The UNCITRAL Model Law and Asian Arbitration Laws

Implementation and Comparisons

Edited by Gary F. Bell

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Indonesian Arbitration Law and Practice in Light of the UNCITRAL Model Law

GATOT SOEMARTONO AND JOHN LUMBANTOBING

Introduction

On 29 August 1999, Indonesia enacted Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution ('New Arbitration Law' or 'Law').[1] The enactment was in line with the trend towards the liberalization of national arbitration laws which has taken place in almost all parts of the world. However, the New Arbitration Law does not adopt any version of the UNCITRAL Model Law on International Commercial

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[1] Undang-Undang Nomor 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa (1999) State Gazette No. 138 [New Arbitration Law], with its Official Elucidation (1999) Supplement to the State Gazette No. 3872 of 1999 [Elucidation of the New Arbitration Law]. In Indonesia, an Act or legislation passed by parliament is always accompanied by a so-called 'elucidation', a document containing clarification or commentaries on the provisions of the Act. In one case regarding the New Arbitration Law, the Constitutional Court held that the Elucidation on art. 70 of the Law is unconstitutional, thus suggesting that the Elucidation itself is also legally binding. See Judgment of the Constitutional Court No. 15/PUU-XII/2014 (11 November 2014) ('Constitutional Court, Arbitration Law Case').

Arbitration 1985 with amendments as adopted in 2006 ('ML').[2] The ML also was generally not considered as a starting point in drafting the legislation, as the Official Elucidation to the New Arbitration Law does not mention the ML at all.

Previously, the law on arbitration in Indonesia was derived from the Dutch Civil Procedural Law ('Rv').[3] Even though the continuing applicability of the Rv after Indonesia's independence was often questioned, in practice the instrument continued to be referred to in Indonesian arbitration. Indeed, article 81 of the New Arbitration Law expressly revokes articles 615–651 of the Rv, indicating that at least this part of the Rv had in fact remained applicable up to that point. As the provisions of the Rv were no longer considered suitable for increasingly complex commercial disputes, the International Monetary Fund called on a reform of the Indonesian arbitration law during the Asian financial crisis in the late 1990s, making Indonesia 'a more investment-friendly environment'.[4] The New Arbitration Law is much more detailed than the ML, comprising 82 articles as opposed to 36 articles in the ML. The extensive scope suggests that the drafters may have intended to consolidate arbitration *law* and arbitration *rules* into a single framework.[5] Unfortunately, this brings certain adverse consequences on the flexibility of arbitration procedures in Indonesia, as will be elaborated below.

The ML is of particular importance since it has widely been used to investigate 'the role and the typical provisions of national laws on international arbitration'.[6] In that vein, this chapter examines certain aspects of the New Arbitration Law in conformity with the ML. Except

[2] UNCITRAL Model Law on International Commercial Arbitration 1985, UN General Assembly Resolution 40/72 (11 December 1985); UNCITRAL Model Law on International Commercial Arbitration 2006, UN General Assembly Resolution 61/33 (4 December 2006) ('ML').

[3] Reglement op de Burgerlijke Rechtsvordering (Staatsblad 1847:52).

[4] Komar Mulyana and Jan K. Schaefer, 'Indonesia's New Framework for International Arbitration: A Critical Assessment of the Law and its Application by the Courts' (2002) 17 *Mealey's International Arbitration Report* 39 at 40 ('Mulyana and Schaefer'). Among other shortcomings, the Rv did not provide for enforcement of foreign arbitral awards and lacked express limitation of court intervention. There were also other dated provisions such as the one barring women from acting as arbitrators.

[5] *Ibid*. For a concise explanation on the distinction between 'arbitration law' and 'arbitration rules', see also Simon Greenberg, Christopher Kee and Romesh Weeramantry, *International Commercial Arbitration, an Asia-Pacific Perspective* (Cambridge University Press, 2011) at 58–66 ('Greenberg, Kee and Weeramantry').

[6] John Collier and Vaughn Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (Oxford University Press, 2000) at 53.

for the general provisions, the analysis goes through each article of the ML to find its corresponding provision(s) with the New Arbitration Law. The result is an evaluation of whether (or to what extent) the New Arbitration Law's main principles conform to (or deviate from) the ML. Identifying the characteristics of Indonesian arbitration law and practice and their suitability with the ML will assist the government in improving the arbitration system and in making feasible amendments. In practice, this will help both Indonesian and foreign parties (and their counsels) better understand the implementation of the New Arbitration Law with respect to international standards reflected in the ML.

Part I General Provisions of the Model Law (Articles 1 to 6)

Scope of Application

It should first be noted that the New Arbitration Law does not employ the definition of 'international arbitration' as understood in the ML, which in principle refers to any arbitration with foreign elements.[7] The New Arbitration Law instead distinguishes between 'domestic' and 'international' arbitration, in which the latter is defined as any arbitration where the award is rendered outside of Indonesia.[8] Hence the notion of 'international arbitration' under the New Arbitration Law is effectively equivalent to 'foreign arbitration' or 'foreign award' under the ML. Any subsequent reference to 'international arbitration' in this chapter should be understood in that regard.

However, some uncertainty may remain because the New Arbitration Law does not provide any definition of 'domestic award'. While 'international award' is defined as any arbitral award rendered in a foreign country, the logical inference is that 'domestic award' would be those rendered within Indonesia. Nevertheless, certain court practices have deviated from that logic. For example, in *Pertamina* v. *Lirik*,[9] the Supreme Court affirmed the district court decision holding that an award rendered in Jakarta under the ICC Rules is an international award. Those courts reasoned that the ICC is a foreign arbitration institution based in Paris and that the currency in the contract and the language used in

[7] See ML art. 1(3). [8] See New Arbitration Law art. 1(9).

[9] *PT Pertamina EP and PT Pertamina (Persero)* v. *PT Lirik Petroleum*, Supreme Court, Judgment No. 904 K/Pdt.Sus/2009 (9 June 2010) ('*Pertamina* v. *Lirik*'). See also the district court judgment, Central Jakarta District Court, Judgment No. 01/Pembatalan Arbitrase/2009/PN.Jkt.Pst. (3 September 2009).

arbitration are all foreign. This holding cannot be correct as the courts departed from the express definition of 'international arbitral award' in the New Arbitration Law. The decision also illustrates the courts' lack of understanding of some basic concepts on arbitration, such as the role of arbitration rules and arbitral institutions.

As to its scope of application, the New Arbitration Law does not contain any express provision as regards international or domestic arbitration other than in the context of recognition and enforcement of arbitral awards. Given that international awards are only expressly referred to in the provisions on enforcement of awards, the common view is that the rest of the New Arbitration Law does not apply to international arbitration.[10] This is in line with article 1(2) of the ML, which applies the territorial principle whereby the putative arbitration Act only applies to arbitrations having its seat in that state's territory.

Waiver of the Right to Object

Unlike article 4 of the ML, the New Arbitration Law does not address the issue whereby a party is deemed to have waived his right to object if he knows of non-compliance but instead proceeds with the arbitration without any objection. However, two relevant cases are worth noting.

First, in *Manunggal Engineering* v. *BANI*,[11] the Supreme Court upheld a district court judgment that rejected an application to set aside an award issued by BANI (the Indonesian National Arbitration Board). The applicant argued that the appointment of one arbitrator by BANI had not complied with the terms of the arbitration agreement as it was made without prior consultation with the party. But the court considered that the parties had acquiesced to the appointment during the proceedings.

[10] This view appeared to be supported by the Supreme Court in one of its *Karaha Bodas* decisions. See Judgment No. 01/Banding/Wasit.Int/2002 (8 March 2004) at 42 ('*Pertamina* v. *Karaha Bodas*, Supreme Court Appeal'). The Court stated that 'with regards to international arbitration, Law No. 30 of 1999 only governs them in articles 65–69 [. . .]'; thus, the Court rejecting the argument that art. 70 of the New Arbitration Law governing annulment of awards may be applied to international awards. Kindly note that throughout this chapter translations from Indonesian to English are by the authors unless otherwise stated.

[11] *PT Manunggal Engineering* v. *Badan Arbitrase Nasional Indonesia (BANI)*, Supreme Court, Judgment No. 770 K/Pdt.Sus/2011 (19 March 2012).