

# Comparative Weaknesses of *BANI* to Accommodate the Needs of Business Actors in the Middle of Expansion and Globalization of International Arbitration

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**Abstract**— The conflict of *BANI*'s founders and administrators to court institutions resulted in the Indonesian Arbitration becoming unattractive and inappropriate for cross-border business players to resolve trade disputes between them. In fact, without the conflict *BANI* has been overwhelmed by competition with international arbitration bodies, because they have more competitive advantages such as objective and expedient, cost-effective, quick settlement and decisions are easily accepted or enforced in any part of the country. This study identifies and compares the weaknesses and or disadvantages of *BANI* to face international arbitration bodies, and recommends relevant matters to improve *BANI*'s performance and services in order to accommodate the needs of cross-border business actors.

**Keywords**—Comparative-Weaknesses, *BANI*, Business Actors, Expansion, Globalization, International-Arbitration.

## I. INTRODUCTION

The conflict and disputes of the board of the Indonesian National Arbitration Board (*BANI*) are detrimental to many parties, both Arbitrators, Advocates and business actors who tend to choose SIAC, Singapore Arbitration to avoid settling disputes through Indonesian Arbitration[1]. The split between fellow heirs of *BANI*'s founders to court institutions, making the *BANI* forum increasingly unattractive and inappropriate to be chosen by transnational business actors to facilitate business disputes between them. Without internal disunity among fellow founders, *BANI* has been overwhelmed by competition between international arbitration institutions / bodies such as ICC, ICA, AAA, ICSID, LCIA, SCC, SIAC, UNCITRAL, HKIAC, SHIAC (China), DIAC etc..

The International Court of Arbitration of the International Chamber of Commerce (ICC), for example, has succeeded in developing the International Arbitration Court (ICA) with its headquarters in Paris, with the National Committee in nearly 60 countries; The American Arbitration Association (AAA) and the International

Institute for Conflict Prevention & Resolution (CPR), both based in New York City; London International Court of Arbitration (LCIA); Swedish Chamber of Commerce (SCC); and the International Center for Settlement of Investment Disputes (ICSID). ICSID was formed under the auspices of the World Bank and is based in Washington DC, specifically handling cases where one of the parties is the government or government agency and the other is a foreign investor, and both the investor country and the host country.[2] ICSID has also ratified the Convention on the Settlement of Investment Disputes between States and Other Citizens (Washington Convention). At the regional level, there are regional ase arbitration institutions / institutions such as the Hong Kong International Arbitration Center (HKIAC), the Singapore International Arbitration Center (SIAC) and the Dubai International Arbitration Center (DIAC).

## II. RESEARCH METHODS

This study prescriptively intends to identify and compare (comparative-method) the weaknesses and disadvantages of *BANI* in accommodating the needs of cross-border business actors amid the expansion and globalization of international arbitration bodies, especially between *BANI* and SIAC (Singapore International Arbitration Center) as competitors closest to ASEAN by observing and recommending relevant matters to improve the performance and services of *BANI* in order to accommodate the needs of cross-border business actors as an option to settle arbitration disputes.

## III. RESULTS AND DISCUSSION

### A. *Expansion and Generalization of International Arbitration*

International arbitration is often referred to as the "par excellence" globalization area of business dispute resolution that is most favored by multinational companies, because it is an example of "living" the stage of legal globalization.

This forum is a place to bring together parties, consultants and advisors and arbitrators with diverse legal backgrounds. In the past 10 years, international arbitration has experienced spectacular growth. Trade transactions take place more quickly and in large numbers, from one part of the world to another part of the world, surely bring together a mixture of cultural arbitrators, parties, lawyers and different legal systems. On that basis, the system and mechanism of international arbitration must be neutral and able to answer the demands of the global world, adapt to different situations, as well as be kept away from local and national rules.

Thus, international arbitration forums have competitive advantages including: (i) can resolve disputes / disputes objectively and qualitatively; (ii) deadline for completion is relatively fast; (iii) saving cost allocation; and (iv) easily accepted and enforced in any part of the country.

### *B. Basic Expansion and Generalization of International Arbitration*

There are at least 2 (two) cross-country international law texts that underlie the expansion and generalization of international arbitration forums[3] : First, The UNCITRAL Model Law, about cross-country ratification to harmonize and implement their national law rules regarding arbitration, with the legal framework for global arbitration; Secondly, the 1958 NEW YORK CONVENTION, Convention on Recognition and award of the National Court for the implementation of international arbitral awards, as a key legal instrument.

### *C. Identification of Weaknesses Comparative of BANI*

BANI's comparative advantage is faced with several international arbitration bodies, at least it can be identified in the following matters [4]:

- 1) Default deadline for response of request
- 2) Choice of arbitrations number;
- 3) Appointment of sole arbitrator;
- 4) Restrictions where parties of different nationalities;
- 5) If Challenging arbitrator time limit;
- 6) The third Interventions (Joinder);
- 7) Consolidation to pending arbitration proceedings;
- 8) Tribunal's discretion to order interim measures;
- 9) Time limit for issuing awards;
- 10) Expedited / summary procedure;
- 11) Availability of emergency arbitrator procedure; and
- 12) Cost Allocation.

First, the deadline responds to the request of the parties (default deadline for response of request). The reason for cross-border business actors choosing international arbitration is because the management of trade dispute settlement times is relatively fast, including the allocation of time needed to follow up the parties' requests. According to Art. 8.2 and 8.3 of Law No. 30 of 1999, BANI took 30 days to follow up the parties' requests. The deadline is faster than the provisions of Article 13.1 of the 2016 SHIAC Rules which determine 45 days. However, among ASEAN countries, the Rule 4.1 Singapore International Arbitration Center (SIAC) only requires a 14-days deadline to follow up on requests from parties.

Second, Provisions on the number of Arbitrators (default number of arbitrators). The ICC Rules 2012 and the SIAC Rules 2016 provide parties with the opportunity to choose the Sole Arbitrator. While BANI (Indonesia), KLRCA (Malaysia), VIAC (Vietnam), PDRCI (Philippines), UNCITRAL, HKIAC (Hong Kong), and SHIAC (China) still arrange arbitration courts with 3 Arbitrators. Provisions regarding the arbitrator, whether 3 arbitrators or a single arbitrator, are different. KLRCA Rules 4 states [5]: '3 arbitrators for international arbitration; sole arbitrator for domestic arbitration. 'While the 2015 PDRCI Rules art 11 "PDRCI to determine if the previous agreement is not available." While BANI art 10.4, regulates: "... Agreed by Parties, otherwise decided by Chairman."

Third, Approval of the appointment of a Sole Arbitrator (default appointment if a sole arbitrator). In ICC Rules 2012 art 12.2 and 12.3 approval of assignment of Sole arbitrator at the agreement of the parties. In the event that the parties do not expressly state that, then the parties are deemed to submit the appointment and / or assignment to the Chair of the ICC. SIAC in Rule 10 governs: '... Joint appointment for 21 days of receipt of request by registrar, otherwise by President.' While BANI, in Article 6.2, Article 10.1 and 10.2 only stipulates that '... Each party nominates arbitrator, otherwise appointed chairman.

Fourth, the regulation that the nationalities of the parties may not be the same as the nationality of the Sole Arbitrator or Chairperson of the tribunal (Restrictions where parties of different nationalities). To guarantee the neutrality of the arbitrator, ICC Rules 2012 regulates in art. 13.5 that: Sole ... Sole arbitrator or chair not of nationality of either party. Outside of the ICC, there are no arbitral institutions which affirm the issue of 'Restriction', except the Philippines. PDRCI Rules 2015 regulates in art. 13: '... Arbitrator not to be of nationality of either party.

Fifth, the Issue of Right of War / Deadline to refuse arbitrator assignment (Time limit if challenging arbitrator). The right of the parties to reject the arbitrator's assignment is made possible by all arbitral institutions, even with different deadlines. BANI and SIAC set a 14-day deadline. While KLRCA, VIAC, PDRCI, UNCITRAL, and SHIAC set a 15-day deadline for Rights. Only the 2012 ICC Rules set deadlines rather long (30 days). In art. 14.2 is regulated: '... Within 30 days of the arbitration receipt of the appointment or of becoming aware of relevant circumstances.

Sixth, third parties who wish to participate in the Arbitration Examination (The third Interventions / Joinder); All arbitral institutions regulate the possibility of third parties entering and participating in the examination, if they can demonstrate their legal interests. The difference lies in whether the participation of the third party is at the request of the parties, one of the parties or on their own accord. ICC, KLRCA, BANI and UNCITRAL arrange for third parties to participate if requested by one of the parties. If not requested, the third party cannot enter and join the arbitration examination that will or is taking place. However, only the SIAC Rule explicitly regulates the possibility of Non-Party Applicants participating in the parties' dispute [6]. SIAC Rule 7.1. declare: 'Upon

application by a party or non-party provided third party is all parties consent bound by arbitration agreement, including party to be joint.'

Seventh, Merger / pooling of the Arbitration examination process (Consolidation to pending arbitration proceeding); BANI does not regulate the possibility of bringing together arbitration case hearings on the basis of two or more arbitration agreements relating to the interests of the parties. While SIAC (Singapore) in Rule 8 strictly regulates the following:

'...Upon application by a party, Court can consolidate pending SIAC arbitrations before constitution of tribunal where: (a) Parties agree; or (b) claims made under some arbitration agreement; or (c) arbitration agreement are compatible and disputes arise out of same legal relationship, or principal and ancillary contracts, or same transaction.'

Eighth, the Authority of the Arbitral Tribunal takes temporary measures deemed necessary (Tribunal's discretion to order interim measures). BANI only regulates in art 26 that the authority of the assembly to act or issue an interim or temporary decision, only in the provisional, interlocutory or partial award. KLRCA Rule 7, art 26 states: '... At a party's, the tribunal may prioritize the constitution of the tribunal. appropriate. 'As a comparison, the PDRCI Rules 2015 art 33 determines:' ... at a party's request and generally after satisfying the tribunal: (a) harm not adequately reparable by damages will likely result and it will be against them. and (b) there is a reasonable possibility that requesting successful parties will claim the claim. '

Ninth, the time limit for the arbitrator to issue a decision (Time limit for issuing award). The BANI Assembly takes 30 days to decide, unless the assembly requires an extension of time. According to art provisions. 25 Law No. 30 of 1999 regulated: '... Within 30 days of conclusion of hearings, unless the tribunal needs extensions.' 2 arbitration bodies, the 2013 UNCITRAL Ad Hoc Rules and the 2015 PDRCI Rules do not provide a time limit (no limit). SIAC Rule 32.3 sets a 45-day deadline. The deadline is shorter than the provisions of the ICC Rules 2012 art 30 (6 months) and the 2016 SHIAC Rules art 44 which states: '... For international / HKSAR / Macao / Taiwan Disputes, within 6 months of constitution of tribunal; For domestic disputes, within 4 months of constitution. KLRCA Rule 11 determines: '... Within 3 months of the date the closing submissions. 'Regarding this uncompetitive KLRCA decision, Malaysian Federal court can consider" to set aside KLRCA arbitral award ... "[7].

Tenth, Quick Check (Expedited / summary procedure). The purpose of Arbitration arrangements for quick Examination Procedure procedures, in addition to saving time and costs is to give authority to the assembly to determine that the case can be decided only 'based on documentary evidence only ', of course after consultation and / or approval of litigants. Some arbitration bodies that do not regulate this are the BANI, VIAC Rules, and the 2013 UNCITRAL Ad Hoc Rules. Whereas the SIAC 2016 Rule 5 has set firmly: '... Applies where: (a) amount in dispute does not exceed SGD 6 Million; (b) parties agree; or (c) Exceptional urgency. Documents only at tribunal's discretion. 'While the 2016 SHIAC Rule 52 governs:' ...

Applies where: (a) amount in dispute does not exceed RMB 1 Million; or (b) if amount exceeds RMB 1 Million and a parties applies for procedures and other parties agrees. 'As of March 1, 2017, the ICC New Rules art 1 applies 'Automatic' Application to be disbursed up to USD 2 Million [8].

Eleventh, Use of the procedure of 'emergency arbitrator' (Availability of emergency arbitrator procedure). The arbitration bodies that do not regulate this include BANI, VIAC, UNCITRAL and SHIAC. Whereas SIAC, ICC, KLRCA, and PDRCI set different deadlines. In SIAC Rules 5 it is determined that a case can be resolved more quickly with the rar emergency arbitrator 'procedure, with the terms of the contract value below SGD 5 Million, or in the contract agreed upon. Another reason, this procedure is used if there is a reason mendesak urgent urgency'. SIAC schedule 1 paragraph 1 regulates: ... Appointment within 1 day of receipt by register of application and fees. Orders or awards are made within 14 days of appointment. 'ICC Rules art 29 appendix V determines:' ... Normally within 2 days of receipt application ... Orders are made within 15 days of file was transmitted to emergency arbitrator. 'Although there are doubts about the flexibility of the procedure emergency arbitration event, considering the assembly decides the case only based on the examination of the document file. According to the Expert, hearing and assessing the information of the parties in the trial, is also very important to produce a decision of a quality and proportional assembly.

Twelfth, Amount of Allocation of Arbitration Examination Costs (Cost allocation). SIAC and HKIAC are the two most cost-effective arbitration institutions [9]. SIAC's administration fee is US \$ 5,853.00 lower than HKIAC with the amount of US \$ 9,281.49. But on the contrary, the tribunal's court fees for arbitration at HKIAC are US \$ 19,587.63 lower than SIAC with the amount of US \$ 26,852.00. On 15 December 2016, the Hong Kong International Arbitration Center ("HKIAC") released its data on the costs and duration of HKIAC arbitration, after the release of similar data by the Singapore International Arbitration Center ("SIAC") on 10 October 2016, the Stockholm Chamber of Arbitration Institute (" SCC ") on 24 February 2016, and the International Court of London Arbitration (" LCIA ") on 3 November 2015.

From the above explanation, it can be shown the weaknesses and or disadvantages of several arbitration institutions, including BANI, compared to the ICC, UNCITRAL and SIAC. BANI's toughest competitor is SIAC. Many disputes occur between Indonesian business actors and regional-asia pacific business partners - which BANI can actually solve, but the parties decide not to choose BANI but SIAC. Based on the previous description, such things are very understandable.

In the Jakarta SIAC Rules 2016 Roadshow, November 16, 2016, a number of new SIAC provisions that were innovative, efficient and competitive were presented, including [10]:

- a) Unification of several contracts (Multiple contracts and Consolidation);

- b) Merger of other parties in the arbitration process (Joinder of additional);
- c) Early refusal of requests that have no strategic value (Early dismissal of Claims and Defenses);
- d) Automatic Determination of the Arbitration location (Delocalising the seat of the Arbitration);
- e) Orders to pay down the down-payment fees (Remedy against a Non-Playing Party)
- f) Acceleration of emergency Arbitration decisions (Enhancing the emergency Arbitration proceedings);
- g) Expanding and Refining the Law of Fast Events (Expanding and refining the Expedited procedure); and
- h) Rejection of Arbitrator Challengers.

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#### IV. CONCLUSION

It can be shown the weaknesses and or disadvantages of several arbitration institutions, including BANI, compared primarily with the ICC, UNCITRAL and SIAC. SIAC is the toughest competitor of BANI, because of various innovations and responsive changes that SIAC continues to do. SIAC also claims to be the first commercial arbitration body to dare to adopt ICSID (International Center for the Settlement of Investment) provisions. Many disputes occur between Indonesian business people and regional-asia pacific business partners who actually need the BANI forum, but the parties decide not to choose BANI but SIAC. Based on the previous description, such things are very understandable. In the future, BANI if it is not to be abandoned by business people both regionally and internationally, must adjust and or correct various comparative disadvantages as an option to settle a commercial Arbitration dispute.

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