registration of awards can requests be made for their enforcement. This is the second stage of the enforcement process of international (foreign-rendered) arbitral awards in Indonesia. At this stage, a number of

documents must be presented before the Central Jakarta District Court. All of these documents are 'mandatory', and consequently the failure to supply one of them will impede the enforcement process, because the Central Jakarta District Court may refuse to process the enforcement application.

The relevant documents to be submitted for the enforcement application are precisely determined by Article 67(2) of the Arbitration Legislation. These documents comprise:

a. The original text or an authentic copy of the International Arbitration Award in accordance with the provisions on authentication of foreign documents and an official Indonesian translation of the text;
b. The original text or an authentic copy of the agreement which is the basis for the International Arbitration Award, in accordance with the provisions on authentication of foreign documents and an official Indonesian translation of the text;
c. Information from the diplomatic representative of the Republic of Indonesia in the country in which the International Arbitration Award was made, stating that the claimant's country is bound to the Republic of Indonesia by bilateral or multilateral treaty on the recognition and execution of International Arbitration Awards (Budidjaja, 2002).

a. The requirement of original or authentic copies of arbitral awards and agreements

The required documents under Articles 67(2)(a) and 67(2)(b) of the Arbitration Legislation are similar to those under Articles IV(1)(a) and IV(1)(b) of the New York Convention (Article IV(1) of *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958)*, although the Arbitration Legislation does not entirely adopt the language of the New York Convention. For example, the Arbitration Legislation adopts the term 'the original text of arbitral awards and agreements' instead of using the term 'the duly authenticated original award and agreement' used under the New York Convention. The Central Jakarta District Court in interpreting the Arbitration Legislation applies the approach of the New York Convention because, similarly to the New York Convention,

the Court also considers that 'genuine signatures on documents' prove the originality of the documents. Accordingly, the term 'the original text of arbitral awards and agreement' under Articles 67(2)(a) and 67(2)(b) of the Arbitration Legislation has the same meaning as the term 'the duly authenticated original award and agreement' under Articles IV(1)(a) and IV(1)(b) of the New York Convention.

The term 'the authentic copy of arbitral awards and agreements' under Articles 67(2)(a) and 67(2)(b) of the Arbitration Legislation has the same meaning as the term 'the duly certified copy of awards and agreements' under Articles IV(1)(a) and IV(1)(b) of the New York Convention. Similarly to the New York Convention, the Arbitration Legislation requires that the copy of a document must be 'a true copy'. It is unfortunate that Indonesia has not adhered to the *Convention Abolishing the Requirement of Legalization for Foreign Public Documents* (referred to as the Den Haag Convention 1961). As a result, the authentic copy of documents required by the Arbitration Legislation for the enforcement application must be legalized twice by different officials. In practice today, the authentic copies of the documents have to be legalized by a local notary in a country where the documents are made and subsequently the documents must be legalized again by an Indonesian diplomatic or consular agent in that country (Gautama, 1990).

b. The requirement of translating arbitral awards and agreements

It is a condition based on Articles 67(2)(a) and 67(2)(b) of the Arbitration Legislation that all of the required documents for the enforcement application be translated into the Indonesian language, since any other language constitutes a foreign language. According to the method of translating foreign documents in Indonesia, the translation must be conducted by a sworn translator or by an Indonesian diplomatic or consular agent. This method is applied by Articles 67(2)(a) and 67(2)(b) of the Arbitration Legislation. Hence, it may be argued that these articles of the Arbitration Legislation impose a stricter condition than that of Article IV(2) of the New York Convention. The reason is that Article IV(2) of the New York Convention does not require the translation of the documents to be made by an official or sworn translator or by a diplomatic or consular agent.

c. The requirement of information relating to the implementation of the reciprocity reservation

Article 67(2)(c) of the Arbitration Legislation requires parties applying for the enforcement of international (foreign-rendered) arbitration awards to provide information (a statement) stating that the parties' country is bound to Indonesia by a bilateral or multilateral treaty on the recognition and enforcement of foreign awards. This provision implements the reciprocity principle in the Arbitration Legislation. The application of this principle (referred to as the 'reciprocity reservation') is justified by Article I(3) of the New York Convention. However, the application of the reciprocity reservation under Article 67(2)(e) of the Arbitration Legislation is different from the approach of the New York Convention because under the Convention it merely imposes obligations between the enforcing country and the rendition country, not between the enforcing country and the party's country.

It is obvious that the Arbitration Legislation not only interprets the reciprocity reservation differently from the New York Convention, but it also imposes more conditions on the applicability of this reservation. This is because, in addition to Article 67(2)(c) of the Arbitration Legislation, Article 66(a) of this Legislation also imposes the reciprocity requirement on the enforcement process of international (foreign-rendered) arbitral awards in Indonesia. Article 66(a) of this Legislation requires that reciprocal relationships must occur between Indonesia and the rendition state. As a result, it must be proven before the Indonesian enforcing court that the country of the party seeking the enforcement of the award and also the rendition country have a bilateral or multilateral treaty on the recognition and enforcement of international (foreign-rendered) arbitral awards with Indonesia. This approach conflicts with Article III of the New York Convention which requires enforcing states to impose less conditions on the enforcement process for foreign arbitral awards in their jurisdiction. This approach was not newly introduced by the Arbitration Legislation because the previous arbitration Regulation (Supreme Court Regulation No. 1 of 1999) also implemented the approach (Decision No. 64/Pdt/G/1984/PN.Jkt.Sel; Decision No. 512/PDT/1985/PT DKI; Decision No. 4231 K/Pdt/1986).

5. The issuance of an 'exequatur' (leave for enforcement)

The third stage of the enforcement process of international (foreign-rendered) arbitration awards is that the Head of the District Court of Central Jakarta issues 'an exequatur'. Prior to issuing the exequatur, the Chief Judge will examine the awards in accordance with the rules of exequatur examinations as follows:

a. Exequatur is a formal examination process only. Consequently, the authority in charge of this process is not eligible to review the merit of the awards or determine whether or not the awards are correct (Harahap, 1996).

b. In the examination process, the authority merely examines whether the awards violate the fundamental principles relating to the recognition and enforcement of international (foreign-rendered) awards established by Article 66 of the Arbitration Legislation. The authority also examines the awards against Article V of the New York Convention, because the Convention also constitutes the legal source of arbitration in Indonesia due to the ratification of the Convention by Presidential Decree No. 34 of 1981.

c. The authority will issue an exequatur if the awards do not violate Article 66 of the Arbitration Legislation and Article V of the New York Convention. The authority may refuse to grant an exequatur if the awards violate one of the elements under Article 66 of the Arbitration Legislation and Article V of the New York Convention. In this regard, parties may challenge the refusal of the awards before the Supreme Court (Article 68 of *Law No. 30 of 1999*).

In practice, the Head of the Central Jakarta District Court grants an exequatur no later than sixty (60) days after the filing of the enforcement application (Budidjaja, 2002). The exequatur is issued in the form of an ordinary court's judgment; therefore, the sacred words 'In the name of Justice based on the Almighty God' (Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa) must be included (Harahap, 1990). The words serve to include the ideology of Indonesia (Pancasila) in the judiciary system.

Ideally, the issuance of an exequatur for international (foreign-rendered) arbitral awards has to be followed by the execution of the

awards, yet this is not always the case in Indonesia. In other words, the exequatur does not guarantee the execution of the awards. This circumstance occurred in *ED & F Man (Sugar) Ltd v. Yani Haryanto*). In that case, the Supreme Court made a controversial decision by cancelling its own exequatur on the grounds that the exequatur merely rendered an executorial title to the foreign awards. Consequently, the exequatur became irrelevant to enforcement since the Supreme Court had nullified the contract of the disputing parties. This proposition should not be adopted as the jurisprudence of arbitration in Indonesia, because the cancellation of the exequatur indicates that there is no certainty in the implementation of international (foreign-rendered) arbitration awards in that country (Adolf, 1992). This controversial decision does not align with the spirit of the New York Convention which encourages enforcing states to recognize and enforce foreign arbitral awards in their territories.

6. The competent authority dealing with the recognition and enforcement of international (foreign-rendered) arbitral awards

The Arbitration Legislation grants an authority to the District Court of Central Jakarta to process the recognition and enforcement of international (foreign-rendered) arbitral awards (*Law No. 30 of 1999* Article 66(d), 67(1), 68(1), 69(1). In this regard, the District Court of Central Jakarta merely performs its administrative function rather than its judiciary function, since this Court does not deal with the disputes or review the merits of the awards (Pardede, 2002). A question may arise why this privilege is only given to the District Court of Central Jakarta and not to other District Courts in Jakarta.

According to Harahap, (2002) the District Court of Central Jakarta is preferable to other District Courts in Jakarta to handle the process of recognition and enforcement of international (foreign-rendered) arbitral awards because of its geographical and communication proximity. The District Court of Central Jakarta is located in the central of Jakarta, so access to this Court may be easier. The Court is also near the Supreme Court, so that administrative matters for the recognition and enforcement process may be taken care of quickly. These reasons may not be compelling

anymore since access to the other District Courts in Jakarta (the District Courts of North Jakarta, West Jakarta, East Jakarta and South Jakarta) is now relatively easier and faster. Since the implementation of the Arbitration Legislation, the issuance of exequatur for international (foreign-rendered) arbitral awards is fully the authority of the Central Jakarta District Court, and consequently the Supreme Court is no longer involved in the process of recognition and enforcement of these awards. In this respect, the close distance between the Central Jakarta District Court and the Supreme Court is no longer relevant to accelerating the recognition and enforcement process.

Although Harahap's opinions are arguable, it is still appropriate to give full authority to the District Court of Central Jakarta to deal with the recognition and enforcement of international (foreign-rendered) arbitration awards. The reason is that the District Court of Central Jakarta is more familiar with dealing with various arbitral matters of an international nature than other District Courts in Jakarta (Gautama, 1990), because this Court was also given the authority to handle the registration of international (foreign-rendered) arbitral awards (Article 1 of *Supreme Court Regulation No. 1 of 1990*) prior to the implementation of the Arbitration Legislation.

However, the Central Jakarta District Court does not always process the recognition and enforcement of international (foreign-rendered) arbitration awards smoothly (Gautama, 1996). For example, in *Bankers Trust Company & Bankers Trust International PLC v. PT Mayora Indah, Tbk. (Decision No. 001/Pdt/Arb.Int/1999/PN.Jkt.Pst vide No. 002/Pdt/Arb.Int/1999/PN.Jkt.Pst vide No. 02/Pdt.P/2000/PN.Jkt.Pst; Decision No. 02 K/Ex'r/Arb.Int/Pdt/2000)*, after the award for Bankers Trust Company was registered by the arbitrators, the company requested that the Head of the District Court of Central Jakarta issue an exequatur. Instead of granting the exequatur, the Court notified the losing party (PT Mayora Indah, Tbk.) that the winning party had filed an application for the enforcement of the award (Budidjaja, 2002). The Court also permitted the losing party to submit its response to the winning party's application for the exequatur. The conduct of the District Court of Central Jakarta in this case could be considered as in 'manifest disregard of law', since the Arbitration Legislation or any other relevant regulation

concerning arbitration does not regulate such conduct. Yet, the Supreme Court affirmed the conduct of the District Court of Central Jakarta.

The actions of the District Court of Central Jakarta and the Supreme Court in *Bankers Trust* have been criticized by Indonesian and international lawyers. They frequently comment that legal enforcement relating to the implementation of international (foreign-rendered) arbitral awards in Indonesia is still far from satisfactory (Pardede, 2002). The argument may be compelling. This is because, although the Arbitration Legislation reforms the procedures for the recognition and enforcement of international (foreign-rendered) arbitral awards under the previous arbitration Regulation (Supreme Court Regulation No. 1 of 1990), this Legislation does not reform the onerous conditions of the recognition and enforcement of international (foreign-rendered) arbitral awards adopted by the previous arbitration Regulation of Indonesia. As a result, similarly to the previous arbitration Regulation, the Arbitration Legislation continues to impose onerous conditions on international (foreign-rendered) arbitral awards. This approach may impede the process of recognition and enforcement of international (foreign-rendered) arbitration awards in Indonesia, and consequently may taint the reputation of Indonesia in the world of international arbitration.

C. The recognition and enforcement process of domestic arbitration awards

The recognition and enforcement of domestic arbitration awards are clearly governed by Article 59 of the Arbitration Legislation which states that:

1. Within no more than thirty (30) days as from the date when the award is rendered, the original text or an authentic copy of the arbitration award must be delivered to the Registrar of the District Court and registered there by the arbitrator or his/her its proxy.
2. The delivery and registration contemplated in paragraph (1) will be carried out by the recording and signing of the last part or the margin of the award by the Registrar to the District Court and the arbitrator

or his/her/its proxy that delivers it, which record constitutes a deed of registration.

3. The arbitrator or his/her/its proxy must deliver the award and the original text of his/her appointment as arbitrator, or an authentic copy of it, to the Registrar to the District Court.
4. Non-fulfillment of the provisions contemplated in paragraph (1) above will make the arbitration award unenforceable.
5. All costs connected with the making of the deed of registration are to be charged to the parties.

Article 61 of the Arbitration Legislation further states, 'if the parties do not voluntarily effectuate the arbitration award, it may be enforced by an order from the Head of the District Court at the request of one of the parties to the dispute'. Article 62 of the Arbitration Legislation sets the conditions for Article 61 as it states:

1. The order, contemplated in Article 61 must be given within no more than thirty (30) days after the application for execution has been registered with the Registrar of the District Court.
2. The Head of the District Court-contemplated in paragraph (1) must first examine whether the arbitration award fulfills the provisions of Articles 4 and 5 and does not conflict with public morality and order before giving the order for its execution.
3. If the arbitration award does not fulfill the conditions contemplated in paragraph (2), the Head of the District Court will reject the request for execution, and no legal remedy whatsoever is open against the judgment of the Head of the District Court.
4. The Head of the District Court may not examine the reasons or considerations for the arbitration award.

Article 63 of the Arbitration Legislation emphasizes that, 'the order of the Head of the District Court must be written on the original text and the authentic copy of the arbitration award issued". The *res judicata* effect is also imposed on domestic arbitration awards which are recognized and enforced by the District Court. This notion is governed by Article 64 of

the Arbitration Legislation, as it states that, 'the arbitration award to which the order of the Head of the District Court is affixed must be enforced in accordance with the provisions on the execution of judgments in civil cases whose judgment has received absolute legal effect'.

Most domestic awards are enforced by the District Courts if they meet all the conditions required by the Arbitration Legislation without distinguishing between arbitration awards rendered by ad hoc arbitration and institutional arbitration. It is suggested that arbitration be conducted in Indonesia if the assets of disputing parties are in Indonesia, because the requirements of domestic arbitration awards are relatively easier to meet by the winning party to arbitration. In addition, the District Court facilitates the enforcement of domestic awards.

CHAPTER 7

DEFENCES AGAINST THE RECOGNITION OR ENFORCEMENT OF ARBITRATION AWARDS

A. Defences against the recognition and enforcement of international arbitration awards

Although Article 66 of the Arbitration Legislation specifically adopts the conditions for the recognition and enforcement of an international (foreign-rendered) award, the conditions may also be used to defend the recognition and enforcement of the award. By applying the method of *argumentum a contrario* (proof from the opposite), the language of Article 66 of the Arbitration Legislation suggests that an international (foreign-rendered) award that fails to fulfill the conditions under this provision will not be recognized and may not be enforced in Indonesia. Yet, among the five conditions under this provision, only three are frequently used as defence against the recognition and enforcement of an international (foreign-rendered) arbitral award in Indonesia, since they constitute the significant principles of international commercial arbitration in that country. These principles constitute 'reciprocity, arbitrability and public policy' and they can be found under Article 66(a-c) of the Arbitration Legislation as follows:

> International Arbitration Awards will only be recognized and may be enforced in the jurisdiction of the Republic of Indonesia if they fulfill the following criteria:

1. The International Arbitration Award must have been handed down by an arbitrator or arbitration tribunal in a country bound to the Republic of Indonesia by a bilateral or multilateral treaty on the recognition and enforcement of International Arbitration Awards;
2. The International Arbitration Awards contemplated in point (a) are limited to awards which are included within the scope of commercial law under the provisions of Indonesian law;
3. The International Arbitration Awards contemplated in point (a), which may only be enforced in Indonesia, are limited to those which do not conflict with public order [public policy] (Budidjaja, 2002).

The contents of Article 66(a-c) of the Arbitration Legislation do not reproduce the language of Article V of the New York Convention. Yet the opening paragraphs of each of the two articles are similar, since they both use the permissive word 'may' to clarify that an arbitral award may still be enforced although one of the grounds of refusal exists. In this regard, it is clear that the two articles indicate that the question of the refusal of an award is at the discretion of the competent authority of an enforcing state. This authority in Indonesia is given to the Central Jakarta District Court according to the Arbitration Legislation.

Nevertheless, there is a more important difference between Article 66 (a-c) of the Arbitration Legislation and Article V of the New York Convention. This difference occurs since the Arbitration Legislation does not clearly determine who is eligible to resist an international (foreign-rendered) arbitral award when there is a violation of the significant principles under Article 66(a-c) of the Legislation. On the contrary, Article V of the New York Convention explicitly mentions those who are eligible to utilize the grounds for refusal to recognize and enforce an arbitral award under this provision. First, 'a party' against whom the recognition and enforcement of an arbitral award is sought, may use the grounds under Article V(1) of the New York Convention as a defence against the recognition or enforcement of the award. In this regard, the party 'must request' that an enforcing court refuse the awards. Second, 'the competent

authority' of an enforcing state on its own motion *(ex officio)* may use the grounds under Article V(2) of the New York Convention to refuse the recognition or enforcement of an arbitral award. In addition, there are also a number of differences between the approaches of the Arbitration Legislation and the New York Convention in relation to defences against the recognition and enforcement of international (foreign-rendered) arbitration awards.

1. The violation of the reciprocity principle under Article 66(a) of the Arbitration Legislation

Article 66(a) of the Arbitration Legislation may be used as a defence against the recognition and enforcement an international (foreign-rendered) arbitral award if it is obvious that the award violates the application of the reciprocity principle. This principle is derived from the language of Article 66(a) of the Arbitration Legislation which stipulates:

> The International Arbitration Award must have been handed down by an arbitrator or arbitration tribunal in a country bound to the Republic of Indonesia by a bilateral or multilateral treaty on the recognition and enforcement of International Arbitration Awards (Budidjaja, 2002).

Article 66(a) of the Arbitration Legislation does not provide an explanation as to whether the violation of the principle of reciprocity must be proven by 'a party' who wishes to resist the recognition and enforcement of an international (foreign-rendered) arbitral award or by 'the competent authority (the Central Jakarta District Court)' on its own motion. The Elucidation of this provision is also silent about it. Yet, according to Harahap (1996), the enforcing court (the Central Jakarta District Court) has the full authority *(ex officio)* to refuse the recognition and enforcement of an international (foreign-rendered) arbitral award because of the violation of the reciprocity principle, even though a party against whom the recognition and enforcement of the award is sought does not request the court to refuse the award by reason of the violation of the principle.

It may be questioned why the violation of the reciprocity principle is categorized as grounds *ex officio* to refuse the recognition and enforcement of an international (foreign-rendered) arbitral award in Indonesia. Harahap (1996) asserts that the reciprocity principle is imposed on international commercial arbitration in Indonesia to ensure that other countries respect the legal sovereignty of that country. This sovereignty may only be realized if an arbitral award made in Indonesia may also be enforceable overseas. Hence, the application of the principle of reciprocity in that country becomes 'mandatory' in relation to international commercial arbitration (Setiawan, 1993). As a general principle in the legal system of Indonesia, only courts have the authority to supervise the application of mandatory rules. Accordingly, the question of whether the reciprocity principle is violated or not, is decided by the competent court 'with or without' the request of a party *(ex officio)*.

It may be argued that Article 66(a) of the Arbitration Legislation may not be compatible with Article V of the New York Convention, since the violation of the principle of reciprocity is not included in the exhaustive grounds for refusal to recognize or enforce an arbitral award under Article V of the Convention. It should be noted that the New York Convention permits contracting states to make a reservation for the application of the reciprocity principle under Article 1(3) of the Convention. Therefore, although none of the provisions under Article V of the New York Convention includes the violation of the reciprocity principle as a defence against the recognition and enforcement of an arbitral award, the violation of the principle may still be used as grounds to refuse the award. In this regard, the Arbitration Legislation explicitly stipulates that the violation of the reciprocity principle constitutes a defence against the recognition and enforcement of an international (foreign-rendered) arbitral award, since the application of this principle in the context of international arbitration is mandatory in Indonesia.

2. The violation of the arbitrability principle under Article 66(b) of the Arbitration Legislation

The content of Article 66(b) of the Arbitration Legislation relates to the application of the arbitrability principle. The violation of this principle may lead to the refusal of international (foreign-rendered) awards in Indonesia. The application of the arbitrability principle in the context of Article 66(b) of the Arbitration Legislation only relates to the application of 'objective arbitrability' rather than 'subjective arbitrability'. This is because Article 66(b) of the Arbitration Legislation only governs 'arbitrable subject matters', as this provision stipulates:

> The International Arbitration Awards contemplated in item (a) are limited to awards which are included within the scope of commercial law under the provisions of Indonesian law (Budidjaja, 2002).

Article 66(b) of the Arbitration Legislation points out that any international (foreign-rendered) award containing any decision outside the scope of 'commercial' under the Indonesian laws may be refused on the grounds that the award violates this provision. The Elucidation of Article 66(b) of the Arbitration Legislation provides some examples of activities that may fall within the scope of commercial in Indonesia, such as 'commerce, banking, finance, capital investment, industry and intellectual property'. Yet, these activities are not deemed to be exhaustive because there are other activities categorized as having a 'commercial nature' in Indonesia, but they are not mentioned by the Elucidation of Article 66(b) of the Arbitration Legislation.

The defence against the recognition and enforcement of an international (foreign-rendered) award under Article 66(b) of the Arbitration Legislation is similar to the grounds for refusal to recognize or enforce an arbitral award under Article V(2)(a) of the New York Convention. This is because both articles point out that the violation of the arbitrability principle may cause the refusal of an arbitral award. Yet, Article 66(b) of the Arbitration Legislation does not copy the language of Article V(2)(a) of the New York Convention, and consequently it is not clear whether Article 66(b) of the

Arbitration Legislation adopts the approach of Article V(2)(a) which clearly determines that the competent authority of an enforcing state on its own motion *(ex officio)* may refuse an award on the grounds of the violation of the arbitrability principle.

Harahap (1996) contends that 'with or without the request' of a party against whom the recognition and enforcement of an international (foreign-rendered) arbitral award is sought, the competent court in Indonesia (the Central Jakarta District Court) on its own motion may refuse the award on the grounds that the award violates the application of the arbitrability principle. This opinion may be correct since it is a general approach in international commercial arbitration in Indonesia that the application of the arbitrability principle is 'mandatory'; hence, the violation of the arbitrability principle may be used by the competent court on its own motion *(ex officio)* as grounds for refusing an international (foreign-rendered) arbitral award.

It is apparent that the approach of Article 66(b) of the Arbitration Legislation is similar to that of Article V(2)(a) of the New York Convention in the sense that the violation of the arbitrability principle may be used by the Indonesian enforcing court as grounds for refusing an arbitral award. Yet, Article 66(b) of the Arbitration Legislation suggests that a party may also request the Central Jakarta District Court to refuse an international (foreign-rendered) arbitral award on the grounds that the award violates the arbitrability principle of Indonesia.

3. The violation of the public policy principle under Article 66(c) of the Arbitration Legislation

The violation of Indonesian public policy may lead to the refusal of international (foreign-rendered) arbitral awards in that country. This defence is similar to that of Article V(2)(b) of the New York Convention. Article 66(c) of the Arbitration Legislation does not specifically determine who may use the defence under this provision to resist the recognition and enforcement of an international (foreign-rendered) arbitral award, because the language of Article 66(c) of the Arbitration Legislation merely states:

> The International Arbitration Awards contemplated in item (a), which may only be enforced in Indonesia, are limited to those,

which do not conflict with public order [public policy] (Budidjaja, 2002).

It may be concluded that in addition to the request of a party, the competent court (the Central Jakarta District Court) may also refuse an international (foreign-rendered) arbitral award on its own motion on the ground that the award violates the public policy principle (Harahap, 1996). Nevertheless, all of the cases in Indonesia in which it is claimed that an arbitral award violates the public policy principle, are requested by the party against whom the recognition or enforcement of the award is sought (*ED & F Man (Sugar) Ltd v. Yani Haryanto*: Decision No. 499/Pdt/G/VI/1988/PN.JKT.PST; Decision No. 486/Pdt/1989/PT.DKI; Decision No. 1205 K/Pdt/1990; *Bankers Trust Company & Bankers Trust International PLC v. PT Mayora Indah, Tbk.*: Decision No. 001/Pdt/Arb.Int/1999/PN.Jkt.Pst vide No.002/Pdt/Arb.Int/1999/PN.Jkt.Pst vide No.02/Pdt.P/2000/PN.Jkt.Pst; Decision No. 02 K/Ex'r/Arb.Int/Pdt/2000).

Article 66(c) of the Arbitration Legislation and Article V(2)(b) of the New York Convention have different approaches to the interpretation and the scope of public policy. The competent court in Indonesia (the Central Jakarta District Court) construes the interpretation of Indonesian public policy under Article 66(c) of the Arbitration Legislation broadly, and consequently the scope of public policy in that country is also broad (*ED & F Man (Sugar) Ltd v. Yani Haryanto*: Decision No. 499/Pdt/G/VI/1988/PN.JKT.PST; Decision No. 486/Pdt/1989/PT.DKI; Decision No. 1205 K/Pdt/1990; *Bankers Trust Company & Bankers Trust International PLC v. PT Mayora Indah, Tbk.*: Decision No. 001/Pdt/Arb.Int/1999/PN.Jkt.Pst vide No. 002/Pdt/Arb.Int/1999/PN.Jkt.Pst vide No. 02/Pdt.P/2000/PN.Jkt.Pst; Decision No. 02 K/Ex'r/Arb.Int/Pdt/2000). Obviously, this approach does not align with the New York Convention that requires the term 'public policy' to be interpreted narrowly (*Summary Record,* UN Doc E/CONF.26/SR.17, 1958).

4. The implementation of the grounds for refusal to recognize and enforce an arbitral award under the New York Convention

The ratification of the New York Convention by Presidential Decree No. 34 of 1981 means Indonesia is bound by the Convention, and therefore,

that country is obliged to implement all of the Convention provisions. Up to date, Indonesia has not repealed Presidential Decree No. 34 of 1981, and consequently, the New York Convention still has the force of law in that country. Accordingly, in addition to the violation of the three significant principles under Article 66(a-c) of the Arbitration Legislation, the exhaustive grounds under Article V of the New York Convention are also effective to resist an international (foreign-rendered) arbitral award in Indonesia. Ideally, any Indonesian legislation on international arbitration has to conform to the Convention after it is ratified and incorporated into the Indonesian sources of international arbitration law. Yet, this expectation may not always occur. The discussions here show that not all of the approaches of the New York Convention regarding the grounds for refusal to recognize and enforce an arbitral award are adopted by the Arbitration Legislation.

A party who wishes to utilize the defences under Article V(1) of the New York Convention must apply before the competent court in Indonesia (the Central Jakarta District Court), and request that the court refuse the arbitral award. In the absence of the application, the Central Jakarta District Court will not entertain the party's request (Harahap, 1991). In addition, a party that uses the defence under Article V(1) of the New York Convention is obliged to supply evidence to prove that one of the grounds for refusal to recognize or enforce an arbitral award under Article V(1) of the Convention exists. There is no minimal evidence requirement, and therefore, the party may submit any evidence, for example 'written evidence, a witness or information', to support their application. In the absence of evidence, the Central Jakarta District Court will not accept the party's application (Harahap, 1991).

Indonesian arbitration law also recognizes that the grounds for refusal to recognize or enforce an arbitral award under Article V(2) of the New York Convention are *ex officio* in the sense that a competent court on its own motion may use these grounds to resist an award. The grounds for refusal to recognize or enforce an arbitral award under Article V(2) of the New York Convention (the violation of the arbitrability and public policy principles) are also regulated by the Arbitration Legislation. Consequently,

the approaches of the Arbitration Legislation to the application of the principles are adopted because this New Legislation is higher in the hierarchy than the Convention. Although the New York Convention is implemented in Indonesia, the Arbitration Legislation does not adopt the approaches of this Convention in their entirety.

a. The incapacity of a party and the invalidity of an arbitration agreement (Article V(1)(a) of the New York Convention)

The grounds for refusal to recognize or enforce an arbitral award under Article V(1)(a) of the New York Convention are recognized by arbitration law of Indonesia for the purpose of resisting the award in that country. This provision points out that a party against whom the recognition or enforcement of an arbitral award is sought may use Article V(1)(a) of the Convention as a defence against the recognition or enforcement of the award. In this regard, the party must prove the incapacity of either party according to the law applicable to the disputing parties. The applicable law here is not necessarily a foreign law. Indonesian law may also become the applicable law if the parties agree to select this law, but the award must be rendered outside the jurisdiction of Indonesia in order to be refused by using Article V(1)(a) of the New York Convention. This is because an international arbitral award according to the approach of Indonesian arbitration law is merely 'a foreign-rendered award'. As a result, the Indonesian enforcing court (the Central Jakarta District Court) only entertains the request of a party if an arbitral award is not made in the Indonesian jurisdiction and the party is capable of supplying evidence to support their request.

A party may also rely on the defence under Article V(1)(a) of the New York Convention and request that the Central Jakarta District Court refuse an award on the grounds of the invalidity of the parties' arbitration agreement. The courts in Indonesia interpreted the approach of Article V(1)(a) of the New York Convention wrongly in *ED & F Man (Sugar) Ltd v. Yani Haryanto (*Decision No. 499/Pdt/G/VI/1988/PN.JKT.PST; Decision No. 486/Pdt/1989/PT.DKI; Decision No. 1205 K/Pdt/1990) because the courts in that case did not separate the arbitration agreement from the main contract. The consequence of the courts' approach was that the invalidity

of the main contract automatically caused the invalidity of the arbitration agreement. Although the courts in *ED & F Man (Sugar) Ltd* relied in their approach on Article 1821 of the Indonesian Civil Code (Hawin, 1996), the approach does not align with the approach of Article V(1)(a) of the New York Convention which explicitly stipulates that the invalidity of an 'arbitration agreement' and not a 'main contract' constitutes one of the grounds for refusal to recognize or enforce an arbitral award under the Convention.

b. The violation of procedural fairness (Article V(1)(b) of the New York Convention)

The violation of procedural fairness under Article V(1)(b) of the New York Convention is recognized as one of the grounds for refusing an international (foreign-rendered) arbitral award in Indonesia. Since this violation occurs during arbitral proceedings, it is commonly referred to as the violation of arbitration procedure. Arbitration law of Indonesia clearly determines that only a 'serious' and 'fundamental' violation of arbitration procedures may lead to the refusal of an award. In other words, not all of the violations of arbitration procedures may be considered as 'serious and fundamental'. For example, the refusal to hear the witness or the expert of one party does not constitute a serious and fundamental violation of procedures in arbitral proceedings, if the arbitral tribunal considers that the evidence before the tribunal is sufficient to deliver an award (Harahap, 1991). However, if the arbitral tribunal fails to give an opportunity to one of the parties to deliver their statement of defence or an additional statement of defence, this circumstance amounts to a serious and fundamental violation of arbitration procedures and may lead to the refusal of an award (*Trading Corporation of Pakistan Ltd v. PT Bakri & Brothers:* Decision No. 64/Pdt/G/1984/PN.Jkt.Sel; Decision No. 512/PDT/1985/PT DKI; Decision No. 4231 K/Pdt/1986).

Nevertheless, a party may not succeed in utilizing the defence against the recognition or enforcement of an award under Article V(1)(b) of the New York Convention before the Indonesian enforcing court, if the party is estopped from raising this defence at the enforcement stage. This circumstance may occur because the party does not raise the objections

during the proceedings even though he/she realizes that a violation of arbitration procedures is occurring (Harahap, 1991).

It is clear that Indonesian arbitration law adopts the approaches of the New York Convention in the application of Article V(1)(b) of the Convention, because arbitration law of that country also strictly limits the standard of the violation of arbitration procedures to serious and fundamental violation. In addition, the failure of a party to raise the issue of the violation of arbitration procedures during arbitral proceedings in Indonesia also prevents that party from raising this issue at the enforcement stage.

c. Awards outside the terms of submission to arbitration (Article V(1)(c) of the New York Convention)

The grounds for refusal to recognize or enforce an arbitral award under Article V(1)(c) of the New York Convention may be used to resist an international (foreign-rendered) arbitral award in Indonesia. The contents of Article V(1)(c) of the Convention concern the excessive authority of arbitrators in the making of an award. According to the approaches of the New York Convention, the contents of Article V(1)(c) of the Convention may be relied upon by a party only; consequently, the Indonesian enforcing court (the Central Jakarta District Court) is not entitled to use this provision on its own motion to refuse the recognition and enforcement of an international (foreign-rendered) arbitral award in that country. In other words, in the absence of the request of a party, the Indonesian enforcing court cannot refuse an international (foreign-arbitral) award, even though one of the grounds for refusal to recognize and enforce the award under this provision exists.

Nevertheless, Harahap (1991) is of the opinion that with or without the request of a party, the Indonesian enforcing court has the authority to refuse the award based on Article V(1)(c) of the Convention. In order to support his arguments, he gives a hypothetical example where parties only agree to arbitrate their dispute with respect to the payment of the remaining debts. If the parties' award contains a decision that orders the respondent to return the purchased goods in addition to the payment of the remaining debts, the award obviously contains a decision on a matter

not able to be submitted to arbitration. In this regard, the arbitrators have 'manifestly exceeded their powers'.

According to Harahap (1991), the award cannot be justified, recognized and enforced in Indonesia even though the respondent does not request the court to refuse the award. The reason is that if the award were enforced in Indonesia, it would only encourage arbitrators to decide international (foreign-rendered) arbitral awards beyond their authority for the purpose of benefiting foreign parties. This is because the arbitrators could believe the awards may be enforced in Indonesia unless losing parties request that the Indonesian competent court refuse them.

It is apparent that Harahap does not present a sound argument to support his proposition. This is because his reasoning to permit the use of Article V(1)(c) of the New York Convention by the Indonesian enforcing court, is based on the aim of preventing arbitrators making international (foreign-rendered) arbitral awards for the benefit of foreign parties. This reason may not be acceptable since international (foreign-rendered) arbitral awards are not always made for foreign parties. They may also be made for Indonesian parties. Harahap may be reluctant to retain his argument if arbitral awards are rendered for Indonesian parties. Hence, his proposition should not be adopted for the application of Article V(1)(c) of the New York Convention in Indonesia. This is because his proposition is not compelling and it may make the approach of Indonesian arbitration law different from that of the New York Convention.

d. Irregularity in the composition of arbitral tribunal or arbitral procedure (Article V(1)(d) of the New York Convention)

In the context of international commercial arbitration in Indonesia, the contents of Article V(1)(d) of the New York Convention are acknowledged as the grounds for refusal to recognize and enforce an international (foreign-rendered) arbitral award. This provision relates to the violation of arbitration procedures, since it deals with the inconsistency between the composition of arbitral authority or its procedures and the parties' arbitration agreement. The New York Convention determines that the competent court may only refuse the recognition or enforcement of an

arbitral award if a party, against whom the recognition and enforcement of the award is sought, requests the court to do so.

The approach of Article V(1)(d) of the New York Convention is also adopted by Indonesian arbitration law. Hence, the Indonesian enforcing court (the Central Jakarta District Court) cannot refuse the recognition or enforcement of an international (foreign-rendered) arbitral award in the absence of a request from the party, against whom the recognition or enforcement of the award is sought. The violation of arbitration procedures under Article V(1)(d) of the Convention is regarded as 'not so serious and fundamental' for the implementation of international (foreign-rendered) awards in Indonesia. Hence, the Indonesian enforcing court is not entitled to refuse an international (foreign-rendered) arbitral award in that country on its own motion *(ex officio)* because of the violation of arbitration procedures (Harahap, 1991).

e. Awards not binding or set aside or suspended (Article V(1)(e) of the New York Convention)

Article V(1)(e) of the New York Convention clearly stipulates that an enforcing court may refuse an award if the award has not been binding, or has been set aside or suspended. Although this provision is applicable to refuse the recognition or enforcement of an international (foreign-rendered) award in Indonesia, the approach of arbitration law of that country is different from that of the Convention. This is because the Indonesian enforcing Court (the Central Jakarta District Court) interprets the language of Article V(1)(e) of the New York Convention differently. Such a different interpretation can be found in *Perusahaan Pertambangan Minyak dan Gas Bumi Negara & PT PLN (Persero) v. Karaha Bodas Company LLC* (referred to as the *KBC* case) (Decision No. 86/PDT.G/2002/PN.JKT.PST). According to the Central Jakarta District Court in that case, Article V(1)(e) of the New York Convention determines that there are two authorities capable of setting aside an award, first, the competent authority of the country in which the award is rendered and second, the competent authority of the country under the law of which the award is made. This interpretation is correct and it aligns with that of Article V(1)(e) of the New York Convention (Juwana, 2002).

However, the Central Jakarta District Court in 2002 interpreted the term 'the law' under Article V(1)(e) of the New York Convention differently from the thrust and the approach of the Convention, since it referred this term to 'the governing law of contract', rather than 'the law of arbitration' (Juwana, 2002). The Court in *KBC* adopted this approach on the ground that the disputing parties chose the law of Indonesia to govern the contract and they were silent regarding the law governing the proceedings of the arbitration (the curial law of arbitration). The parties did not determine that the law of the seat of arbitration (Swiss law) would govern the arbitral proceedings. Hence, the Court was of the opinion that in this particular circumstance, the law that was applied to govern the contract was also the law to set aside the award. As a result of this reasoning, the Court held that the awards rendered in Geneva, Switzerland could also be set aside in Indonesia since the Indonesian law was adopted to govern the contract.

The approach is not only different but also incorrect in its interpretation of Article V(1)(e) of the New York Convention. The term 'the law' under Article V(1)(e) of the Convention must refer to 'the law of the seat of arbitration', when disputing parties do not select another law to govern their arbitral proceedings (the curial law of arbitration). If the correct interpretation of Article V(1)(e) of the Convention had been applied in *KBC* then the competent authority to set aside the award was the Swiss Court rather than the Indonesian Court (the Central Jakarta District Court).

It is obvious that the Court in *KBC* did not distinguish between the governing law of the contract and the curial law of the arbitration. The Court simply concluded that the governing law of the contract automatically governed the arbitral proceedings. Based on this wrong interpretation of Article V(1)(e) of the Convention, the Court set aside the award made for the American company (Karaha Bodas Company LLC) in *KBC*.

The New York Convention does not govern the setting aside of arbitral awards. It merely regulates the refusal of the recognition or enforcement of an arbitral award. In this regard, it is apparent that the Indonesian enforcing court in *KBC* confused the term 'the setting aside' and the term 'the refusal' of arbitral awards (Tjajo, 2004).

Since the winning party in *KBC* did not request the enforcement of the award in Indonesia, the award could not be refused in that country. Nevertheless, the Indonesian losing party expected that the setting aside of the award in Indonesia would lead to the refusal of the award in countries where the winning party sought enforcement. This expectation may not have been realized because, although the award had been set aside by the Indonesian Court, it was not necessary for other states in which the winning party sought enforcement to refuse the awards as well (Juwana, 2004). This circumstance may occur if states adopt the approach of Article V of the New York Convention which precisely stipulates that 'an award may be refused'. The word 'may' in the opening paragraph of Article V of the New York Convention is permissive rather than mandatory, and consequently, although the awards may have been set aside in Indonesia, other enforcing states may still enforce the awards.

A question may arise as to whether Indonesian arbitration law also interprets Article VI of the New York Convention differently from the approach of the Convention. This question arises because there is a coherent connection between the application of Articles V(1)(e) and VI of the New York Convention. Article VI of the Convention stipulates that an enforcing court may adjourn the enforcement decision for an arbitral award if an application to set aside the award has been made to the court of a rendition country. In this regard, Harahap (1991) points out that the enforcement court in Indonesia (the Central Jakarta District Court) may only 'adjourn' the enforcement of an award if 'an exequatur has been given to the award'.

If Harahap's proposition had been adopted by the arbitration law of Indonesia as the proper approach to the interpretation of Article VI of the New York Convention, the approach of arbitration law in that country would be different from the real interpretation of Article VI of the New York Convention. The enforcement of an award according to the Convention is only adjourned if a request to set aside an award has been submitted by a losing party to the court of a rendition country, while the award is still being processed by an enforcing court. In this regard, the enforcing court would not have issued its decision regarding the enforcement of the award

(the exequatur in the Indonesian arbitration context). According to the approach of the New York Convention, if an enforcing court has made its decision to grant the enforcement of an award and subsequently it can be proven that the award has been set aside, the enforcing court may cancel the enforcement of the award.

Article VI of the New York Convention stipulates that a losing party has to provide suitable security if the enforcing court considers that it is a proper measure to order the losing party to give such security. This approach is adopted by Article VI of the New York Convention in order to protect the interests of the winning party. Yet, this measure may only be implemented if the winning party requests the enforcing court to do so.

Although the applicability of Article VI of the New York Convention is recognized in Indonesia, Harahap argues that it is not logical to order a losing party to give suitable security as required by this provision. He raises this argument because he is of the opinion that the term 'adjourn' under Article VI of the Convention leads to the refusal of an award when an enforcing court has not issued its decision on the enforcement of the award. It is apparent that Harahap has misunderstood the approach of Article VI of the New York Convention. The article requires a losing party to provide suitable security because this provision is applied to the postponement of the enforcement of an award. It does not apply to the refusal of an award.

Harahap (1991) suggests that the Indonesian enforcing court 'has to refuse' the recognition or enforcement of an award when the enforcing court has not issued an exequatur for the award, but it can be proven before the court that the award has been set aside. Harahap's proposition apparently does not align with the approach of Article V(1)(e) in conjunction with Article VII of the New York Convention. According to the latter, the setting aside of an award does not automatically cause the refusal of the award, since winning parties may rely on the enforcing country's national arbitration law or treaties between enforcing and rendition countries, that are 'more favourable' than the New York Convention concerning the enforceability of arbitral awards. Since Indonesia has not concluded any bilateral agreement on the recognition and enforcement of international arbitral awards with any country (Gautama, 1991) and the Arbitration Legislation may not be

more 'pro-enforcement' than the New York Convention in relation to the recognition and enforcement of arbitral awards, Harahap's proposition may be adopted by Indonesian arbitration law.

f. Grounds for refusal to recognize or enforce an arbitral award to be initiated by an enforcing court (Article V(2) of the New York Convention)

Article V(2) of the New York Convention specifically provides the defences that may be utilized by an enforcing court on its own motion to refuse the recognition or enforcement of an arbitral award. These defences deal with the violation of the principle of arbitrability under Article V(2)(a) of the New York Convention and the violation of public policy under Article V(2)(b) of the Convention. The violation of these principles is also adopted as the grounds for refusal to recognize and enforce an international (foreign-rendered) arbitral award in Indonesia not only for the purpose of implementing the New York Convention in that country but also for the application of the Arbitration Legislation. Article 66(b) of the Arbitration Legislation deals with the violation of the arbitrability principle while Article 66(c) of the Arbitration Legislation concerns the violation of the public policy principle.

Although the New York Convention and the Arbitration Legislation govern the same matters, inter alia, the violation of the principles of arbitrability and public policy, they adopt different approaches to the application of these principles. The enforcing court of Indonesia (the Central Jakarta District Court) frequently interprets the violation of the significant principles relating to the recognition and enforcement of international (foreign-rendered) arbitral awards under the Arbitration Legislation differently from the spirit and the thrust of the New York Convention (Hawin, 1996).

For example, the principle of public policy has been construed broadly by the Court in *Bankers Trust Company & Bankers Trust International PLC v. PT Mayora Indah, Tbk*. (Decision No. 001/Pdt/Arb.Int/1999/PN.Jkt.Pst vide No. 002/Pdt/Arb.Int/1999/PN.Jkt.Pst vide No. 02/Pdt.P/2000/PN.Jkt.Pst; Decision No. 02 K/Ex'r/Arb.Int/Pdt/2000) and also in *Perusahaan Pertambangan Minyak dan Gas Bumi Negara & PT PLN (Persero) v. Karaha Bodas*

*Company LLC (*Decision No. 86/PDT.G/2002/PN.JKT.PST, and the case is still being reviewed by the Supreme Court). This approach has given Indonesia a bad reputation in the world of international arbitration (Mills, 2002).

B. Defences against the recognition and enforcement of domestic arbitration awards

Article 70 of the Arbitration Legislation governs the grounds for annulling domestic arbitration awards. Although this provision is placed directly after the provisions for international arbitration awards, it does not mean that it is deemed for both domestic and international arbitration awards. This is because the District Court, where arbitration awards are rendered, has the authority to annul the awards. Since international arbitration awards regulated by the Arbitration Legislation have to render outside the jurisdiction of Indonesia, the Indonesian District Court has no authority to annul the awards.

Article 70 of the Arbitration Legislation stipulates that, 'an application to annul an arbitration award may be made if the award is alleged to contain the following elements:

1. Letters or documents submitted in the hearings which are admitted to be forged or are decided to be forgeries after the award has been handed down;
2. Documents are found after the award has been made which are decisive in nature and were deliberately concealed by the opposing party; or
3. An award is made on the strength of a fraud committed by one of the parties to the dispute being examined.'

Article 71 of the Arbitration Legislation further states: 'an application for annulment of an arbitration award must be submitted in writing within not more than thirty (30) days as from the day the arbitration award was delivered to and registered with the Registrar to the District Court.'

Article 72 of the Arbitration Legislation states:

1. An application to annul the arbitration award must be submitted to the Head of the District Court.

2. If the application contemplated in paragraph (1) is granted the Head of the District Court must further determine the results of the annulment of the whole or only part of the arbitration award.
3. Judgment on the application for annulment must be pronounced by the Head of the District Court within no more than thirty (30) days from the date when the application contemplated in paragraph (1) is received.
4. An application to appeal may be lodged with the Supreme Court against the judgment of the District Court, which must decide, being the court of first and last instance.
5. The Supreme Court must consider and decide on the application to appeal, as contemplated in paragraph (4), within no more than thirty (30) days after the Supreme Court receives the application to appeal.

Perum PERURI v. PT Pura Barutama is an example of the cases where the arbitration award of institutional arbitration (BANI) was sought for an annulment at the District Court. The case is about a breach of contract on the part of PT Pura Barutama. In November 1999, PT Pura Barutama won a bid to print bank notes for Perum PERURI. It was agreed that PT Pura Barutama printed bank notes of Rp.1,000 (One thousand rupiah) and Rp.5,000 (Five thousand rupiah) for a total amount of US$7,000,000 (Seven million US dollars). When Perum PERURI examined the bank notes printed by PT Pura Barutama, it was found that 35 percent of the bank notes were faulty. Perum PERURI demanded that PT Pura Barutama take responsibility for the defects. However, PT Pura Barutama responded that the defects were caused by the printing machines of Perum PERURI; therefore, PT Pura Barutama could not be held responsible. Perum PERURI brought this case before BANI based on their clause in the contract.

Based on the BANI arbitral proceedings, it was rendered that PT Pura Barutama had violated the contract. BANI rendered its award No. 47/IV/ARB-BANI/2001 on 4 July 2002, containing an order to PT Pura Barutama to destroy the defective bank notes at their own cost. In addition, the award stated that PT Pura Barutama had to reimburse all expenses for printing the

bank notes, a total of Rp.21,700,000,000 (Twenty-one billion, seven hundred million rupiah), to Perum PERURI.

PT Pura Barutama refused to perform the BANI award and it subsequently applied to Kudus District Court for an annulment of the arbitration award (Register No. 30/Pdt.19/2002/PN Kds) on the grounds that it was not fair because the arbitrator who rendered the award (Priyatna Abdurrasyid) had a connection with Perum PERURI. It was also submitted by PT Pura Barutama that Perum PERURI did not have a letter of attorney from Bank of Indonesia (BI) to sue PT Pura Barutama on behalf of BI. Furthermore, PT Pura Barutama claimed that Perum PRURI had not revealed significant evidence relevant to the subject matter of the case.

The case was examined by Kudus District Court and on 22 September 2002 the Court decided in favor of PT Pura Barutama and cancelled the BANI award entirely. Perum PERURI appealed to the Supreme Court, which decided to annul the decision of Kudus District Court and upheld the BANI award (Decision No. 1/Banding/Wasit/2003 dated 11 February 2004). The Judge of the Supreme Court, Bagir Manan, held that the claims and arguments submitted by PT Pura Barutama did not meet the conditions under Article 70 of the Arbitration Legislation. In addition, there was a flaw in the annulment hearings at the Kudus District Court because the hearings did not involve Perum PERURI. The hearings were not conducted according to due process, and consequently the Court's decision was not fair and valid.

Another example of the notion to annul a domestic arbitration is the case of *PT Cipta Kridatama v. BANI*. Different from the previous case, this case involves the instructional arbitrator as the defendant. The case commenced when BANI rendered an award in favor of Bulk Trading SA. PT Cipta Kridatama submitted its case before BANI against Bulk Trading SA on the grounds that the latter company had not performed its contractual obligation. BANI rendered its award No. 300/II/ARB-BANI/2009 dated 22 October 2009, refusing the claims of PT Cipta Kridatama. BANI also decided that PT Cipta Kridatama was the one that had breached the contract based on the counter claims submitted by Bulk Trading SA.

PT Cipta Kridatama applied for the annulment of the BANI award at South Jakarta District Court and the award was annulled (Decision No.

270/Pdt.P/2009/PN.Jkt.Sel dated 4 January 2010). In this case, the Court accepted the claims of PT Cipta Kridatama that the award contained flaws on the grounds that the arbitration panel had violated Article 57 of the Arbitration Legislation, because it failed to announce its award within thirty (30) days after the end of dispute examinations in the arbitration proceedings. The award also violated the administrative requirements because the arbitrators' addresses did not appear in the award as mandated by Article 54 of the Arbitration Legislation.

BANI did not accept the decision of the South Jakarta Court and submitted the case to the Supreme Court. BANI argued that the grounds for annulment of the award submitted by PT Cipta Kridatama were not based on Article 70 of the Arbitration Legislation. BANI also argued that the decision of the Court could not be accepted because the grounds for the decision, namely Articles 54 and 57 of the Arbitration Legislation, provided no sanctions if the requirements under these articles were not met. The Supreme Court decided to annul the decision of the South Jakarta Court. Based on this case, it is clear that only Article 70 of the Arbitration Legislation can be used as the grounds to annul a domestic award.

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CHAPTER 8

LEGAL APPROACHES TO ONLINE ARBITRATION

A. Introduction to online arbitration

Today, developed technology has penetrated business transactions. Electronic commerce and the use of the Internet offer unprecedented opportunities for business people to expand their businesses (Wilikens, Vahrenwald and Morris, 2000). Similar to off-line businesses, e-commerce transactions may result in e-disputes; consequently it should be resolved by an e-dispute resolution mechanism. Online arbitration is one of the dispute settlement mechanisms which can be utilized by business people. Those who engage in business may also use online arbitration to settle their disputes even though their business transactions are off-line. This is because online arbitration can transcend national boundaries, and accordingly online arbitration fits with international business engagements. Other advantages of online arbitration are as follows:

Table 1. Advantages of Online Arbitration

No	Type of Advantage	Description
1	Neutrality	The Internet is a neutral place for the disputing parties.
2	Lower cost	The parties and arbitrators do not have to travel for the hearings.

3	Flexibility	Audio and video conferencing capabilities allow the parties to conduct meetings and hearings remotely.
4	Saving time	The parties are able to initiate and defend a claim by accessing a website and completing arbitration forms electronically.
5	Efficiency	Web-based document filing systems help the parties to submit many documents instantly and over any distance.
6	Convenience	Submissions can be archived by automated document management systems and be reviewed from any location, at any time.

Source: Yüksel A E B (2007)

Despite the online arbitration advantages as stated previously, the legality and validity of online arbitration in Indonesia are questionable because the Arbitration Legislation does not specifically govern online arbitration. So it is questioned whether the provisions under this Law are adequate to support the applicability and validity of online arbitration. Hence, the issue of online arbitration should be examined by using the Arbitration Legislation and Law No. 11 of 2008 concerning Electronic Information and Transactions (hereinafter referred to as IT Legislation).

The IT Legislation was enacted to respond to the development of information technology and communications. The General Elucidation of this Legislation clearly emphasizes that 'Information Technology becomes a double-edged sword, that is to give contributions to the improvement of human welfare, advance, and civilization, and at the same time, becomes effective means for unlawful acts'. The enactment of this Legislation was also driven by the realization that:

> Electronic transactions for trade via electronic systems (electronic commerce) have made a part of national and international trade. This fact shows that the convergence in the field of information technology, media, and informatics (telematics), inevitably, keeps developing in line with the invention in the field of information technology, media, and communications.

The IT Legislation consists of 13 chapters as follows:

Table 2. Chapters of Law No. 11 of 2008 concerning Electronic Information and Transactions

Chapter	Title
I	General Provisions
II	Principles and Objectives
III	Electronic Information, Records and Signatures
IV	Provision of Electronic Certification and Electronic Systems
V	Electronic Transactions
VI	Domain Names, Intellectual Property Rights and Protection of Privacy Rights
VII	Prohibited Acts
VIII	Dispute Resolution
IX	Role of the Government and Role of the Public
X	Investigation
XI	Penal Provisions
XII	Transitional Provisions
XIII	Concluding Provisions

Source: Law No.11 of 2008

B. The validity of online arbitration agreements

Article 1 (1) of the Arbitration Legislation stipulates that 'arbitration' means 'a method of settling civil disputes outside the general courts, based on an arbitration agreement made in writing by the parties to the dispute'. This provision merely emphasizes that arbitration settles the disputes outside of the general court jurisdiction without stating the methods of conducting the arbitration processes. It is clear here that the definition of 'arbitration' under Article 1 (1) of the Arbitration Legislation can be interpreted more widely to cover traditional and online arbitration. Since online arbitration utilizes technology via the Internet, emails and online conferencing, the definition of online arbitration is 'a method of dispute resolution that has all the activities of arbitration, including submissions to the arbitral tribunal and all proceedings, taking place over the Internet via networks, email, chat groups or online conferencing" (Arsic, 1997; Yüksel, 2007).

Article 1(1) of the Arbitration Legislation emphasizes that arbitration can only be conducted if the disputing parties agree to arbitrate, which is proven by their arbitration agreement. It is questioned whether online agreement to arbitrate has legal standing under the Arbitration Legislation. Prior to examining the validity of online arbitration agreement, it is significant to state the substance of Article 4(2) of the Arbitration Legislation. This provision strictly requires that, 'The agreement to resolve disputes through arbitration as specified in paragraph (1) must be contained in a document signed by the parties'. In other words, the arbitration agreement shall be in writing and signed by the disputing parties. The question is whether these requirements can be fulfilled by online arbitration agreement.

The requirement in writing is met by online arbitration since Article 4(3) of the Arbitration Legislation stipulates, 'If an agreement is made to resolve a dispute by an exchange of letters, the sending of telexes, telegrams, faxes, e-mails or any other form of communication, it must be accompanied by a record of receipt by the parties'. This provision permits e-mails to be evidence of the written form of an arbitration agreement. The other requirement is the signature of disputing parties on the arbitration agreement. The use of electronic signatures in an arbitration agreement is valid since Article 11 of the IT Legislation states:

(Electronic Signatures shall have lawful legal force and legal effect to the extent of satisfying the following requirements:

1. Electronic Signature-Creation data shall be associated only with the Signatories/ Signers;
2. Electronic Signature-creation data at the time the electronic signing process shall be only in the power of the Signatories/ Signers;
3. Any alteration in Electronic Signatures that occurs after the signing time is knowable;
4. Any alteration in Electronic Information associated with the Electronic Signatures after the signing time is knowable;
5. There are certain methods adopted to verify the identity of the Signatories/Signers; and

6. There are certain methods to demonstrate that the Signatories/ Signers have given their consent to the associated Electronic Information.

Based on this provision, it is clear that electronic signatures are equal to manual signatures in general, with legal force and legal effect. Based on the explanations above, it can be defined that an online arbitration agreement is an agreement made by the disputing parties through the medium of technology to settle their dispute in arbitration.

C. The recognition of online arbitration proceedings

Online arbitration agreement is the legal base to conduct an online arbitration hearing. The hearing can be fully conducted using electronic means, such as hearing witnesses via video conferences 'where each participant to arbitration sits before sound and video camera equipment. On the screen the faces of the other participants appear'. Another method of conducting an arbitration hearing is by transmitting documents electronically as long as the parties have the right of equal access to the information (Hill, 1999). Since the arbitrators do not physically meet, then another issue arises pertaining to the seat of arbitration. It is very significant to arbitrators who conduct online hearings and proceedings to ascertain the seat of arbitration, because it will determine 'the nationality of the award and the jurisdiction of local courts for setting aside the award' (De Witt, 2001).

There shall not be any problem if the disputing parties have determined the seat of arbitration prior to the hearings and proceedings. In this circumstance, the arbitrators only state the seat of arbitration in the award itself (Manevy, 2001). However, if the seat of arbitration has not been determined by the disputing parties, the question is how to determine this. The answer to this question is provided by Article 31(3) of the Arbitration Legislation which stipulates: 'If the parties have chosen an arbitration procedure, as contemplated in paragraph (1) they must agree on provisions for the timeframe and venue of the arbitration, and if the timeframe and venue are not determined, the arbitrator or arbitration panel will determine them'.

Based on the explanations above, it should be noted here that there are no provisions of the Arbitration Legislation prohibiting online arbitration proceedings and hearings as long as they are conducted based on the principle of equality, transparency and due process.

D. The recognition and enforcement of online arbitration awards

The most determinative phase in the context of arbitration is the recognition and enforcement of arbitration awards (Chukwumerije, 1994) because the awards have no legal effect in the absence of their recognition and enforcement and the other phases of the arbitration process, such as arbitration proceedings and the issuance of arbitration awards, become meaningless. Winning parties also feel frustrated because they have incurred costs and time for arbitration, but their awards cannot be realized. (Gautama, 1975) The question is whether online arbitration awards can be enforced in the same way as traditional arbitration awards. It should be noted here that arbitrators do not have executory power to recognize and enforce the online arbitration awards that they have made. As a result, the process of the recognition and enforcement of the awards must be performed by the courts of enforcing states according to their laws that govern such a process.

The Arbitration Legislation divides arbitration awards into two categories, namely domestic (national) and international (foreign) arbitration awards. They are categorized as domestic (national) if the proceedings and the seat of arbitration are in the jurisdiction of Indonesia. Article 1(9) of the Arbitration Legislation defines an international (foreign) arbitration award as:

> An award handed down by an arbitration institution or individual arbitrator outside the jurisdiction of the Republic of Indonesia, or an award by an arbitration institution or individual arbitrator which, under the provisions of Indonesian law, is deemed to be an international arbitration award.

The question arises of how to categorize online arbitration awards when all the processes of arbitration are conducted online. As previously mentioned, the seat of arbitration determines the nationality of the

arbitration process; therefore, the nationality of online arbitration awards also depends on the seat of arbitration written in the awards.

As previously stated, online arbitration awards can only be enforced by the courts of enforcing states according to their laws that govern such a process. In Indonesia, the enforcement of online domestic arbitration awards is governed by Article 59(1) of the Arbitration Legislation, which states: 'Within thirty (30) days from the date the award is rendered, the original text or an authentic copy of the arbitration award must be delivered to the Clerk of the District Court and registered there by the arbitrator or his/her/its proxy.'

Article 59(4) of the Arbitration Legislation stipulates that 'non-fulfilment of the provisions contemplated in paragraph (1) above will render the arbitration award unenforceable'. Based on these provisions, it is clear that the Arbitration Legislation requires online arbitration awards to be printed and signed by the arbitrators. It is then clear that all phases of arbitration can be conducted online in Indonesia, but the last phase, namely the enforcement of arbitration awards, shall be conducted by using the traditional approach, that is to print the online arbitration awards and have the arbitrators sign them.

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CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

ARTICLE 1

1. This Convention shall apply to the recognition and` enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.
2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.
3. When signing, ratifying or acceding to this Convention, or notifying extensions under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

ARTICLE 2

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

ARTICLE 3

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

ARTICLE 4

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
   (a) The duly authenticated original award or a duly certified copy thereof;
   (b) The original agreement referred to in article II or a duly certified copy thereof.
2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for

recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

ARTICLE 5

1. Recognition and enforcement of the award maybe refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
   (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
   (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
   (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
   (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
   (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country, or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

ARTICLE 6

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

ARTICLE 7

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the, law or the treaties of the country where such award is sought to be relied upon.
2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

ARTICLE 8

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.
2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE 9

1. This Convention shall be open for accession to all States referred to in article VIII.
2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE 10

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.
2. At any time thereafter any such extensions shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.
3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

ARTICLE 11

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which

are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

ARTICLE 12

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.
2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession,- this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

ARTICLE 13

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.
3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

ARTICLE 14

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

ARTICLE 15

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

ARTICLE 16

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

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LAW OF THE REPUBLIC OF INDONESIA NUMBER.30 OF 1999 CONCERNING ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION

WITH THE BLESSING OF GOD ALMIGHTY THE PRESIDENT OF THE REPUBLIC OF INDONESIA,

Considering: a. that pursuant to the prevailing laws and regulations, resolution of a civil dispute besides by resorting to the general courts could also be by resort to arbitration and alternative dispute resolution;

b. that the prevailing laws and regulations for the resolution of disputes through arbitration are no longer suited to the developments in business and law generally;

c. that based on the considerations as referred to in points a and b, it is necessary to enact a Law concerning Arbitration and Alternative Dispute Resolution.

In view of: 1. Article 5 paragraph (1) and Article 20 paragraph (1) of the Constitution of 1945;

2. Law Number 14 of 1970 concerning the Basic Provisions on the Judiciary (State Gazette of the Republic of Indonesia Number 74, Supplement to State Gazette Number 2951);

With the approval of
THE HOUSE OF REPRESENTATIVES OF
THE REPUBLIC OF INDONESIA

HAS DECIDED:

To stipulate: THE LAW CONCERNING ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION

CHAPTER I
GENERAL PROVISION

Article 1

In this Act the following terms have the following meanings:

1. Arbitration means a means of settling civil disputes outside the general courts, based on an arbitration agreement made in writing by the parties to the dispute;
2. The parties means the legal subjects, whether in civil or public law;
3. Arbitration agreement means an agreement in the form of an arbitration clause set out in a written agreement made by the parties before the dispute arose, or a separate arbitration agreement made by the parties after the dispute arose.
4. District Court means the District Court whose jurisdiction covers the place of the respondent's residence.
5. Claimant means the party submitting the request for resolution of the dispute by arbitration.
6. Respondent means the party opposing the Claimant in the resolution of the dispute by arbitration.
7. Arbitrator(s) means one or more persons chosen by the parties in dispute, appointed by the District Court or by an arbitration institution to make an award in a particular dispute submitted for resolution by arbitration.
8. Arbitration Institution means a body chosen by the parties in dispute to give an award with regard to a particular dispute. This institution

may also give a binding opinion on a particular legal relationship where a dispute has not yet arisen.

9. International Arbitration Award means an award handed down by an arbitration institution or individual arbitrator outside the jurisdiction of the Republic of Indonesia, or an award by an arbitration institution or individual arbitrator which, by the provisions of Indonesian law, is deemed to be an international arbitration award.
10. Alternative Dispute Resolution means an institution for the resolution of disputes or differences of opinion through procedures agreed by the parties, i.e., resolutions outside the courts by consultation, negotiation, mediation, conciliation, or expert assessment.

Article 2

This Act regulates the resolution of disputes or differences of opinion between the parties in a particular legal relationship that have entered into an arbitration agreement which explicitly states that all disputes or differences of opinion arising or which may arise from a legal relationship will be resolved by arbitration or by some alternative dispute resolution.

Article 3

The District Court is not competent to try disputes between parties bound by an arbitration agreement.

Article 4

1. If the parties have agreed that disputes between them are to be resolved through arbitration and have granted them authority, the arbitrators are competent to determine in their award the rights and obligations of the 'parties, if these matters are not stipulated in their agreement.
2. The agreement to resolve disputes through arbitration specified in paragraph (1) must be contained in a document signed by the parties.
3. If it is agreed a dispute by arbitration" will be resolved by an exchange of letters, the sending of telexes, telegrams, faxes, e-mails, or any other form communication must be accompanied by a record of receipt by the parties.

Article 5

1. The only disputes which maybe settled by arbitration are disputes in the commercial sector concerning rights, which in the law and regulations have the force of law and are fully controlled by the parties in dispute.
2. Disputes which may not be resolved by arbitration are disputes where, according to the regulations with the force of law, an amicable settlement cannot be reached.

CHAPTER II
ALTERNATIVE DISPUTE RESOLUTION

Articles 6

1. Civil disputes or differences of opinion may be resolved by the parties by alternative dispute resolution based on good faith by waiving the resolution by litigation in the District Court.
2. Resolution of disputes or differences of opinion by alternative dispute resolution, as contemplated in paragraph (1), is carried out by a direct meeting of the parties in no more than fourteen (14) days, and the outcome will be set out in a written agreement.
3. If the dispute or difference of opinion contemplated in paragraph (2) cannot be resolved, the dispute or difference of opinion between the patties may, with the written agreement of the parties, be resolved with the assistance of one or more expert advisors or a mediator.
4. If the parties do not succeed in reaching a formula for agreement within 14 (fourteen) days with the assistance of one or more expert advisors or a mediator, or the mediator does not succeed in bringing the two parties together, the parties may contact another arbitration institution or alternative dispute resolution institution to appoint a mediator.
5. After the appointment of the mediator by the arbitration institution or alternative dispute resolution institution, the attempts at mediation must begin within no more than seven (7) days.
6. Attempts at resolving the dispute or difference of opinion through a mediator, as contemplated in paragraph (5) must, keeping strict

confidentiality, reach an agreement in written form, signed by, all parties concerned, within no more than 30 (thirty) days.

7. The written agreement resolving the dispute or difference of opinion will be final and binding on the parties for execution in good faith, and must be registered at the District Court within no more than 30 (thirty) days after it has been signed.
8. The agreement for resolution of the dispute or difference of opinion contemplated in paragraph (7) must be completely executed within no more than 30 (thirty) days after its registration.
9. If attempts to reach an amicable settlement, as contemplated in paragraphs (1) to (6), are unsuccessful, the parties, based on a written agreement, may submit the matter to resolution by an arbitration institution or ad hoc arbitration.

CHAPTER III

CONDITIONS OF ARBITRATION, APPOINTMENT OF ARBITRATORS AND RIGHT OF REFUSAL

First Part

Conditions of Arbitration

Article 7

The parties may agree that a dispute which occurs or which will occur between them should be resolved by arbitration.

Article 8

1. If a dispute arises, the claimant must inform the respondent by registered letter, telegram, telex, fax, email, or by courier that the conditions for arbitration to be entered into by the claimant and respondent: apply.
2. The notification of the arbitration which is being entered into, as contemplated in paragraph (1), must clearly state:
   (a) the names and addresses of the parties;
   (b) a reference to the applicable arbitration clause or agreement;

(c) the agreement or problem in dispute;

(d) the basis for the claim and the amount claimed, if any;

(e) the method of resolution desired; and,

(f) the agreement entered: into by the parties concerning the number of arbitrators, or if no such agreement has been entered into, the claimant may submit a proposal about the odd number of arbitrators desired.

Article 9

1. Should the parties choose resolution of the dispute by arbitration after the dispute occurs, their consent to this must be given in a written agreement, signed by the parties.
2. If the parties are unable to sign a written agreement as contemplated in paragraph (1), the written agreement must be made in the form of a notarial deed.
3. The written agreement contemplated in paragraph (1) must contain:
   (a) the Matter in dispute;
   (b) the full names and places of residence of the parties;
   (c) the full names and places of residence of the arbitrator or the arbitration tribunal; the place where the arbitrator or arbitration tribunal will make their decision;
   (d) the full name of the secretary;
   (e) the period for resolution of the dispute;
   (f) a statement of assent by the arbitrator; and
   (g) a statement of assent from the disputing parties that they will bear all costs necessary for the resolution of the dispute through arbitration.
4. A written agreement not containing the matters specified in paragraph (3) will be void in law.

Article 10

An arbitration agreement will not become void because of the circumstances mentioned below.

(a) the death of one of the parties;

(b) the bankruptcy of one of the parties;

(c) novation;

(d) the insolvency of one of the parties;

(e) inheritance;

(f) the coming into effect on the main agreement of conditions subsequent;

(g) the implementation of the agreement's being, transferred to a third party with the consent of the-parties who made the arbitration agreement; or

(h) the expiry or voiding of the main contract.

Article 11

1. The existence of a written arbitration agreement does not nullify the right of the parties to submit the resolution of the dispute or difference of opinion contained in the agreement to the District Court.
2. The District Court must refuse to interfere in settling of any dispute which has been determined by arbitration, except in particular cases determined in this Act.

Conditions of Appointment of Arbitrators

Article 12

1. The parties who may be appointed or designated as arbitrators must:

   (a) be competent to perform legal actions;

   (b) be at least 35 years of age;

   (c) not have a family relationship by blood or marriage to the second degree with one of the disputing parties;

   (d) not have any financial or other interest in the arbitration award; and

   (e) have at least 15 years experience and active mastery in the field.

2. Judges, prosecutors, Registrars to courts, and other officials of justice may not be appointed or designated as arbitrators.

Article 13

1. If the parties cannot reach agreement on the choice of arbitrators or no terms have been made concerning the appointment of arbitrators, the Head of the District Court may appoint the arbitrator or arbitration tribunal.
2. In an ad hoc arbitration, the parties may, where there is any disagreement in the appointment of one or more arbitrators submit an application to the Head of the District Court to appoint one or more arbitrators to resolve the parties' dispute.

Article 14

1. If the parties have agreed that a dispute is to be examined and decided by a sole arbitrator, they are obliged to reach an agreement concerning the appointment of the sole arbitrator.
2. The claimant may propose to the respondent, by registered letter, telegram, telex, fax, e-mail or courier service the name of a person to be appointed as sole arbitrator.
3. If, within no more than 14 (fourteen) days after the respondent receives the claimant's proposal contemplated in paragraph (2), the parties do not succeed in agreeing on a sole arbitrator, then the Head of the District Court, at the request of one of the parties, will appoint the sole arbitrator.
4. The Head of the District Court will appoint a sole arbitrator from a list of names submitted by the parties, or obtained from the arbitration organisation or institution contemplated in Article 34, with due attention to the recommendations of or objections to the person concerned submitted by the parties.

Article 15

1. The appointment of two arbitrators by the parties gives the two arbitrators. authority to choose and appoint a third arbitrator.
2. The third arbitrator contemplated by paragraph (1) will be appointed as the chair of the arbitration tribunal.

3. If within no more than 30 (thirty) days after notification is received by the respondent, as contemplated in Article 8, paragraph (1), one of the parties turns out not to have appointed someone to be a member of the arbitration tribunal, the arbitrator chosen by the other party will act as sole arbitrator and his/her award will bind both parties.
4. If the two arbitrators appointed by the parties contemplated in paragraph (1) do not succeed in appointing a third arbitrator within no more than fourteen (14) days after the last arbitrator was appointed, the Head of the District Court, at the request of one of the parties, may appoint the third arbitrator.
5. No attempt to nullify the appointment of an arbitrator made by the Head of the District Court as contemplated in paragraph (4) may be submitted.

Article 16

1. The arbitrator appointed or designated may accept or refuse the appointment or nomination.
2. The parties must be informed in writing of the acceptance or rejection contemplated in paragraph (1), within no more than 14 (fourteen) days as from the date of the appointment or designation.

Article 17

1. With the appointment in writing by the parties of one or more arbitrators, and the acceptance in writing of the appointment by the arbitrator(s), there is a civil contract exists between the appointing parties and the arbitrator accepting the appointment.
2. The appointment contemplated in paragraph (1) will have the effect that the arbitrator or arbitrators will render an award honestly, fairly, and in accordance with the prevailing provisions, and the parties will accept the award as final and binding, as jointly agreed.

Article 18

1. A prospective arbitrator who is asked by, one of the parties to sit on the arbitration tribunal must inform the parties of anything which

could influence his independence or give rise to bias in the award to be rendered.

2. Anyone accepting an appointment as arbitrator, as contemplated in paragraph (1), must inform the parties of his appointment.

Article 19

1. If an arbitrator states his/her acceptance of the appointment or designation, as contemplated in Article 16, he/she may not withdraw his/her acceptance, except with the consent of the parties.
2. If the arbitrator contemplated in paragraph (1), who has accepted the appointment or designation, declares his/her withdrawal, he/she must submit a, written request to the parties.
3. If the parties' consent to the request to withdraw contemplated in paragraph (2), the arbitrator concerned may be released from his/her duties as arbitrator.
4. If the request for withdrawal does not receive the consent of the parties, the release of the arbitrator from his/her duties is to be determined by the Head of the District Court.

Article 20

If an arbitrator or arbitration tribunal, without any good reason, does not render an award within the period specified, the arbitrator will be ordered to pay the parties compensation for the costs and losses caused by the delay.

Article 21

The arbitrator or arbitration tribunal may not be held legally responsible for any action taken during the proceedings to carry out the function of arbitrator or arbitration tribunal, unless it is proved that there was bad faith in their action.

Third Part Right of Refusal

Article 22

1. A demand for refusal may be submitted against an arbitrator if sufficient authentic evidence is found to give rise to doubts that the

arbitrator will not perform his/her duties independently, or will be biased in rendering an award.

2. Demands for refusal of an arbitrator may also be made if it is proved that there is any family, financial, or employment relationship with one of the parties or its attorney.

Article 23

1. The right of refusal of an arbitrator appointed by the Head of a District Court must be submitted to the District Court concerned.
2. The right of refusal of a sole arbitrator must be submitted to the arbitrator concerned.
3. The right of refusal of a member of an arbitration tribunal must be submitted to the arbitration tribunal concerned.

Article 24

1. An arbitrator who was not appointed by court decree may only be refused for a reason which only became known to the party making use of the right of refusal after the appointment of the arbitrator concerned.
2. An arbitrator appointed by court decree may only be refused for a reason which became known after receipt of the court decree.
3. The party objecting to the appointment of an arbitrator made by the other party must submit his demand for refusal within not more than 14 (fourteen) days after the appointment.
4. If the reason contemplated in Article 22 paragraphs (1) and (2) becomes known at a later date, the demand for refusal must be submitted within not more than 14 (fourteen) days of its becoming known.
5. The demand for refusal must be submitted in writing, either to the other party or to the arbitrator concerned, stating the reason for the demand.
6. If the other party consents to the demand for refusal submitted by one of the parties, the arbitrator concerned must resign and a replacement arbitrator appointed in accordance with the procedure determined in this Act.

Article 25

1. If the other party does not consent to the demand for refusal submitted by one of the parties, and the arbitrator concerned is unwilling to resign, the party concerned may submit a demand for refusal to the Head of the District Court, whose judgment will bind the two parties, and no objection against it may be submitted.
2. If the Head of the District Court decides that the demand contemplated in paragraph (1) is well founded, a replacement arbitrator must be appointed in the manner applied to the appointment of the arbitrator he/she is replacing.
3. If the Head of the District Court rejects the demand for refusal, the arbitrator must carry out his/her duties.

Article 26

1. An arbitrator's authority is not nullified by the death of the arbitrator and the authority must thereupon be continued by a replacement appointed in accordance with this Act.
2. An arbitrator will be released from his/her duties if he/she is proved to be biased or performs unworthy, which must be proved in law.
3. If an arbitrator dies during the examination of the dispute, is incapacitated, or resigns, and so is unable to meet his/her obligations, a replacement arbitrator must be appointed in the manner applied to the appointment of the arbitrator concerned.
4. If a sole arbitrator or- the chair of the arbitration tribunal is replaced, all examinations previously held have to be repeated.
5. If a member of the arbitration tribunal is replaced the examination of the dispute will only be repeated in an inter-arbitrator-manner.

CHAPTER IV
PROCEDURE APPLICABLE BEFORE THE ARBITRATION TRIBUNAL

First Part

Arbitration Procedure

Article 27

All examinations of disputes by arbitrators or arbitration tribunals take place in private.

Article 28

The language to be used in all arbitration proceedings is Indonesian, except that with the consent of the arbitrator or arbitration tribunal, the parties may choose some other language to be used.

Article 29

1. The parties in dispute have the same right and opportunity to state: their opinions.
2. The parties in dispute may be represented by an attorney with a special power of attorney.

Article 30

Third parties outside the arbitration agreement may participate and join the proceedings for the resolution of disputes by arbitration, if any element of related interest is found and their participation is agreed to by the parties in dispute and by the arbitrator or arbitration tribunal examining the dispute.

Article 31

1. The parties are free to determine in an. explicit written agreement the arbitration procedure to be used in examining the dispute, provided it does not conflict with the provisions of this Act.
2. If that the parties do not: decide themselves the terms of the arbitration proceedings to be used in the examination, and the arbitrator

arbitration tribunal has been formed in accordance with Articles 12, 13, and 14, all disputes whose resolution has been handed over to an arbitrator or arbitration tribunal must be examined and decided in accordance with the provisions in this Act.

3. If the parties have, chosen an arbitration procedure, as contemplated in paragraph (1) they must agree on provisions for the time and place for the arbitration to be held, and if the time and place are not determined, the arbitrator or arbitration tribunal will determine them.

Article 32

1. At the request of one of the parties, the arbitrator or arbitration tribunal may make a provisional award or other interlocutory decision on how to run the examination of the dispute, including decreeing a security attachment, ordering the deposit of goods with third parties, or the sale of perishable goods.
2. The period for implementing the provisional award or other interlocutory decision contemplated in paragraph (1) will not be counted in the period contemplated in Article 48.

Article 33

The arbitrator or arbitration tribunal is authorized to extend its term of office if:

(a) an application is made by one of the parties in special circumstances;

(b) it is extended as a result of a provisional award or other interlocutory decision being made; or

(c) it is deemed necessary by the arbitrator or arbitration tribunal in the interests of the examination.

Article 34

1. A dispute may be resolved through arbitration making use of national or international arbitration institutions with the agreement of the parties.

2. A dispute through arbitration institutions, as contemplated in paragraph (1), may be resolved according to the rules and procedure of the institution chosen, unless otherwise determined by the parties.

Article 35

The arbitrator or arbitration tribunal may order any document or evidence is be accompanied by a translation in the language determined by the arbitrator or arbitration tribunal.

Article 36

1. The dispute under arbitration must be examined in writing.
2. Oral examination is permissible if the parties consent, or it is deemed to be necessary by the arbitrator or arbitration tribunal.

Article 37

1. The place of arbitration is determined by the arbitrator or the arbitration tribunal, unless it is decided by the parties themselves.
2. The arbitrator or arbitration tribunal may hear information from witnesses or hold any meetings deemed necessary at particular places outside the place where the arbitration is taking place.
3. Witnesses and expert witnesses will be examined before the arbitrator or arbitration tribunal in accordance with the provisions in civil procedural law.
4. The arbitrator or arbitration, tribunal may examine locally the goods in dispute or some other matter connected with the dispute being examined. If necessary, the parties may be lawfully summoned, so that they may also be present at the examination.

Article 38

1. The claimant must submit a. statement of its claim to the arbitrator or arbitration tribunal within the period determined by the arbitrator or the arbitration tribunal.
2. The statement of claim must contain at the least:
   (a) the full names and residences/domiciles of the parties;

(b) a short description of the dispute, accompanied by exhibits; and

(c) clear contents of the claim.

Article 39

After receiving the statement of claim from the claimant, the arbitrator or the chair of the arbitration tribunal will forward a copy of the claim to the respondent, together with an order that the respondent must reply and give its answer in writing within a period of no more than 14 (fourteen) days as from the date he/she/it receives a copy of the claim.

Article 40

1. Immediately after receiving the respondent's reply as ordered by the arbitrator or the chair of the arbitration tribunal, a copy of the reply must be delivered to the claimant.
2. At the same time, the arbitrator or chair of the arbitration tribunal will order the parties or their attorneys to appear at an arbitration hearing fixed for no more than 14 (fourteen) days as from the issue of the order.

Article 41

If that the respondent has not, after the elapse of the 14 (fourteen) days period contemplated in Article 39, presented its reply, he/she/it will be summoned under the provisions contemplated in Article 40, paragraph (2).

Article 42

1. In the reply or no later than the first hearing, the respondent may submit a counterclaim and the claimant shall be given an opportunity to refute this counterclaim.
2. The counterclaim contemplated in paragraph (1) will be examined and decided by the arbitrator or arbitration tribunal together with the main dispute.

Article 43

If, on the day contemplated in Article 40 paragraph (2), the claimant does not, for good reason, appear after being duly summoned, the statement of

claim will be declared to have been aborted and the task of the arbitrator or arbitration tribunal to be over.

Article 44

1. If on the day determined, as contemplated in Article 40, paragraph (2), the respondent, for no good reason, fails to appear, although duly summoned, the arbitrator or arbitration tribunal must immediately summon him/her/it again.
2. If no more than 10 (ten) days after the respondent has received the second summons, and for no good reason still does hot appear at the hearing, the examination will continue in his/her/its absence, and the claimant's claim will be granted as a whole, unless the claim is groundless or is not based on law.

Article 45

1. If the parties appear on the determined day, the arbitrator or arbitration tribunal must first attempt to bring about an amicable settlement between the parties in dispute.
2. If the attempt to bring about an amicable settlement contemplated in paragraph (1) succeeds, the arbitrator or arbitration tribunal will make a deed of amicable settlement, which will be final and binding on the parties, and will order the parties to comply with the terms of the amicable settlement.

Article 46

1. Examination of the merits of the dispute will proceed if the attempts to bring about an amicable settlement, as contemplated in Article 45, paragraph (1), are not successful.
2. The parties must be given a last opportunity to explain in writing their opinions and to submit any evidence they deem necessary to uphold their opinion in a period to be determined by the arbitrator or arbitration tribunal.
3. The arbitrator or arbitration tribunal has the right to ask the parties to submit supplementary written explanations, documents or other evidence deemed necessary in a period to be determined by the arbitrator or arbitration tribunal.

Article 47

1. Before the respondent makes any reply from, the claimant may withdraw its request for resolution of the dispute by arbitration.
2. If the respondent has already a replied, an amendment or supplement to the statement of, claim may only be allowed with theconsent of the respondent, and as long as the amendment or supplement involves matters of fact only and does not involve the legal grounds which form the basis of the claim.

Article 48

1. Examination of the dispute must be completed within no more than 180 (one hundred and eighty) days from the appointment of arbitrator or arbitration tribunal is formed.
2. The period contemplated in paragraph (1) may be extended with the consent of the parties and if necessary in accordance with the provisions of Article 33.

Second Part

Witnesses and Expert Witnesses

Article 49

1. On the order of the arbitrator or arbitration tribunal or at the request of the parties, one or more witnesses or expert witnesses may be called for their evidence to be heard.
2. The costs of the summons and the witnesses, or expert witnesses travel expenses will be charged to the party that necessitated them.
3. Before they give evidence, the witnesses or expert witnesses must take an oath.

Article 50

1. The arbitrator or arbitration tribunal may request the assistance of one or more expert witnesses on giving written evidence on special problems connected with the merits of the dispute.
2. The parties must give all .the information the expert witnesses deem necessary.

3. The arbitrator or arbitration tribunal must forward copies of the witnesses evidence to the parties in dispute so that they may reply in writing.
4. If anything is found to be unclear or to be at the request of interested parties, the evidence of the expert witnesses may be heard at a hearing of the arbitration attended by the parties or their attorneys.

Article 51

Minutes of the examination will be taken by a secretary to review all happenings in the examination and arbitration hearings.

CHAPTER V

THE ARBITRATION OPINION AND AWARD

Article 52

The parties to an agreement have the right to request a binding opinion from an arbitration institution on a particular legal point in the agreement.

Article 53

No opposition to the binding opinion contemplated in Article 52 may be through any legal remedies whatsoever.

Article 54

1. The arbitration award must contain:
   (a) a heading to the award with the words "*DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA*" (For the sake of justice, based on belief in God Almighty);
   (b) the full names and addresses of the parties;
   (c) a short description of the dispute;
   (d) the opinions of the parties;
   (e) the full names and addresses of the arbitrators;
   (f) the considerations and conclusions of the arbitrator or arbitration tribunal regarding the whole dispute;
   (g) the opinion of each arbitrator, if any differences of opinion arise within the arbitration tribunal;

(h) the award order;

(i) the place and date of the award; and

(j) the signature of the arbitrator or arbitration tribunal.

2. The validity of the award will not be affected by one of the arbitrators not signing of the arbitration award by one of the arbitrators because of sickness or death.
3. The reason for not of signing, contemplated in paragraph (2), must be recorded in the award.
4. The award must state a time within which the award must be put into effect.

Article 55

When the examination of the dispute is completed, it will be closed and a date for a hearing will be fixed for the arbitration award to be rendered.

Article 56

1. The arbitrator or arbitration tribunal will base their decision on the provisions of the law or on justice and decency.
2. The parties are entitled to determine the choice of law to be applied to resolving any disputes which may arise or which have arisen among the parties.

Article 57

The award must shall be rendered within no more than 30 (thirty) days after the examination is closed.

Article 58

Within no more than 14 (fourteen) days after the parties learn of the award, they may submit a request to the arbitrator or the arbitration tribunal to correct any administrative errors and/or to add to or subtract from the award claims.

CHAPTER VI

ENFORCEMENT OF ARBITRATION AWARDS

First Part

National Arbitration

Article 59

1. Within no more than 30 (thirty) days as from the date when the award is rendered, the original text or an authentic copy of the arbitration award must be delivered to the Registrar of the District Court and registered there by the arbitrator or his/her its proxy.
2. The delivery and registration contemplated in paragraph (1) will be carried out by the recording and signing of the last part or the margin of the award by the Registrar to the District Court and the arbitrator or his/her/its proxy that delivers it, which record constitutes a deed of registration.
3. The arbitrator or his/her/its proxy must deliver the award and the original text of his/her appointment as arbitrator, or an authentic copy of it, to the Registrar to the District Court.
4. Non-fulfillment of the provisions contemplated in paragraph (1) above will make the arbitration award unenforceable.
5. All costs connected with the making of the deed of registration are to be charged to the parties.

Article 60

The arbitration award is final in nature and has absolute and binding legal effect on the parties.

Article 61

If the parties do not voluntarily effectuate the arbitration award, it may be enforced by an order from the Head of the District Court at the request of one of the parties to the dispute.

Article 62

1. The order, contemplated in Article 61 must be given within no more than 30 (thirty) days after the application for execution has been registered with the Registrar of the District Court.
2. The Head of the District Court-contemplated in paragraph (1) must first examine whether the arbitration award fulfils the provisions of Articles 4 and 5 and does not conflict with public morality and order before giving the order for its execution.
3. If the arbitration award does not fulfill the conditions contemplated in paragraph (2), the Head of the District Court will reject the request for execution, and no legal remedy whatsoever is open against the judgment of the Head of the District Court.
4 The Head of the District Court may not examine the reasons or considerations for the arbitration award.

Article 63

The order of the Head of the District Court must be written on the original text and the authentic copy of the arbitration award issued.

Article 64

The arbitration award to which the order of the Head of the District Court is affixed must be enforced in accordance with the provisions on the execution of judgments in civil cases whose judgment has received absolute legal effect.

Second Part

International Arbitration

Article 65

The party with the authority to handle problems of the recognition and enforcement of International Arbitration Awards is the District Court of Jakarta Pusat.

Article 66

International Arbitration Awards will only be recognized and may be enforced in the jurisdiction of the Republic of Indonesia if they fulfill the following criteria.

(a) the International Arbitration Award must have been handed down by an arbitrator or arbitration tribunal in a country bound to the Republic of Indonesia by a bilateral or multilateral treaty on the recognition and enforcement of International Arbitration Awards;

(b) the International Arbitration Awards contemplated in item a are limited to awards which are included within the scope of commercial law under the provisions of Indonesian law;

(c) the International Arbitration Awards contemplated in item a, which may only be enforced in Indonesia, are limited to those which do not conflict with public order;

(d) an International Arbitration Award may be enforced in Indonesia after obtaining an exequatur from the Head of the District Court of Jakarta Pusat; and

(e) the International Arbitration Awards contemplated in item a, which involve the State of the Republic of Indonesia as one of the parties to a dispute, may only be enforced after obtaining an exequatur from the Supreme Court of the Republic of Indonesia, which will then delegate it to the District Court of Central Jakarta.

Article 67

1. An application to enforce an International Arbitration Award may be made after the award has been delivered to the Registrar to the District Court of Central Jakarta and registered there by the arbitrator or his/her/its proxy.
2. The file on the application for enforcement contemplated in paragraph (1) must be forwarded together with:
   (a) the original text or an authentic copy of the International Arbitration Award in accordance with the provisions on authentication of foreign documents and an official. Indonesian translation of the text;

(b) the original text or an authentic copy of the agreement which is the basis for the International Arbitration Award, in accordance with the provisions on authentication of foreign documents and an official Indonesian .translation of the text;

(c) information from the diplomatic representative of the Republic of Indonesia in the country where the International Arbitration Award was made, stating that the claimant's country is bound to the Republic of Indonesia by bilateral or multilateral treaty on the recognition and execution of International Arbitration Awards.

Article 68

1. No appeal, even an appeal to the Supreme Court, may be made against a judgment of the Head of the District Court contemplated in Article 66, item d, which recognizes and enforces the International Arbitration Award.
2. An appeal to the Supreme Court may be made against a judgment of the Head of the District Court contemplated in Article 66, item d, for refusing to recognize and enforce an International Arbitration Award.
3. The Supreme Court will consider and decide on any appeal submitted to it, as contemplated in paragraph (2), within a period of no more than 90 (ninety) days after the application for appeal to the Supreme Court is received by the Supreme Court.
4. No opposition may be submitted against the judgment of the Supreme Court- contemplated in Article 66, item e.

Article 69

1. After the Head of the District Court of Central Jakarta has issued the writ of execution contemplated in Article 64, further enforcement will be delegated to the Head of the. District Court which is competent to enforce it.
2. An execution attachment may be on forced on the assets and goods of the party adjudged to be the debtor.
3. The procedure for the attachment and enforcement of the award must follow the procedure lay down in the Civil Procedural Law.

CHAPTER VII

ANNULMENT OF ARBITRATION AWARDS

Article 70

An application to annul an arbitration award may be made if the award is alleged to contain the following elements.

(a) letters or documents submitted in the hearings which are admitted to be forged or are decided to be forgeries after the award has been handed down;

(b) documents are found after the award has been made which are decisive in nature and were deliberately concealed by the opposing party; or

(c) an award is made on the strength of a fraud committed by one of the parties to the dispute being examined.

Article 71

An application for annulment of an arbitration award must be submitted in writing within not more than 30 (thirty) days as from the day the arbitration award was delivered to and registered with the Registrar to the District Court.

Article 72

1. An application to annul the arbitration award must be submitted to the Head of the District Court.
2. If the application contemplated in paragraph (1) is granted the Head of the District Court must further determine the results of the annulment of the whole or only part of the arbitration award.
3. Judgment on the application for annulment must be pronounced by the Head of the District Court within no more than 30 (thirty) days from the date when the application contemplated in paragraph (1) is received.
4. An application to appeal may be lodged with the Supreme Court against the judgment of the District Court, which must decide, being the court of first and last instance.

5. The Supreme Court must consider and decide on the application to appeal, as contemplated in paragraph (4), within no more than 30 (thirty) days after the Supreme Court receives the application to appeal.

CHAPTER VIII

THE TERMINATION OF THE ARBITRATORS' TASK

Article 73

The arbitrators' task will terminate because:

(a) the award regarding the dispute has been rendered;

(b) the period determined in the arbitration agreement or after any extension thereto by the parties has expired; or

(c) the parties agree to withdraw the arbitrator's appointment.

Article 74

1. The death of one of the parties will not cause the task allotted to the arbitrator(s) to terminate.
2. The period for the arbitrators' task contemplated in Article 48 may be postponed for not more than 60 (sixty) days from the death of one of the parties.

Article 75

1. If the arbitrator dies or a demand for refusal or dismissal of one or more arbitrators is granted, the parties must appoint (a) replacement arbitrator(s).
2. If the parties have, not, within no more than 30 (thirty) days reached agreement on the appointment of (a) replacement arbitrator(s), as contemplated in paragraph (1), the Head of the District Court may, at the request of the interested parties, appoint one or more replacement arbitrators.
3. The replacement arbitrator(s) shall have the task of continuing resolution of the dispute concerned, based on the most recent conclusions drawn.

CHAPTER IX

ARBITRATION FEES

Article 76

1. The arbitrator(s) determine the arbitration fee.
2. The fee contemplated in paragraph (1) includes:
   (a) the arbitrators' honorarium;
   (b) travel expenses and other expenditure incurred by the arbitrator(s);
   (c) the costs of witnesses and expert witnesses needed in the examination of the dispute; and
   (d) administrative costs.

Article 77

1. Arbitration fees are charged to the losing party.
2. If a claim is only granted in part, the arbitration fees will be charged to the parties equally.

CHAPTER X

TRANSITIONAL PROVISIONS

Article 78

Resolution proceedings in disputes which, when this Act comes into effect have already been submitted to an arbitrator or arbitration tribunal, have not yet been examined, the will be based on this Act.

Article 79

Disputes which, at the time when this Act comes into effect, have been examined but not yet decided, will still be examined and decided in accordance within the provisions of the old regulations which have the force of law.

Article 80

Disputes which, at the time when this Act comes into effect have been decided and the award has obtained absolute legal effect, will be enforced underthis Act.

CHAPTER XI
CLOSING PROVISIONS

Article 81

When this Act comes into effect Articles 615 to 651 of the Civil Procedure Rules (Reglemen Acara Perdata *(Reglement op de Rechtsvordering), Staatsblad 1847:52),* Article 377 of the Renewed Indonesian Rules (Reglemen Indonesia Yang Diperbaharui *(Het Herziehe Indonesisch Reglement), Staatsblad 1941:44)* and Article 705 of the Procedural Rules for Areas Outside Java and Madura (Reglemen Acara Untuk Daerah Luar Jawa dan Madura *(Rechtsreglement Buitengewesten, Staatsblad 1927:227)* are declared to be repealed.

Article 82

This Act will come into effect on the date of its promulgation.

In order that every person may know of it, the promulgation of this Law is ordered by placement in the State Gazette of the Republic of Indonesia.

Ratified in Jakarta on August 12, 1999
THE PRESIDENT OF THE REPUBLIC OF INDONESIA

signed
BACHARUDDIN JUSUF HABIBIE

Promulgated in Jakarta on August, 12 1999
MINISTER/STATE SECRETARY OF THE REPUBLIC OF INDONESIA

signed
MULADI

STATE GAZETTE OFTHE REPUBLIC OF INDONESIA
NUMBER 30 OF 1999

ELUCIDATION

TO

LAW OF THE REPUBLIC OF INDONESIA

NUMBER 30 OF 1999

CONCERNING

ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION

GENERAL

Exercise of the judicial powers is entrusted to the judiciary guided by Law No.14 of 1970 concerning the Basic Provisions on the Judiciary. The Foregoing is the basis and general framework providing the foundation and judicial principles as well as the guidance for the general courts, religious courts, military courts and administrative courts each of which is regulated by a specific Law.

In the elucidation of Article 3 Paragraph (1) of Law No.14 of 1970, it is stipulated, inter alia, that dispute resolution out of court pursuant to a compromise or through arbitration is permitted, but, the arbitrator's award can only have enforceable effect after obtaining the permission or order for execution from the courts.

Up to now, the bases for arbitration in Indonesia are Article. 615 up to Article 651 of the Civil Procedures Regulation *(Reglement op de Rechtsvordering, Staatsblad 1847:52)* and Article 377 of the Updated Indonesian Regulation *(Het Herziene Indonesisch Reglement, Staatsblad 1941:44)* and. Article 705 of the Procedures Regulation for outside Java and *Madura (Rechtsreglement Buitengewesten, Staatsblad 1927:227)*.

In general, the institution of arbitration has advantages it is compared to court proceeding. The advantages are, inter alia:

a. the confidentiality of the dispute of the parties is guaranteed;
b. delays as a result of procedural and administrative matters could be avoided;

c. the parties could choose arbitrators who they believe have sufficient knowledge and background concerning the matter in dispute, (and who they believe are) honest and fair;
d. the parties could choose the law to be applied to resolve their problems and the procedures and the place of the arbitration; and
e. the arbitral award is an award binding on the parties and could be enforced through a simple procedure or directly.

In fact what are mentioned above are not all true because in certain countries, court proceedings can be faster than arbitration procedures. The only advantage of arbitration compared to the courts is its confidential nature, because the award is not publicized. However, dispute resolution through arbitration is still more favorable compared to litigation, especially for international business contracts.

With the developments in business and trade both nationally and internationally and the developments in law in general, the rules in the Civil Procedures Regulation *(Reglement of de Rechtsvordering) which* are used as guidance for arbitration are no longer appropriate and are in need of adjustment because rules concerning international trade are a condition *sine qua non* necessity and they are not provided for in the Civil Procedures regulation *(Reglement op de Rechtsvordering)*. Based on these conditions, it is time for the making of fundamental changes to the Civil Procedures Regulation *(Reglement op de Rechtsvordering)* both philosophically and substantively.

Arbitration which is regulated in this Law is a means of resolving a dispute outside of the general courts pursuant to written agreement of the parties to the dispute. However, not every dispute can be resolved through arbitration, it is only with respect to disputes concerning rights which according to law are fully controlled by the parties to the dispute pursuant to their mutual consent.

Besides, the foregoing, the rules which prohibit women from serving as an arbitrator as referred to in Article 617 paragraph (2) of the Civil Procedures Regulation *(Reglement op de Rechtsvordering) are* no longer relevant to present day conditions and also no longer tenable in this present climate of liberty

which fully recognizes the equality between the rights of women and the rights of men. Therefore, this Law no longer mentions a woman cannot be appointed as an arbitrator. All the foregoing is dealt with in Chapter I concerning General Provisions.

Chapter II regulates alternative dispute resolution through deliberations to reach a consensus among the parties to a dispute. Alternative Dispute Resolution (or ADR) is a means of resolution of disputes of differences of opinion through procedures which are agreed to by the parties, namely, resolution outside of the courts by way of consultation, negotiation, mediation, conciliation or expert, determination.

Chapter III provides a specific summary of the conditions which must be fulfilled for arbitration send the conditions for the appointment of arbitrators and also regulates the right to challenge of the parties to the dispute.

Chapter IV provides the procedures for proceeding before an arbitration panel and the possibility of interlocutory award or other interim awards including the pronouncing of conservatory seizure, order to entrust items of property to a third party, or to the sell easily damaged goods and the taking of testimony of witnesses and expert witnesses.

As in the, case of a court. decision, an arbitral award shall also have as its heading the wording of "FOR THE SAKE OF JUSTICE BASED ON THE BLESSING OF GOD ALMIGHTY".

Besides the above, Chapter V also provides the other requirements applicable for an arbitral award. Further, this Chapter (Chapter V) also provides the rules in the case of a dispute concerning the authority of an arbitrator, the enforcement of an arbitral award by the Head of the District Court in the first an final instance, and that the Head of the District Court shall not examine the grounds or reasoning of an arbitral award.

These are intended to avoid dispute resolution through arbitration from becoming excessively time consuming. Different from court proceedings with respect to which decision the parties can still lodge an appeal and cessation and legal review.

In order to have a comprehensive procedural law, this Law contains provisions concerning the implementation of duties of national and international arbitration.

Chapter VI clarifies the rules concerning enforcement of an award in one package, so that this Law is applicable up to the phase of enforcement of an award, both as to national and international arbitration and this is justified as a matter of the legal system.

Chapter VII regulates the annulment of an arbitral award. This is possible for several. reasons, inter alia:

a. letters or documents submitted in the examination proceedings, after the award was rendered, were admitted as forged or declared as forgeries;
b. after the award was rendered, documents which are dispositive were discovered, which were concealed by the opposing party; or
c. the award was a result of fraud committed by one of the parties during examination of the dispute.

Application for annulment of an arbitral award shall be submitted to the Head of the District Court and as against the decision of the Head of the District Court, there can be only an appeal to the Supreme Court which shall givedecision in the first and final instance.

Further, in Chapter VIII the issue of expiry of the duty of an arbitrator is regulated, which Chapter provides, inter alia, that the duty of an arbitrator ends because of the lapse of the time period of the duty or both of the parties have agreed to withdraw the appointment of the arbitrator. The death of one of the parties does not cause the cessation of the duty given to the arbitrator.

Chapter IX of this Law regulates the costs of arbitration which shall be determined by the arbitrator.

Chapter X of this Law provides for the transitional provisions for disputes which have been referred (to arbitration) but have not been examined, disputes which are in the process of being examined or disputes which have been decided upon and which awards have *res judicata* effect.

While Chapter XI provides that Article 615 up to Article 651 of the Civil Procedures Regulation *(Reglement op de Rechtsvordering, Staatsblad 1847:52)* and Article 377 of the Updated Indonesian Regulation *(Het*

Herziene Indonesisch Reglement, Staatsblad 1941:44) and Article 705 of the Procedures Regulation for outside of Java and Madura *(Rechtsreglement Buitengewesten, Staatsblad 1927:227)* are declared to be of no effect.

ARTICLE BY ARTICLE

Article 1

Sufficiently clear

Article 2

Sufficiently clear

Article 3

Sufficiently clear

Article 4

Sufficiently clear

Article 5

Sufficiently clear

Article 6

Sufficiently clear

Article 7

Sufficiently clear

Article 8

Sufficiently clear

Article 9

Sufficiently clear

Article 10

Letter a

Sufficiently clear

Letter b

Sufficiently clear

Letter c

"Novation" shall mean renewal of obligations.

Letter d

"Insolvency" shall mean the state of being unable to pay.

Letter e

Sufficiently clear

Letter f

Sufficiently clear

Letter g

Sufficiently clear

Letter h

Sufficiently clear

Article 11

Sufficiently clear

Article 12

Paragraph (1)

Sufficiently clear

Paragraph (2)

The prohibiting of the officials mentioned in this paragraph from serving as an arbitrator is intended to guarantee objectivity in the examination and the rendering of an award by an arbitrator or arbitration panel.

Article 13

Paragraph (1)

The aim of this provision is to avoid a deadlock in practice if the parties regulate in a thorough and good manner the procedures to be followed for the appointment of the arbitrator(s).

Paragraph (2)

Sufficiently clear

Article 14

Sufficiently clear

Article 15

Sufficiently clear

Article 16

Sufficiently clear

Article 17

Sufficiently clear

Article 18

Sufficiently clear

Article 19

Sufficiently clear

Article 20

Sufficiently clear

Article 21

Sufficiently clear

Article 22

Sufficiently clear

Article 23

Sufficiently clear

Article 24

Paragraph (1)

Before appointing an arbitrator, the parties will certainly have considered the possible reasons for use of the right to challenge.

However, if the arbitrator is still appointed by the parties, the parties are considered to have agreed not to use the right to challenge based on the facts known to the parties at the time of appointment of the arbitrator. However, this does not foreclose the possibility of the emergence of new facts which were not previously known, so that the right is given to the parties to exercise the right to challenge pursuant to the new facts.

Paragraph (2)

Sufficiently clear

Paragraph (3)

This paragraph regulates the submission of a challenge and the time period for it. The time period is considered necessary in order to prevent obstruction by exercise of the right to challenge at any time.

Paragraph (4)

Sufficiently clear

Paragraph (5)

Sufficiently clear

Paragraph (6)

Sufficiently clear

Article 25

Paragraph (1)

Decision of the Head of the District Court with regard to the challenge shall bind both of the parties and the decision shall be final and there shall be no contest.

Paragraph (2)

Sufficiently clear

Paragraph (3)

Sufficiently clear

Article 26

Paragraph (1)

Sufficiently clear

Paragraph (2)

Sufficiently clear

Paragraph (3)

Sufficiently clear

Paragraph (4)

Sufficiently clear

Paragraph(5)

If there is only one arbitrator who is replaced, the examination of the dispute may be continued based on the existing minutes and documents, and sufficiently by the existing arbitration.

Article 27

The provision that the examination is conducted behind closed doors is in deviation from the provisions of civil procedures that apply in the District Court which proceedings in principle are open to the public. This is to emphasize the confidential nature of resolution by arbitration.

Article 28

Sufficiently clear

Article 29

Paragraph (1)

Sufficiently clear

Paragraph (2)

Pursuant to the general provisions of civil procedures, the parties are given the opportunity to appoint attorneys in-fact by virtue of specific powers attorney.

Article 30

Sufficiently clear

Article 31

Paragraph (1)

Sufficiently clear

Paragraph (2)

Sufficiently clear

Paragraph (3)

The parties may agree on the place and the time period that they would like to apply. If the parties do not stipulate any provisions concerning these matters then they will be determined by the arbitrator or arbitration panel..

Article 32

Sufficiently clear

Article 33

Letter a

A certain specific matter for example is an interim claim or ancillary claim outside of the merits of the claim, such as application for security referred to in the Civil Procedural Law.

Letter b

Sufficiently clear

Letter c

Sufficiently clear

Article 34

Paragraph (1)

Sufficiently clear

Paragraph (2)

This paragraph provides the freedom to the parties to choose the rules and procedures which will be used on the resolution of the dispute between them, without having to resort to the rules and procedures of the chosen arbitration institution.

Article 35

Sufficiently clear

Article 36

Paragraph (1)

Sufficiently clear

Paragraph (2)

In principle, the proceedings of an arbitration shall be conducted in writing. If there is approval of the parties the examination can be conducted verbally. Also, the testimony of an expert witness as referred to in Article 50 may be given verbally if it is deemed necessary by the arbitrator or arbitration panel.

Article 37

Paragraph (1)

This provision concerning the place of arbitration is important especially when there is a foreign law element and the dispute is a dispute of international conflict of laws. Generally, the place of arbitration may determine the law which must be used to examine the dispute, if the parties do not determine the place of arbitration, the arbitrator will then be the person who shall determine the place of arbitration.

Paragraph (2)

In paragraph (2) of this article the possibility is given to hear a witness at a place other than the place of arbitration, inter alia, as it is the place of residence of the relevant witness.

Paragraph (3)

Sufficiently clear

Paragraph (4)

Sufficiently clear

Article 38

Paragraph (1)

Sufficiently clear

Paragraph (2)

Letter a

Sufficiently clear

Letter b

A copy of the arbitration agreement shall also be submitted as an attachment.

Letter c

The content of the claim must be clear and if the content of the claim is money, a clear amount must be stated.

Article 39

Sufficiently clear

Article 40

Sufficiently clear

Article 41

Sufficiently clear

Article 42

Paragraph (1)

This article regulates the counter claim submitted by the respondent.

Paragraph (2)

Sufficiently clear

Article 43

In accordance with the civil procedural law, a dispute becomes void if the petitioner does not appear on the first day of hearing.

Article 44

Sufficiently clear

Article 45

Sufficiently clear

Article 46

Sufficiently clear

Article 47

Sufficiently clear

Article 48

Paragraph (1)

The determination of 180 (ore hundred and eighty) days as the time period for an arbitrator to resolve the relevant dispute through arbitration is to assure there is a certainty as to time for completion of the arbitration examination.

Paragraph (2)

Sufficiently clear

Article 49

Sufficiently clear

Article 50

Sufficiently clear

Article 51

Sufficiently clear

Article 52

Even without a dispute, an arbitration institution could accept a request submitted by parties to an agreement to give a binding opinion concerning a matter relating to the agreement. For example on the interpretation of a provision which is unclear, the adding or amending of a provision relating to a new circumstance which arose and others. With the giving of the opinion by the arbitration institution, both parties shall be bound to the opinion and if one of the parties acts contrary to the opinion, it will be deemed to be in breach of the contract.

Article 53

Sufficiently clear

Article 54

Sufficiently clear

Article 55

Sufficiently clear

Article 56

Paragraph (1)

Basically the parties may make an agreement to determine that the arbitration in deciding the case must base themselves on the rules of law or in accordance with the sense of what is just and fair *(ex aequo et bono)*.

In the event arbitrators are given the authority to decide *ex aequo et bono,* the laws and regulations may be set aside. However in certain cases, mandatory rules of law *(dwingende regels)* must be applied and may not be deviated from by arbitrators.

In the event arbitrators are not given the authority to decide *ex aequo et bono,* arbitrators may only decide pursuant to norms of substantive law as a judge would do.

Paragraph (2)

The parties to a dispute are given the latitude to choose the law to be applied in the arbitration proceeding. If the parties do not determine otherwise, the applicable law shall be the law of the place of the arbitration.

Article 57

Sufficiently clear

Article 58

The meaning of "correction to an administrative error" is correction to matters such as, a typographical error or an error in the writing of

names, addresses of the parties or arbitrators and other, which does not change the substance of an award.

The meaning of "to add or to reduce claims" is that one of the parties may raise an objection to an. Award of the award, inter alia:

a. has granted something which is not claimed by the opposing party;

b. does not contain one or more things which are requested to be decided upon; or

c. contains binding positions which are contradictory to each other.

Article 59

Sufficiently clear

Article 60

An arbitral award is a final decision and hence is not subject to appeal, cassation or legal review.

Article 61

Sufficiently clear

Article 62

Paragraph (10)

Sufficiently clear

Paragraph. (2)

Sufficiently clear

Paragraph (3)

Sufficiently clear

Paragraph (4)

That the grounds and reasoning of an arbitral award shall not be examined by the Head of the District Court is so that an arbitral award shall truly be independent, final and binding.

Article 63

Sufficiently clear

Article 64

Sufficiently clear

Article 65

Sufficiently clear

Article 66

Letter a

Sufficiently clear

Letter b

What is meant by "in the scope of commercial law" are activities in, inter alia:

- Commerce;
- Banking;
- Finance;
- Capital investment;
- Industry;
- Intellectual property.

Letter c

Sufficiently clear

Letter d

An International Arbitral Award can only be enforcedly a decision of the Head of the District Court of Central Jakarta in the form of exequatur [an, authorization of execution]

Letter e

Sufficiently clear

Article 67

Sufficiently clear

Article 68

Sufficiently clear

Article 69

Sufficiently clear

Article 70

An application for annulment can only be submitted against an arbitral award which has been registered at the court. The reasons of an application for annulment referred to in this article must be proven by court decision. If the court declares that the reasons are proven or are not proven, then this decision of the court can be used as a consideration for the judge to grant or reject the application.

Article 71

Sufficiently clear

Article 72

Paragraph (10)

Sufficiently clear

Paragraph (2)

The Head of the District Court is given the authority to examine a claim for annulment if requested by the parties, and rule on the consequence of the annulling of the entirety or a part of the arbitral award in question.

The Head of the District Court may decide that after the annulment is pronounced, the same arbitrators or other arbitrators shall re- examine the relevant dispute or determine that the dispute can no longer be resolved through arbitration.

Paragraph (3)

Sufficiently clear

Paragraph (4)

What is meant by "appeal" is only for the annulment of arbitral award as referred to in Article 70.

Paragraph (5)

Sufficiently clear

Article 73

Sufficiently clear

Article 74

Sufficiently clear

Article 75

Sufficiently clear

Article 76

Sufficiently clear

Article 77

Sufficiently clear

Article 78

Sufficiently clear

Article 79

Sufficiently clear

Article 80

Sufficiently clear

Article 81

Sufficiently clear

Article 82

Sufficiently clear

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