

Indonesia

Hiswara Bunjamin & Tandjung (in association with Herbert Smith)

Litigation

1 What is the structure of the legal profession?

Currently the legal profession is divided into advocates, public prosecutors, police officers, and judges. Advocates are entitled to advise on Indonesian law and have a right of audience in court. Advocates must obtain an advocate's licence by passing an examination administered by the Advocates Organisation.

An individual wishing to become a judge must apply to the Supreme Court, attend a special six-month course and pass an examination. The individual then becomes a candidate judge and serves as a clerk at a District Court. During the candidate's clerkship, the Head of the District Court reports to the Supreme Court with a recommendation as to whether they are suitable to become a judge. District and High Court judges can be moved to other District or High Courts, as required by the Supreme Court. The Supreme Court is granted on authority to organise, finance and administer the judiciary. A similar process will be applied for an individual wishing to become a public prosecutor or police officer.

2 What is the structure of the court system?

The court system in Indonesia has four main divisions: General Courts (in which most civil and criminal cases are handled), Religious Courts, Military Courts and Administrative Courts. In addition, special Courts for handling certain types of cases may be established as subdivisions of the General Court. For example, Commercial Courts have been established to handle bankruptcy and suspension of payment cases. Other subdivisions may also be established soon, for example, a Court for labour dispute cases.

Within the General Court system, cases are brought in the first instance in the District Courts. The jurisdiction of District Courts is divided geographically. Appeals from the District Court lie as of right to the High Court, and further appeals may be brought in appropriate cases to the Indonesian Supreme Court, which is the final court of appeal.

3 What is the role of the judge (and, where applicable, the jury) in civil proceedings?

Indonesia is a civil law country. Therefore, there is no doctrine of binding precedent under Indonesian law, although decisions of the High Court and the Supreme Court are influential. The Courts are obliged to apply their discretion where there is no specific applicable law. The judges must also take into consideration other sources such as Circular Letters issued by the Supreme Court, which are binding on the lower Courts. There is no jury system in civil proceedings.

4 What are the time limits for bringing civil claims?

In general, all legal claims must be pursued within 30 years. However, there are certain legal claims for which the time limit is shorter. For example, claims against carriers of deliveries within Indonesia must be brought within one year of the date on which delivery should have taken place. In the case of deliveries to foreign countries, the time limit for claims is two years. The period for contractual claims can be limited by agreement between the parties.

5 How are civil proceedings commenced, and what is the typical procedure which is then followed?

Civil proceedings are usually commenced by the plaintiff filing a claim with the District Court for the region in which the defendant is domiciled, or with a District Court in another region as stipulated in Article 118 of Indonesian Civil Procedure Law. Upon registration of the claim, the District Court will summon the parties. At the first hearing, the judge asks the parties to settle the dispute amicably through a mediation process. If they cannot do so, the judge sets a date

for the hearing. The defendant is invited to submit a written response to the claim, but this is not mandatory. The parties are then required to produce evidence and witnesses in support of their respective cases. A Circular Letter issued by the Indonesian Supreme Court requires the District Court to hold the trial and issue its judgment within six months of the date of the registration of the claim, or report to the Supreme Court if it has not done so within the given timeframe.

6 What is the extent of pre-trial exchange of evidence, and how is evidence presented at trial?

There are no procedures for full pre-trial discovery in Indonesia. The parties may submit documentary evidence to the Court in support of their claim or defence. This evidence is then made available to the other party. Either party may make further requests for discovery of specific documents, the granting of which is subject to the judge's sole discretion. The parties may also exchange written statements of the evidence of any factual or expert witnesses whom they wish to call at trial. The primary source of evidence at trial is written evidence, but the testimony of factual and expert witnesses is also admissible. Witnesses may be cross-examined.

7 To what extent are the parties able to control the procedure and the timetable? How quick is the process?

The parties have no right to control the procedure and timetable. Changes to either the procedure or the timetable are at the sole discretion of the judge. Hearings in the District Court must be concluded and the judgment rendered within six months of the claim's registration. In practice, this time limit can be extended.

8 What interim remedies are available to preserve the parties' interests pending judgment?

The Court has the power to freeze a party's assets upon the plaintiff's request, pending judgment, where there is *prima facie* evidence supporting a strong claim against the owner of the assets and a proven risk that the owner may dissipate those assets to defeat a judgment. The Court also has the power to grant an injunction or make other prohibitory or mandatory orders in order to preserve the *status quo* until the trial.

9 What substantive remedies are available?

The substantive remedies available include financial compensation for material or immaterial damage, mandatory orders requiring the performance of certain specified acts and/or seizure and forfeiture of assets. The judge may also issue a judgment according to fairness and justice (*ex aequo et bono*) if requested by both parties. Indonesian law does not provide for the awarding of punitive damages, although arguably they are implicit in the concept of "immaterial" (ie, intangible) damages, which the Court can award.

10 What means of enforcement are available?

Indonesian law does not contain any provisions for direct enforcement of a court judgment by a judgment creditor, except in cases of a bankruptcy judgment. The judgment creditor must apply to the District Court that rendered the judgment for enforcement. If the assets that are to be attached are within the geographical area of another District Court, the District Court that gave the judgment will request the other Court to enforce its order. The judgment debtor's assets, such as real or moveable property, shares and banks accounts, can be attached and sold or auctioned under the supervision of the Court.

In bankruptcy cases, the Court's judgment will be implemented by an independent curator recommended by the creditor or debtor.

11 Does the Court have power to order costs? Are foreign claimants required to provide security for costs?

The Court has limited power to order costs. The Court usually orders the losing party to pay the Court fees for the trial. These are minimal. However, each party is responsible for paying its own legal costs, including lawyers' fees and the fees of expert witnesses. The losing party is not required to contribute to the legal costs of the successful party. Indonesian law does not provide for security for costs.

12 On what grounds can the parties appeal, and what restrictions apply? Is there a right of further appeal? To what extent is enforcement suspended pending an appeal?

A party may appeal against a District Court judgment to the High Court as of right. The appeal must be filed within 14 days of the judgment. There is no time limit for the High Court to render its judgment in the appeal, but High Court judgments are usually given within six months to one year of the appeal being filed. Similarly, appeals to the Supreme Court against High Court decisions must be filed within 14 days of the decision. Again, there is no time limit for the Supreme Court to render its decision in the appeal. Typically, however, the Supreme Court can take up to four years to deliver a decision.

The High Court has the discretion to grant a successful plaintiff's application to enforce a judgment. However, although the judge is authorised to issue such orders, the Supreme Court may urge the High Court not to do so, as it may raise problems if the appeal is accepted.

13 To what extent can domestic and/or foreign state entities claim immunity from civil proceedings?

A foreign state (or state entity) may claim immunity from legal action for acts of a governmental nature. Immunity does not extend to acts of a commercial nature, which could have been performed equally well by a private individual or a trading corporation. Governmental bodies wishing to resist any obligation to produce high-level, sensitive communications must claim public interest immunity.

14 What procedures exist for recognition and enforcement of foreign judgments?

Foreign judgments are not recognised or directly enforceable in Indonesia. A successful judgment creditor in a foreign proceeding is therefore obliged to file a new action in the Indonesian courts and to re-litigate the matter on its merits. However, the foreign judgment can be offered at trial as *prima facie* evidence of matters governed by the relevant foreign law and of the underlying factual issues. Once a judgment has been secured upon re-trial or re-examination, the judgment can then be enforced against the assets of the judgment debtor in Indonesia in the same way as a domestic judgment.

15 Is it permissible for lawyers to charge contingency or conditional fees, or other fee arrangements based on the result of the litigation/arbitration?

In practice, it is common in Indonesia for litigation lawyers to charge a contingency fee or a conditional fee. The amount of the fees is agreed between the client and the lawyer.

Arbitration

16 Is the arbitration law based on the UNCITRAL Model Law?

The Indonesian Arbitration Law of 1999, which regulates the conduct of arbitration proceedings in Indonesia, is not based on the UNCITRAL Model Law, although it does incorporate many of the principles of the Model Law. The Indonesian Arbitration Law does not draw a distinction between domestic and international arbitration. There is, however, a difference in the procedure for enforcing domestic and international arbitration awards.

17 What are the main national arbitration institutions?

The main national arbitration institution is Badan Arbitrase Nasional Indonesia (BANI) (Indonesian National Arbitration Institution), which was established in 1977 by the Indonesian Chamber of Commerce. See <http://www.bani-arb.org>

18 Are there any restrictions on who may represent the parties to an arbitration?

Parties to an arbitration may represent themselves or be represented by an attorney-at-law. It is recommended that Indonesian counsel be retained when an arbitration is conducted under Indonesian Law.

19 What are the formal requirements for an enforceable arbitration agreement?

The Indonesian Arbitration Law provides that an arbitration agreement must be in writing and signed by both parties. Electronic communications including e-mail and facsimile, are acceptable if they are accompanied by proof of receipt by both parties.

20 Can the court refuse to stay litigation if there is a valid arbitration clause?

The Arbitration Law provides that the District Court has no jurisdiction over disputes where there is a valid arbitration clause and cannot interfere in the settlement of such disputes. The Court may refuse to stay litigation if the arbitration clause is not enforceable or if the subject matter of the dispute cannot be arbitrated.

21 If the arbitration agreement and any relevant rules are silent, how many arbitrators will be appointed and who is the appointing authority?

If the parties cannot reach an agreement concerning the selection of an arbitrator, or in the absence of a provision concerning the appointment of an arbitrator in an arbitration agreement, the chairman of the District Court will appoint a single arbitrator or a panel of arbitrators at their discretion.

22 Are restrictions placed on the right to challenge the appointment of an arbitrator?

A party may challenge the appointment of an arbitrator if the arbitrator has a family, financial or occupational relationship with one of the parties, its proxy, or another party with an interest in the outcome of the arbitration.

The Indonesian Arbitration Law also sets out other reasons that may be used to challenge the appointment of an arbitrator. These include:

- (i) failure to meet the qualifications for an arbitrator as stipulated in the Arbitration Law, such as being over 35 years of age and having at least 15 years' experience in their field;
- (ii) having an interest in the arbitration award; and
- (iii) any other justifiable reason that gives rise to doubts that the arbitrator will carry out their duties freely and will be impartial when making the award.

23 Does the domestic law contain substantive requirements for the procedure to be followed?

Broadly, the parties are free to choose the rules that will govern the arbitration process and the procedure to be followed. However, the Indonesian Arbitration Law does set out certain mandatory procedural requirements (eg, the examination of witnesses and experts must be performed in accordance with the provisions of the Indonesian Civil Procedure Law). If the parties fail to reach an agreement in relation to the procedure and the arbitrator or the arbitration panel has been appointed, then the procedure set forth in the Indonesian Arbitration Law will be applied.

24 On what grounds can the Court intervene during an arbitration?

The Court can intervene during an arbitration when one of the parties challenges the appointment of an arbitrator.

There is also an on-going debate as to whether the Court has jurisdiction when the validity of the contract governed by an arbitration agreement is in question.

25 Do arbitrators have powers to grant interim or conservatory relief?

The arbitrator or the arbitration panel may make a provisional decision to attach security, to sell perishable goods or to entrust goods to a third party at the request of one of the parties. There is no provision to ensure enforcement of interim measures granted by an arbitrator.

26 When and in what form must the award be delivered?

The award must be in writing and be signed and dated by the arbitrators within 30 days of the conclusion of the hearing. The award must contain, among others items, the reasoning of the arbitrators in arriving at their conclusion, as well as opinions from each arbitrator if there is a difference of opinion within the arbitration panel.

27 On what grounds can an award be appealed to the Court?

The grounds for appeal are limited. An arbitral award may be challenged if the content of the award contravenes decency and public order. The Indonesian Arbitration Law provides a right of challenge where:

- (i) forged or falsified documents have been submitted in evidence in the arbitration;
- (ii) a decisive document has been concealed by the opposing party; or
- (iii) one of the parties has given false evidence in the hearing.

28 What procedures exist for enforcement of foreign and domestic awards?

Indonesia is a party to the New York Convention, subject to the commercial and reciprocity reservations. Awards from the Convention countries are recognised (in principle) in Indonesia on the grounds set out in Article 5 of the Convention, provided that they do not offend public order and morality.

Under the Indonesian Arbitration Law, a foreign arbitral award is enforced by obtaining an “Exequatur” from the Chairman of the District Court of Central Jakarta. After the District Court issues its Exequatur, the foreign arbitral award is enforceable as a final court judgment. Refusal by the District Court of Central Jakarta to recognise and execute an international arbitration award may be appealed directly to the Supreme Court, which must give its decision within 90 days of the appeal being lodged.

For domestic awards, the Indonesian Arbitration Law requires that the original award, or an authentic copy of it, shall be registered with the Registrar of the relevant District Court by the arbitrator or their proxy within 30 days of the issuance, otherwise the award will be unenforceable. If the losing party does not honour the award, the successful party can then apply to the District Court for execution through procedures such as the seizure and sale of assets. The District Court may refuse to enforce an award on the grounds set out in section 26, above.

29 Can a successful party recover its costs?

The costs of the arbitration, including legal fees, experts’ fees and the costs of the tribunal, are recoverable from the losing party as determined by the arbitration tribunal.

Alternative dispute resolution

30 Are the parties to litigation or arbitration required to consider or submit to any alternative dispute resolution before or during proceedings?

The parties are not required to consider or submit to any form of alternative dispute resolution before or during the proceeding. However, the arbitrator or the judge at the commencement of the hearing will ask the parties whether they wish to settle the dispute amicably through a mediation process.

Hiswara Bunjamin & Tandjung (in association with Herbert Smith)

Contact [Iril Hiswara \(Managing Partner\)](#)
 [23rd Floor, Gedung BRI II, Jalan Jenderal Sudirman, Kav 44-46](#)
 [Jakarta 10210, Indonesia](#)

Phone [+62 21 547 4010](#)

Fax [+62 21 574 4670](#)

e-mail iril.hiswara@hbtlaw.com

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