

BANI Moves Arbitration Online

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Introduction

At the height of the Coronavirus crisis in March 2020, the Indonesian National Arbitration Board or BANI issued Decree No. 20.007/III/SK-BANI/HU to temporarily suspend all arbitration proceedings in BANI in an effort to contain the outbreak. Now, as the government and businesses are starting to assess the 'new normal', BANI has revoked the March decree and issued Decree Number 20.015/V/SK-BANI/HU on the Rules and Procedures for Electronic Arbitration. Under the new decree, arbitrations can now be held or continued online by using an electronic telecommunication platform, while observing the arbitration principles that apply in BANI.

A noteworthy point from the decree is that this decree will apply beyond the current health crisis, thus allowing an arbitration proceeding to proceed virtually in the event of a disaster, emergency, or any other exceptional circumstances. The ability to move an arbitration online applies not only to new and ongoing arbitrations but also in a situation where a party intends to submit a statement of claim. As a result, it may effectively change the way arbitrations are held in Indonesia going forward.

What Classifies as a Disaster, Emergency or Exceptional Circumstances?

Under the decree, BANI explicitly states the following circumstances as a disaster, emergency, or exceptional circumstances:

1. a natural or non-natural disaster, such as the occurrence of an epidemic, pandemic, flood, national emergency, turmoil, insurgency, uprising, war, sabotage or demonstration, as determined by an authorised agency; and
2. inability of the claimant or the parties to appear before BANI or the determined arbitration venue due to illness or prohibition by a health authority.

Requirements

After satisfying the above circumstantial requirement, BANI will also examine whether there is an agreement between the parties to commence an arbitration or continue an ongoing arbitration virtually. However, our view is that the parties' agreement may not be necessary based on the specific scope of the decree. The mere existence of a disaster, emergency or exceptional circumstance should be enough to warrant the move to online arbitration.

Nonetheless, if the parties have agreed to online arbitration, they can submit their statement of claim, evidence, and documents to BANI via email. Also, the parties must ensure that the technical preparation for the arbitration proceeding is carried out three days before the scheduled date of arbitration. This includes notifying BANI of the attendants from both parties and paying any additional costs for the electronic arbitration, as well as a deposit.

BANI allows an online arbitration to be held using any online-based telecommunication platforms as agreed by the parties, which may include teleconference, videoconference, or virtual conference. Before the online arbitration is commenced, BANI will still allow the parties to attend a mediation to reach a settlement. Upon reaching a decision, BANI will announce the arbitral award electronically through the agreed platform. The award will be deemed to be legally binding once the electronic copy of the award is sent to the parties via email.

Lastly, to ensure that the online arbitration proceeding remains confidential, BANI will only allow the principals and their attorneys to attend the proceeding. Any recording of the arbitration is prohibited.

Concluding Remarks

Except as otherwise stipulated in the decree, the existing BANI rules and procedures from 2018 that apply to ordinary arbitration proceedings remain in force. Further, any matters that are not determined in the decree will be determined by the Governing Board of BANI.

Undoubtedly, although this move online is the result of the current health crisis, it is also a necessity based on technological developments and public demand. Even without Covid-19, the advantages of online arbitration in terms of cost and time would make it an attractive option over physical arbitration. While we have yet to see online arbitration in practice in Indonesia, there is a potential that online arbitration may become the preferred method of dispute resolution in the future.

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