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Asia Pacific Regional Arbitration Group

Efforts and Significance of Badan Arbitrase Nasional Indonesia (BANI) Arbitration Centre for The Development of Arbitration in Indonesia

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Abstract

The role of BANI in the development of the world of arbitration in Indonesia needs to be observed quantitatively and qualitatively. As a forum for resolving disputes through arbitration, BANI has been established for 45 years. It was set up 22 years before Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution was passed. During this time period, a reflective and evaluative question needs to be raised to assess the significance of BANI's existence. This significance is observed by looking at the efforts that BANI has made to socialize arbitration both practically and cognitively. The result can be seen from the development of the number of cases handled by BANI and the quality of disputes resolved by BANI's arbitrators. In essence, BANI has shown significant development with also continuing to evaluate in various aspects. This paper elaborates in more detail the materials that BANI has consistently disseminated to the general public so that it has an impact on its significant development.

A. BACKGROUND

Arbitration is a business dispute resolution method that has been known in Indonesia. During the Dutch East Indies period as stated in the *Reglement op de Rechtsvordering (RV)*, arbitration was known as "referee".[1] Nonetheless, neither the substance nor the procedure was detailed at the time. About 42 years after the declaration of independence, the Indonesian Chamber of Commerce and Industry (Kadin) saw the urgency of establishing a body focused on arbitration. Through the Decree of the Chamber of Commerce Number 152 of 1977, an arbitral institution was established called the Indonesian National Arbitration Board (BANI).[2] At the time, some of the procedures still referred to RVs and others referred to formal regulations made by BANI itself.

The new arbitration gained its more detailed format nationally through Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution (hereinafter referred to as the "Law on Arbitration and ADR").[3] The main factor was the monetary crisis and the large number of business disputes, both international and national level, in Indonesia. The law recognizes the existence of arbitration body as a body chosen by the disputing parties to resolve their business disputes. The absolute competence based on the arbitration agreement and the finality of the award produced by arbitration body are two important elements that strengthen the existence of arbitration bodies, one of which is BANI.[4]

Both before and after the promulgation of the law on Arbitration and the ADR, there are still several issues related to arbitration. The main issue relevant to the development of arbitration is the limited knowledge of the Indonesian people regarding arbitration. Such knowledge includes: (1) its differences from the court; (2) the paradigm of its dispute resolution mechanism; and (3) the procedure. At its core, there are still many parties who confuse the arbitration with conventional dispute resolution in court.

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[1] *Reglement op de Rechtsvordering* (RV), Art. 642.

[2] Kamar Dagang dan Industri Indonesia (The Chamber of Commerce of Indonesia), *The Decree of the Chamber of Commerce Number 152 of 1977*.

[3] UU No. 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa (Lembaran Negara RI Tahun 1999 No. 138, Tambahan Lembaran Negara RI No. 3872) ("Law on Arbitration and Alternative Dispute Resolution (ADR)").

[4] *Ibid,* art 60

The reflective and evaluative question to be answered in this paper is how significant the existence of BANI is in answering these problems. If there are facts that show that BANI has been significantly able to answer these problems, it means that the existence of BANI is of significant value. On the other hand, if the fact is found that BANI is unable to answer them, it means that an evaluation is needed for its existence to be significant.

The first aspect that needs to be answered is whether BANI has sought to provide correct understandings of arbitration to the public. This aspect is answered not only practically but cognitively in the form of socialization. Some of the matters socialized include the distinctions between BANI and the court, the principles in arbitration that are often not understood and/or implemented by the disputing parties, and also the "ought" paradigm in arbitration.

The next aspect that needs to be looked at is the number of business people choosing BANI as their business dispute resolution forum. The answer to the first aspect should be linear with an increase in the number of business people that choose arbitration as a dispute resolution mechanism. Although the answer is quantitative, there is a quality aspect in it. The selection process, in general, requires two things: (1) there are several options besides BANI; and (2) the option chosen is seen as better than the other options. In a normative way, parties' choosing arbitration as a dispute resolution forum – not through a court – means having a rationalization that an arbitration forum is better than another dispute resolution forum. Calculating the rationalizations varies, from the aspects of the quality of dispute resolution to the application of confidentiality principles as well as time and cost efficiency.

Then, the data that needs to be looked at further is whether the quantity tends to increase, decrease, or be unstable. If no one has used or the graph tends to decline, it means that a search is needed to find out the root causes, such as the substance quality of dispute resolution, effectiveness, and efficiency. The upward trend means that there are strong indications that BANI has succeeded in convincing business people who choose that arbitration is a better method to use in dispute resolution than the conventional court.

B. DISCUSSION

B.1. Quantity of Business Dispute Resolution Cases Settled in BANI

The development of BANI occurs gradually. In the year BANI was founded, no party has chosen BANI to resolve its disputes. During the first 5 years, from 1977 to 1982, only in 1979, there were several cases that were requested to BANI to be resolved. It was not until 1983 onwards, every year, that there were cases resolved through BANI although the trend tended to be unstable and declining. This meager quantity is mainly due to, at first, not many had knowledge regarding arbitration and why arbitration was better to choose.

Only in the years approaching the reforms, there began to be a fairly significant increase. As a result of the monetary crisis, there were many business disputes. On the other hand, business people began to consider using other alternatives to the courts to resolve their disputes. At that time also in 1999, arbitration finally got its format nationally through the law on Arbitration and ADR. From 1998 to 2000, more than 25 disputes were submitted to BANI each year[5]. The format of the finality of the arbitral award, the confidentiality aspect, and the professionalism of the arbitral institution began to interest many business people as a dispute resolution forum.

In the next 5 years from 2001 to the end of 2005, the trend again showed a decline to below 20 disputes. In 2006, users of arbitration services experienced another increase despite a decline until 2008. Only after 2009, BANI received cases to be resolved in at least 40 cases. The initial significant spike occurred from 19 cases in 2008 then to 44 cases in 2009, or an increase of more than 200%. The second

[5] 30 cases in 1998, 37 cases in 1997, and 29 cases in 1998.

spike came from 59 cases in 2013 and then to 88 cases in 2014. After that, in 2015, the number of cases resolved broke the 137 case mark. After 2016 which had 136 cases, there was a downward trend back until 2020, namely 79 cases. However, even in a pandemic, BANI is still trusted by many parties to resolve their business disputes.

In total for 45 years, BANI has resolved 1513 business disputes. In fact, the conclusion that can be said during the 45 years of its establishment is that there has been significant development since BANI was founded. From the 20 years initially, the dispute handled no more than 20 cases, then in the last 10 years to a minimum of about 60 cases per year. This may indicate a major point, namely the emergence of awareness that arbitration is a better dispute resolution forum. Not only that, in parallel, there are efforts that have been made consistently by all elements in BANI to bring about this awareness, both through practical and cognitive levels so that it has an impact on the development of the use of significant arbitration.

B.2. Efforts to Provide Correct Understandings in Arbitration

1. Distinguishing the Arbitral Body from the Arbitral Proceedings and the Court

In the beginning, even today, there are still many parties who misunderstand arbitration as a body and as a process, mixing up its meaning and function. The mixing is either done accidentally because of a mistake in thinking or deliberately to create a wrong assumption for one's own interests. In many annulment applications, BANI was implicated as a Co-Respondent or even a Respondent. As if, BANI, as a body, is involved or contributes directly to an arbitral award decided by the Arbitral Tribunal.

In fact, BANI's position is limited to institutional and administrative management. The arbitral tribunal has the widest autonomy over the resolution of disputes. Even today, BANI's board should not hold a case at all even though they are arbitrators.[6]

Errors in distinguishing between arbitral bodies and proceedings can stem from several factors. The first thing is that there is a blurring of relevant norms in providing explanations, particularly in the law on Arbitration and ADR. Under Article 1 number 8, an arbitral institution is the body chosen by the parties to a dispute to resolve a dispute.[7] The lay understanding of this clause is that the arbitral body is the entity that resolves the dispute; in fact, the subject of resolving the disputes is *person* who is registered as an arbitrator in the arbitration body.

For example in BANI, it has been affirmed in Article 1 of the BANI Arbitration Rules and Procedures of 2022 that BANI is not a dispute resolution institution but is an independent institution that only administers the dispute resolution process through arbitration and the arbitral tribunal.[8] One such form of administration is the provision of a list of arbitrators that the parties to the dispute can choose to resolve their disputes; [9] In addition, BANI also provides a format for arbitration procedures.[10] In certain contexts, the parties may propose, to the Chairman of the BANI, arbitrators who are not registered but whose expertise is indispensable for resolving disputes.[11]

In fact, against the Arbitral Tribunal which has been chosen by the parties to resolve the dispute, the Chairman of BANI and his staff shall not intervene or know the material of the dispute. The relationship between the body and the arbitrator is not a relationship of a contractual subordinative nature. Although the arrangement for the payment of arbitrator fees is made by the body, it is only part

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[6] BANI Arbitration Centre, *SK.No. 21.001/I/SK-BANI/AWR* (The Decree of The Chairman of BANI Arbitration Centre).

[7] The Law on Arbitration and Alternative Dispute Resolution, art. 1 number 8.

[8] BANI Arbitration Rules and Procedures of 2022, art. 1.

[9] *Ibid,* art. 10.

[10] *Ibid,* art. 18.

[11] *Ibid,* art 10(2).

of the Agency's Rules and Procedures and has no implications for the existence of a hierarchy between the two.

Apart from the limitations of explanation in the law, there is no Supreme Court Rule (*Peraturan Mahkamah Agung* or *Surat Edaran Mahkamah Agung*) which gives an understanding of the distinction in the mechanism for annulment of arbitral awards in courts. Thus, the pleading party has no direction as to whether the arbitral institution can be withdrawn as a party to the respondent or even the respondent. With the concern that his application would be rejected due to lack of parties, the party applying for annulment retained the arbitral body as either co-Respondent or even Respondent, which in this case was merely a matter of administrating.

This distinction is necessary because there is a principle of confidentiality that must be maintained. All information relating to disputes is only circulated within the arbitration courtroom. Unlike the prevailing procedure in the District Court, which is open to the public (Article 13 of Law No. 48 of 2009 on Judicial Power),[12] dispute resolution through arbitration is carried out in a closed manner to the public (Article 27 Law on Arbitration and ADR).[13] This is done in order to maintain business relations and reputational interests of the parties to the dispute. In addition, this element of confidentiality will also make the parties more open in disclosing the subject matter of the dispute and the evidence and understanding of the parties' business transactions so that the Arbitral Tribunal has more data to resolve the dispute properly.

Not only for the benefit of the parties to the dispute, this principle is also related to the credibility of BANI or other arbitral bodies in resolving business disputes. An arbitration body is not essentially a state institution, but rather an independent institution whose operational sustainability depends on whether the businessmen in dispute trust the resolution of their disputes through the arbitration body. Basically, a dispute can affect the reputation of the businessmen in dispute.

In addition, there are still many parties who equate or even do not know at all the difference between the arbitral body and all its procedures with the district courts. One concrete form is ignoring the arbitration clauses as the basis of the absolute competence of arbitration to resolve disputes. Using the principle that courts should not reject cases (Article 10 of Law No. 48 of 2009 on Judicial Power),[14] absolute competence under arbitration clauses is not heeded as a basis for rejecting requests for dispute resolution in court, as in some cases we do not state here (due to maintaining confidentiality). In fact, there are also parties who write, on their contracts, dispute resolution forums through arbitration alternatively with the district court. The impression that arises is that although the dispute resolution forum written in the parties' agreement is arbitration, dispute resolution by arbitration is the same as dispute resolution in the district court.

Although Article 10 of the Judicial Power Law states that courts are prohibited from rejecting cases, the courts also need to look at the absolute competence in Article 2 of the Arbitration Law.[15] Even in Article 3 of the Arbitration Law, it is stated that the district court is not authorized or must reject an application for dispute resolution in which there is an arbitration clause.[16] This statement does not intend to generalize all parties, but shows that arbitration is still an impressive alternative to the courts.

Not only that, in arbitration proceedings, it was found that there were parties who brought adversarial nuances into the arbitration courtroom whose orientation, in fact, was *non-adversarial*. The form is by accusing each other without giving understanding to the tribunals. In other words, the

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[12] UU No.. 48 Tahun 2009 tentang Kekuasaan Kehakiman (Lembaran Negara RI Tahun 2009 No. 157, Tambahan Lembaran Negara RI No. 5076) ("The Law on Judicial Power"), art. 13.

[13] The Law on Arbitration and ADR, art. 27.

[14] The Law on Judicial Power, art. 10.

[15] The Law on Arbitration and ADR, art. 2.

[16] *Ibid.,* art. 3.

orientation is not to resolve disputes, but to obtain claims that are as large as possible or won by the tribunal.

In addition, there are also researchers or authors who state that the district court may intervene before, during, and even after arbitration proceedings. This statement is supported by reference to several articles in the Arbitration Law and the UNCITRAL *Model Law*.[17] This view is not entirely correct. Because, where the parties have agreed in good faith to resolve their dispute by arbitration, the district court does not need to intervene at all.

In the process of selecting arbitrators, the parties to the dispute have the autonomy to choose which registered arbitrator is entrusted. Then during the hearing process in the proceedings, the parties generally want all the material content of the dispute to be solely within the arbitration courtroom without the other party knowing whoever it is. In fact, since the beginning of the entire arbitration has fully entrusted the Arbitral Tribunal and each other has good faith, the execution of the arbitral award can be carried out on the basis of moral responsibility and without having to register it in the district court; such registration is only required in the context of any party not voluntarily executing the arbitral award.[18]

In addition, there is an aspect of the proceedings that cannot be equated between the procedure of abiding through the arbitral body and the procedure of proceeding through the district court. By orientation, arbitration is an attempt to resolve disputes with a dispute resolution mechanism behind closed doors. This has implications for the nuances of familial proceedings which prioritize giving understanding to the Arbitral Tribunal to better understand the sitting of the case comprehensively. There should be an effort to ensure that the dispute needs to be resolved so that the parties can still establish a business relationship in the present and future.

One more element that needs to be properly put is to distinguish arbitrators from judges in courts. Prof. Bismar Siregar, who has been a chief justice and also an arbitrator, said in his book entitled "Bertasakkur Atas Hadiah Allah", that there are several characteristics of differences between arbitrators and judges, namely as follows.

1. Arbitrators are nobler than formal judges. This relates to the lack of official oversight in tiers at arbitral institutions, such as BANI. Unlike the case with court judges, there is scrutiny until it culminates in the Supreme Court. This glory is judged because the supervision of arbitrators within the BANI is inherent in oneself as well as supervision by the Supreme Supervisor, the Divine Rabbi.
2. In addition, in the context of a trial judge, there is an oath of office before taking office even though in reality it is not in line between the oath and the practice. On the contrary, the member of the arbitrator does not take the oath of office because the arbitrators are obliged to understand and animate, what they do is not just any obligation but one work of resolving a case is equal to the duty of the Judge to swear Justice Based on the Almighty Lordship. It is therefore understood an arbitrator, ethically, does not need to apply, but waits to be applied for by the arbitral institution based on the guarantee so far as to have a good report of his conduct beyond doubt.
3. In addition, unlike in the Courts that rely more on the formal truth to secular law and not to Pancasila, the verdict is only between two: lose or win. For such a Judge it does not matter what the relationship between the parties becomes after the trial. On the contrary, through dispute resolution in BANI it is more about reconciliation efforts. And to be able to do so, (an

[17] See Tri Ariprabowo, "Annulment of Arbitral Awards by Courts in Constitutional Court Judgments No. 15/PUU-XII/ 2014" *Constitutional Journal* Vol. 14 No. 4 (2017), p. 717.

[18] See in a contrario way in Art. 61 of the Law on Arbitration and ADR.

arbitrator) requires art, patience, wisdom and the ability to touch the conscience of the disputing parties to understand the meaning of brotherhood in this mortal life.

2. Implementing 3 Key Principles of Arbitration: Trust, Confidentiality, Good Faith

Apart from talking about the distinction above, some parties still do not know and/or implement the basic principles in arbitration. The three principles we mean are: trust, confidentiality, good faith. As of now, the understanding and the important values of these three principles continue to be socialized and also practiced consistently by all elements of BANI.

2.1. Trust

There are two important elements of trust: (1) willingness; and (2) expectations.[19] A person is willing to ask another person to do something due to rationalizations and careful considerations that provide a sense of "I will let you do this job because I trust you will be able to do this". In parallel, this willingness implies the existence of an expectation or an end that is resulted from the activities carried out by the trusted person. With this construction, relationships based on trust are relationships of fulfilling rights and responsibilities to each other or a give-and-take activity.

In respect of willingness, rationalizations and considerations are based on: (1) the existence of abilities/skills that can be entrusted to solve a problem or more; and (2) the existence of integrity or morality in a narrow sense in solving that problem.[20] These two influence one another. A person will find it difficult to trust the other person having ability but lacks honesty and often commits fraud. Likewise, that person will also find it difficult to trust the other person that is honest but not able to solve the problem.

Meanwhile, with respect to expectation, it is the goal to which the will is directed. The form of expectation in arbitration is, normatively, the disputes being resolved on the basis of truth and justice. From the perspective of the disputing parties, this expectation, as well as willingness, does not only arise due to a factor commonly referred to as "relational trust" (trust based on the quality of the arbitrator). However, another aspect, which can also generate trust, is the concept of "procedural justice" (trust based on formal proceedings in arbitration). A study reveals the importance of fair settlement procedures to public trust in resolving disputes in court.[21] In essence, the community will still be satisfied with the results, even if they lose, if the court procedures they go through are carried out fairly and objectively.[22]

In arbitration, the disputing parties have the freedom to choose which arbitrator to sit in the tribunal (personal level) pursuant to art. 9(3) and the explanatory part of Law 30/1999. Based on the article, the disputing parties have the freedom to choose the arbitrators based on integrity, honesty, expertise, professionalism, and neutrality. In this context, the trust concept that becomes the basis is relational trust. Arbitrators who are considered problematic in terms of ability and/or integrity will

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[19] Peter O. Mülbert and Alexander Sajnovits, "The Element of Trust in Financial Markets Law," *German Law Journal* 18 (March 2019): 4-5.

[20] Kyle J. Thomas, "Rationalizing Delinquency: Understanding the Person-situation Interaction through Item Response Theory," *Journal of Research in Crime and Delinquency* 56 (2019): 5-17.

[21] Tom R. Tyler, *Psychology and the Design of Legal Institutions* (Nijmegen: Wolf Legal Publishers, 2007), 22.

[22] P. Colin Bolger and Glenn D. Walters, "The relationship between police procedural justice, police legitimacy, and people's willingness to cooperate with law enforcement: A meta-analysis," *Journal of Criminal Justice* (2019): 95.

certainly not be chosen.[23] In fact, an arbitrator chosen by the applicant party also needs to seek approval from the respondent party.[24] In the other words, the arbitrators chosen are the choice of both parties.

Besides, this trust is also concretized from the perspective of the arbitration institution. The body absolutely tends to make sure that it is trustworthy for disputing parties. These are some mechanisms to do that.

1. A strict process to become arbitrators of the arbitral institution.[25] This strictness relatively exists in various law enforcement institutions, such as judges of the general court. The distinguishing factor is that the arbitration institution has an interest, like a company, to be chosen by the public in resolving disputes. One of the legit reasons is that its source of funding does come from disputing parties wanting to resolve their disputes through arbitration.
2. The mechanism to give sanctions to arbitrators who do not maintain the principle of trust.[26] As background, one of the factors that influence trust in dispute resolution institutions is how there is a possibility of bribery happening in between the process. To overcome this issue, the parties will choose the most credible institution to resolve disputes objectively, not institutions without integrity. To date, there have been no cases of corruption or bribery involving BANI's arbitrators resulting in the parties trusting BANI as their dispute resolution.
3. The right of denial (*hak ingkar*) is based on Arts. 22-26 of Law 30/1999 and Art.12 of the BANI Indonesia Arbitration Rules and Procedures of 2022. One example is that after the parties determine arbitrators that will resolve their dispute, they are prohibited from meeting personally with the parties. If this is found, one of the parties can file a right of denial which will be assessed by the body to replace those arbitrators breaking that rule.

2.2. Confidentiality

We found that there are four elements of confidentiality: (1) information; (2) that information affects the interests of the parties; (3) it contains interpersonal aspects in the form of trust in keeping the information confidential; and (4) confidentiality is not always confidential as long as there is a context in which the interests of others will be disturbed if it is not disclosed. These elements of confidentiality were gathered from the explanation in the General Data Protection Regulation (GDPR) in which more than 120 countries are already exposed to international privacy laws for data protection to ensure the data security for their citizens.

The disclosure of data or information that is confidential should follow the global privacy principles: notice is to advise the parties to protect their personal information; choice and consent to provide parties with choices and consent to the use, storage, management, and collection of personal information; access and participation—to ensure that the information from the parties is accessed by within the right security protocol; integrity and security—to ensure the information is secured from unauthorized access, and enforcement—to ensure the platform using the information is under regulation.[27]

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[23] Diego M. Papayannis, "Independence, impartiality and neutrality in legal adjudication," *Revus* 28 (2016): 5-23.

[24] Article 11 of *Peraturan dan Prosedur Arbitrase Nasional Indonesia Tahun 2022.*

[25] *Ibid.,* Art. 10.

[26] Article 10 of *Code of Ethics and Code of Conduct for Arbitrators of the Indonesian National Arbitration Board.*

[27] Thales, "Beyond GDPR: Data Protection Around The World," accessed 28 June 2022, https://www.thalesgroup.com/en/markets/digital-identity-and-security/government/magazine/beyond-gdpr-data-protection-around-world.

In the context of confidentiality in arbitration, Reuben explains that confidentiality in arbitration is natural and the parties should already safeguard the sensitive information throughout the process.[28] This confidentiality of the information is limited in terms of its scope and generally recognized according to Article 25(a) UNCITRAL Rules, Article 21(3) ICC, and Article 19(4) of the LCIA. Only information that affects the interests or reputation of disputing parties can enter the universe of information that is being discussed. The consideration of whether or not a piece of information is confidential is determined by different parties in different jurisdictions.

In England, there is only an implicit duty of confidentiality by requiring parties to cover all documents disclosed or generated in the arbitration process, including documents that contain trade secrets or market commercial sensitive information. While in Australia, the High Court of Australia determines confidentiality only in respect of documents under the order of the tribunal. But in other jurisdictions, there is no clear regulation to determine whether a piece of information is confidential or not and it relies upon the agreement between the parties to keep the documentation of arbitration confidential.[29]

Confidentiality contains an interpersonal aspect. For example, the disputing parties trust the other party – in this case, arbitral tribunals – to maintain the confidentiality of the information. The principle of confidentiality is regulated under Article 30 of LCIA Arbitration Rules in which confidentiality should be carried out in a well-defined manner.[30] This international regulation is adopted under Indonesian law through Article 1 section (7) of Law on Arbitration and ADR in which there is a selection before choosing an arbitrator as an implication of the confidentiality principle.[31] According to Emmanuel Gaillard and John Savage, one of the four arbitrators' obligations, to maintain that confidence, is that they must maintain the confidentiality of all matters relating to the arbitration cases they are settling.[32]

Last but not least, confidentiality is also contextual and can be open but very limited. In general, confidential information should be disclosed whenever the interests of other parties are compromised when the information is not disclosed. However, notifying such information must be based on careful rationalizations. First, the information will not be circulated to irrelevant parties. Second, the notification is done for a specific purpose, such as solving the cases.

Confidentiality in arbitration is contained in Article 27 of the law.[33] Pursuant to this article, all arbitration hearings by an arbitrator or an arbitral tribunal, are closed and not open to the public. These closed trials are different from the trial procedure in the district court that is open to the public. This article reflects the UNCITRAL Model Law in Article 34.5 which recognizes the principle of confidentiality by requiring the consent of both disputing parties to make the arbitration be made public.

In contrast to the provision in Law Number 48/2009 on Judicial Power in which it is stated that court decisions are only valid and have legal force if they are pronounced in a trial open to the public;[34] there is no such provision in the law on Arbitration and ADR. This contradiction is further explained in the explanation part of Article 27 of the law which states that although a closed trial contradicts the

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[28] Richard C. Reuben. "Confidentiality in Arbitration: Beyond the Myth," *Kansas Law Review Vol. 54* (2005-2006): 1280.

[29] Simon Crookenden QC, "Who Should Decide Arbitration Confidentiality Issues?" *Arbitration International* 25 (December 2019): 605.

[30] Article 30 of LCIA Rules.

[31] Article 1 section (7) of Law No. 30 of 1999.

[32] Emmanuel Gailard and John Savage, *Fouchard, Gailard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 609-613.

[33] Pursuant to Article 27 of Law No. 30 of 1999, all of the process in dispute inspection by the arbitrators is done closely.

[34] Article 13 section (1) of Law No. 48 of 2009. Also look at Art. 52 section (1) that the courts have to make their decisions accessible to the public.

usual process of civil law procedure, it is justified to emphasize confidentiality in the arbitration process as a dispute resolution.[35]

Furthermore, in the Explanation Part of the law, confidentiality is one of the advantages of arbitration over other institutions. This assumes that there is a general understanding in arbitration procedures that confidentiality is a procedural elemnt that must be maintained in the entire implementation of dispute resolution through arbitration.

The normative basis for confidentiality is also found in the internal regulations for the arbitrators – in this case, the regulations issued by BANI. Pursuant to Article 14 paragraph (2) (Confidentiality Section) of the BANI Indonesia Arbitration Rules and Procedures of 2022:

> All trials are closed to the public, and all matters relating to the appointment of arbitrators, including documents, reports/records of trials, witness testimonies, and decisions, must be kept confidential between the parties, the arbitrators, and BANI, except by laws and regulations it (that confidentiality) is not required or agreed upon by all disputing parties.

The article emphasized that there is a general understanding of confidentiality as an advantage of the arbitration process. This is also in line with Article 6 of the BANI Code of Ethics and Guidelines for Arbitrators' Conduct, in which it is stated in several paragraphs that: (1) the arbitrators are obliged to maintain confidentiality on all matters relating to the case, the course of the arbitration process, the results of the deliberation of the arbitral tribunals, and/or the awards, before and after the awards are read to the disputing parties; (2) the arbitrators are prohibited from discussing the cases they are settling outside the court proceedings; (3) the arbitrators are prohibited from using confidential information obtained during the arbitration process for their personal interests or the interests of others.

The importance of confidentiality can be observed in practice. First, it is to maintain the reputation of the concerned parties. Besides, from the side of arbitral tribunals, the confidentiality guarantee helps them settle the disputes.

Normally, parties are apt to settle their disputes in a format not open to the public. Rosan Perkasa Roeslani, the former Chairman of the Indonesian Chamber of Commerce and Industry (*Kadin*), provides testimony that such a format protects companies' reputations.[36] As written by Margarot Jacoby in Huffpost, not only does a lawsuit cost a company a lot of money, regardless it has been dismissed by the court, but it also makes customers hesitant to do business with that company.[37] The reason is that the news spread cannot be filtered by the company; thus, customers play safe to stay out of trouble. reputation becomes one of the main business assets responsible for sustained financial outcomes.[38]

2.3. Good Faith

In essence, in the context of arbitration, good faith is an intention to resolve a dispute based on these three grounds: (1) truth; (2) benefit; and (3) justice. Several implications arise directly from these grounds. First, the purpose/intent of submitting a case to an arbitration institution is to settle disputes, not merely to gain claims as much as possible. Second, this purpose implies the way the arbitration process is done; the disputing parties should not cherry-pick facts and arguments that are in their favor.

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[35] Explanation of Article 27 of Law No. 30 of 1999.

[36] Badan Arbitrase Nasional Indonesia, *The Role of BANI in the Development of Arbitration* (Jakarta: BANI, 2020), 68.

[37] Peter W. Roberts and Grahame R Dowling, "Corporate Reputation and Sustained Superior Financial Performance," *Strategic Management Journal* 23 (September 2002): 1077.

[38] Peter W. Roberts and Grahame R Dowling, "Corporate Reputation and Sustained Superior Financial Performance," *Strategic Management Journal* 23 (September 2002): 1077.

To Priyatna, arbitration is a dispute settlement that bases its resolution on evidence provided by the parties, but with honesty and good faith.[39]

The importance of good faith in arbitration is also emphasized in the 'Guidelines on Standards of Practice in International Arbitration' published by ICCA which provides a survey of professional standards, ethical rules, and civility guidelines under a variety of jurisdictions. The guidelines explained arbitral process will work effectively and fulfill its purpose according to participants' acts of good faith, treating each other with respect, courtesy, and civility, as well as adhering to the standards of integrity, honesty, and candor.[40]

Based on Black's Law Dictionary, good faith is a mental state that consists of four elements. The first element is honesty in intent.[41] This means that the demonstrated intention is sincere to resolve the disputes. The second element is loyalty to duties or obligations.[42] The third element is compliance with the commercial standards in transactions.[43] Fourth, a person with good faith does not cheat on the system or seek personal gains, but does have the intention for the sake of collective goods.[44]

The next question is: why is good faith necessary in arbitration? The UNCITRAL Model Law on International Commercial Arbitration explains the uniform rules of a arbitration process that aims to ensure the predictability and the certainty of the process. One of the principles is good faith according to Article 2A (1) of the Model Law. It is explained that the interpretation of this Model Law needs to promote uniformity and observe the existence of good faith as the international origin and general principles.[45] This proves that the principle of good faith has global importance in the practice of arbitration, as well as in its practice in Indonesia.

In Indonesia, the term "*iktikad baik*" (good faith) is also normatively mentioned 3 (three) times in the law on Arbitration and ADR. According to these several provisions, good faith must be the basis of both making an arbitration clause and in the arbitration process.

1. The basis or foundation of dispute resolution outside the court through the alternative dispute resolutions – one of which is arbitration – is good faith. (Article 6 paragraph (1)). In this context, good faith is discussed at the stage that arbitration is being selected as a method of dispute resolution or the creation of an arbitration clause.
2. The arbitration clause is immediately binding on the parties to be implemented in good faith (Article 6 paragraph (7)). In this context, good faith is discussed in the stages of the arbitration process carried out by the disputing parties.
3. The arbitral tribunal that carries out all actions taken during the trial process to carry out its functions, based on good faith, cannot be subject to any legal responsibility (Article 21). In this context, good faith is discussed at the stage of the arbitration process carried out by arbitral tribunals.

Beside its normative importance, good faith, based on our observation, has a practical significance. The application of good faith by both parties makes the dispute resolution process the nuance of honesty, not adversarial. From the side of arbitral tribunals, this nuance will make it easier for the tribunals to grant fair awards. The disputing parties not having good faith will complicate the process by hiding or manipulating facts.

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[39] H. Priyatna Abdurrasyid, *Penyelesaian Sengketa Komersial Nasional dan Internasional) di luar Pengadilan*, Article, September 1996, 1.

[40] Audrey Sheppard, "The Lawyer's Duty to Arbitrate in Good Faith and with Civility," *Arbitration International* 37 (2021): 544.

[41] Anita Dewi, *Asas Itikad Baik dalam Penyelesaian Sengketa Kontrak Melalui Arbitrase* (Bandung: Alumni, 2013), 95.

[42] *Ibid.*

[43] *Ibid.*

[44] *Ibid.*

[45] Article 2A of UNICTRAL Model Law on International Commercial Arbitration.

2.4. Arbitration in Indonesia after the Pandemic

Even in a pandemic situation, many business disputes still go to BANI to be solved. There are disputes over agreements that were made before the pandemic emerged or after. The implementation of health protocols and *social distancing* policies forces the businessmen involved and BANI to accommodate teleconferencing technology. At the same time, all parties are beginning to feel that the existence of this technology results in a much more efficient arbitration process in time and cost regardless of the shortcomings produced. However, there are things related to teleconferencing technology that need to be considered for the application of the principle of confidentiality to it.

The first thing to note is: can the available video conferencing platforms really guarantee no unauthorized parties can access the conference? Today, these platforms are not only what they used to be Skype, but also Zoom, Google Meet, Lifesize, Microsoft Teams, Cisco Webex, Join.me, CyberLink U, Zoho, Any Meeting, and others. All of them not only offer ease and completeness of use, but also confidentiality by using *the end-to-end encryption* feature.

What is the understanding of end-to-end encryption? In simple terms, the data / messages sent by the *sender* will be encrypted or made in the form of codes until they reach the *receiver* so that no one will be able to access in the middle of the delivery. As long as, no one has the decryption key, the transmitted message will not be readable. Thus, in fact, in simple terms, according to Kurt Guntheroth, if the key is successfully retrieved or even in the hands of an unknown institution for decryption, the communication can still be read in the middle before it reaches the recipient.[46]

In addition, attention to end-to-end encryption existed for a long time before the internet was what it is today. There is a report made by Michael A. Padlipsky, D.W. Snow, and P.A. Krager entitled "*Limitations of End-to-End Encryption in Secure Computer Networks*". This report was made, in 1978, for the Deputy for Technical Operation of Electronic Systems Division of Air Force Systems Command of the United States Air Force. In essence, in this report, it is stated that it is not enough to rely on end-to-end encryption technology as a way to guarantee security. The main reasons are:[47]

> *[p]otential senders of classified information have several channels (addresses, lengths, and timing of transmissions) available through which to communicate with potential receivers. Although it is at best extremely difficult to eliminate the potential senders or to block the channels, it does seem that the potential software receivers of the information can be prevented from further communicating the information to human agents. The security kernel-based communications subnetwork processor to do this, however, could even be permitted to receive unencrypted transmissions from the Host.*

Not only in the matter of the proceedings through the arbitration, but also the submission of thousands of files to the Tribunal. In online events, the parties can of course collect these files online through encrypted messages. However, not all online messaging services also have an encrypted system that can guarantee that there will be no conceding. Unlike the case of collecting files in person or offline, no one will be able to interrupt in the middle to read them.

The second issue to note is how to ensure that during the examination of witnesses or the trial process, there are no irrelevant parties in it. In simple terms, the solution that can be given is to use a

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[46] Kurth Guntheroth is an expert in software development (*software engineer*) for almost 40 years. Kurt has worked with C++ for more than 20 years, as well as with Dale Green and Shaun R. Mitchell created a book called "*The C++ Workshop*" and several other publications. This answer is given in a question asked through Quora with the question: *can end-to-end encryption be hacked?*.

[47] Michael A. Padlipsky (1939-2011) was a graduate of the Massachusetts Institute of Technology who was one of the early members of the team that developed *the Arpanet networking protocols* which is the foundation of today's internet. One of his books that *groundbreaking* be *The Elements of Networking Style*.

360° camera. Nonetheless, usually, the parties will go directly to the person's place or call him at his representative's office to state his testimony. Ultimately, the complexity of ensuring this confidentiality also arises in online hearings.

Despite these issues, the use of online trial mechanisms is a necessity. Apart from the wide variety of issues that surrounds it, the expediency in terms of efficiency 'forces' both the parties and the Arbitral Body as well as the arbitral tribunal to use it. Moreover, for example, the parties to the dispute are cross-border or even just cross-county, and also the arbitrators are not always in one place. Distance and time constraints are no longer an issue in such contexts as the presence of online hearings. Currently, BANI has formulated in detail the procedure through online hearing in the BANI Arbitration Rules and Procedures 2022 to ensure the preservation of the principle of confidentiality. Virtual hearings and hybrid proceeding can be used so long as both the disputing parties and the tribunal agree to do so.

3. Straightening out the Arbitrated Paradigm: Win-Win or Win-Lose?

In this paper, the paradigm in question is a win-win, win-lose, or even *a lose-lose* mechanism. Based on the interviews we conducted, several arbitrators and academics stated that the paradigm of arbitrage is a *win-win* mechanism; in fact, some state that paradigms should be *lose-lose*. On the other hand, the other advocates as well as academics state that arbitration should be a *win-lose* mechanism as a differentiator from other dispute resolution methods such as negotiation, conciliation, or mediation. We ourselves once revised by *peer-reviewed* in a national law journal that arbitration should be a *win-lose* mechanism.

The paradigm is a basic foothold in the minds of each party, be it the arbitrator or the parties to the dispute, in arbitrating. For arbitrators, this footing will determine how the arbitration procedure begins until the final award is made. For example, when a *win-win* mechanism is implemented, there is a tendency during the proceedings that the sole arbitrator/arbitrator tribunal should not make either party feel in a losing state. At the end, each party must feel that the award rendered puts the parties in a victorious state. Thus, any process of proving facts, the application of norms, the application of business concepts, should be directed to such orientation.

On the other hand, this paradigm also raises the question: is it possible that in a dispute, both parties to the dispute equally win? Based on a statement from one of the arbitration lawyers we interviewed, the application of *a win-win* mechanism in the world of arbitration in Indonesia will only make businessmen rethink using arbitration services in Indonesia. Basically, for the parties to the dispute and the attorneys, the use of arbitration is to determine whose arguments are more appropriate to apply in a final and binding manner, not to reconcile the two by means of applying a *win-win* mechanism. This is because the parties to the dispute can also continue the civil relationship between the two by resolving the dispute in a *win-lose* manner.

Nonetheless, the statement about the win-lose paradigm also raises some issues. The main problem that arises is that this paradigm gives birth to an implication that is not in line in the context of dispute resolution in Indonesia, namely reconciling. The principle is *amicable resolution preserves relation*. In the nuances of that paradigm, as is often the case in court proceedings, there is a tendency to assume that it is the right party. Although in the general context of arbitral business dispute resolution that we often find, not always one party is 100% correct while the other party is 100% wrong. Assuming each of the parties to the dispute is in good faith, the adversarial nuances should not be implemented.

One of the concrete implementations of the amicus resolution is the deliberative approach which is the soul of the Indonesian nation, for example Hybrid Arbitration. This mechanism combines arbitration with other ADR mechanisms, for example with mediation or Arb-Med-Arb. The mediation process in arbitration is different from the mediation conducted in courts in Indonesia as stipulated in Supreme Court Regulation Number 1 of 2016. If in court mediation is conducted by force so that it is

often carried out only by mere formality, in arbitration proceedings mediation is conducted voluntarily after the arbitrator has opened up the parties' thinking that mediation is a viable mechanism to be pursued in order to obtain a mutually acceptable settlement. In addition, arbitrators have an obligation to seek deliberation between the parties in any proceedings, so that mediation proceedings in arbitration may be held at any time if the arbitral award has not been read out. This explains why the success rate of mediation in arbitration proceedings is much higher compared to in court.

C. Conclusion

The role of BANI in the development of arbitration in Indonesia is significant. At the age of 45, BANI has sought to socialize the correct understanding of arbitration both through public seminars and when it becomes an institution for organizing business dispute resolution through arbitration. Not only consistently making substantive distinctions from the courts in general, all elements of BANI continue to strive to socialize 3 basic principles in arbitration, namely trust, confidentiality, and good faith. As an implication, especially in the last 10 years, more and more businessmen trust BANI to be a dispute resolution forum that arises because it is in line with the needs of their desired dispute resolution characteristics. In our opinion, this can happen because the main factor is the awareness of business people that dispute resolution through arbitration at BANI is better than conventional dispute resolution methods through the courts. Nevertheless, BANI continues to evaluate in various aspects to continue to be the organizer of dispute resolution through competitive arbitration in the Asia Pacific environment.

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