

DYNAMEIS CLIENT INSIGHT

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Indonesian National Arbitration Board – Badan Arbitrase Nasional Indonesia (“BANI”) has issued Decree Number 20.-15/V/SK-BANI/HU on Regulation and Procedure on Electronic Arbitration Process (“Reg.20”).

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ONLINE ARBITRATION IN INDONESIA

The basis for the Arbitration process to be performed online/electronically is upon the occurrence of (i) disaster emergency condition; and (2) specific condition.

Disaster Emergency Condition *and* Specific Conditions

Note the use of the wording “*and*” above. It means that both the Disaster Emergency Condition and Specific Condition **must occurred at the same time** in order for the arbitration process to be performed electronically.

Disaster Emergency Condition as one of the basis for arbitration process to be performed electronically is translated from **Keadaan Darurat Bencana**, a term coined by Indonesian Government and gained its “popularity” during the COVID19 pandemic. Reg.20 refers to Law no 24 year 2007 on Disaster Management for the definition of Disaster Emergency Condition, which is: *a condition set by the Government for a certain period of time on the recommendation of the Agency given the task of disaster management.*

Specific Condition as another basis for arbitration process to be performed electronically, is a condition where any of the Claimant, Respondent or even the Arbitrator is **unable to appear** at BANI or the place of the arbitration hearing due to the Disaster Emergency Condition and or any other specific condition which include illness, travel restriction from health officials including doctor or any other authorized officials or any other travel restriction condition.

Will it applied to post COVID-19 conditions?

Yes, if there is another Disaster Emergency Condition being set by Indonesian Government. When there is no Disaster Emergency Condition, then based on the wordings in the Reg.20, **there is no basis** for the arbitration process to be conducted electronically.

We believe that current basis for electronic arbitration process of only Disaster Emergency Condition and Specific Condition is not sufficient. The basis for electronic arbitration process should be expanded.

Electronic Arbitration Process will apply to post-COVID19 situations if there is another Disaster Emergency Condition

Agreement by the Parties

Reg.20 states that arbitration process can be conducted electronically **if the parties agree to it**. With no clear definition of “the parties” we have to assumed that “the parties” refer to the Claimant and the Respondent in the arbitration process.

It means that the initiative and **the decision to conduct arbitration process electronically is on the hand of the parties and not from BANI**. Even if Disaster Emergency Condition and Specific Condition occurred but the parties cannot agreed to conduct the arbitration process electronically, then the normal arbitration process must take place. It is interesting to know the reasoning why BANI does not retain its sole discretion to decide whether an arbitration process must be performed electronically instead of leaving it to the hand of the parties.

We believe that most if not all of the current agreements/contracts that use BANI as a choice of arbitration **has not put the electronic arbitration process** in their dispute settlement clause. Therefore when there is dispute to be settled by the parties under arbitration forum, the parties must reach an agreement whether to conduct arbitration process electronically or not.

To anticipate the parties failing to reach agreement on this matter, it is recommended that any current and applicable agreement/contracts with dispute settlement clause that utilize BANI should be **revised**.

RECOMMENDATION

1. Expand the basis for electronic arbitration process. It should not only cover or tied to Disaster Emergency Condition but also other difficult conditions that hinder the ability to conduct normal arbitration process. **The revision of the wording “and” into “and/or”** on the conditions that occurs is a good place start.
2. Avoid possibility of disagreement between the parties in deciding to conduct electronic arbitration process or not. We believe that **BANI should have the sole discretion** to decide that arbitration process must be conducted electronically.
3. **Revision on the current contracts** with dispute settlement clause that utilize BANI to accommodate the electronic arbitration process. Revision of the dispute settlement clause must (i) minimize the risk of the parties failing to reach agreement on whether to conduct arbitration process electronically or not; (ii) electronic platform to be used on the teleconference, video conference, virtual conference; (iii) who will attend the respective teleconference; and other matters that must be addressed in an electronic process where otherwise do not become an issue in normal arbitration process.

The information contained herein is not intended to provide formal and specific advice and merely highlight important issues in relation to electronic arbitration process. Dynameis makes no warranties about the completeness, reliability and accuracy of the information contained herein. Further, Dynameis is not responsible for any errors or omissions or for the results obtained from the use of this information.

You should seek specific advice prior to take any actions including revision to your current contracts to accommodate electronic arbitration process. Should you have further questions with regard to matters as elaborated above or any other matters, please do not hesitate to contact your usual Dynameis' representative or you may contact our Albert Dustin at albert@dynameisconsulting.com