

Dispute Resolution

Affidavits of Witnesses and Experts in Indonesian Arbitration Practice



Introduction

Looking at the current trend in Indonesian arbitration practice, it is now more common for arbitrators to request the submission of affidavits of witnesses and experts prior to their examination in the hearing. While Indonesian Civil Procedural Law does not specifically recognise the concept of affidavits, the concept of affidavits in the Indonesian Arbitration Law may stem from international arbitration practice. In established international arbitration practice, arbitrators tend to order each party to submit the affidavits of witnesses and experts as reflected in the IBA Rules on the Taking of Evidence in International Arbitration ("**IBA Rules**"). This has led arbitrators with an Indonesian law background to use the Indonesian law approach when examining witnesses or experts that have previously provided the tribunal with a written affidavit.

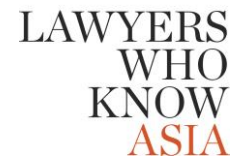
The evidentiary value of affidavits under Indonesian Law holds different weight compared to the IBA Rules. Under the IBA Rules, written statements by way of affidavits can be considered as evidence, whereas under Indonesian Civil Procedure Law, statements of witnesses and experts can only be considered evidence if those statements are given verbally where the individual takes an oath before the tribunal.

Another point worth noting is that the examination of witnesses and experts under Indonesian law focuses more on direct examination than cross examination. Having this mindset, an Indonesian arbitrator tends to not allow the parties, either in direct or cross examination, to address questions that have been established by way of affidavit as it may be deemed repetitive. This approach may have several pitfalls given that the parties will have limited rooms to contest the accuracy of the testimony set out in the affidavit.

Accordingly, it is very important for the parties to formulate affidavits in a specific way to ensure that they can benefit from this approach. The strategy must take into account all possible advantages and disadvantages when conducting direct or cross examination.

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In this article, we will set out practical tips on the format, content, and structure of affidavits that parties, witnesses, and experts may wish to consider when drafting affidavits to be submitted before an Indonesian tribunal or an Indonesia-seated arbitration.

Format of Affidavit

Although affidavits are commonly used in established Indonesian litigation practice, it is important to note that there is no legal basis under Indonesian law which regulates the affidavit, let alone the format of the affidavit. This lack of regulation allows the witness and/or the expert to freely formulate the format of their affidavit.

In contrast, for international arbitration, the IBA Rules regulate the information that shall be incorporated in the affidavit. The information should at least contain the following:

Witness Statement	Expert Report
<ul style="list-style-type: none"> a) the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the statement; b) full and detailed description of the facts, and the source of the witness’s information as to those facts, sufficient to serve as that witness’s evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided; c) a statement as to the language in which the Witness Statement was originally prepared and the language in which the witness anticipates giving testimony at the evidentiary hearing; d) an affirmation of the truth of the Witness Statement; and e) the signature of the witness and its date and place. 	<ul style="list-style-type: none"> a) the full name and address of the party- appointed expert, a statement regarding his or her present and past relationship (if any) with any of the parties, their legal advisors and the arbitral tribunal, and a description of his or her background, qualifications, training and experience; b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions c) a statement of his or her independence from the parties, their legal advisors and the arbitral tribunal; d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions; e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the expert relies that have not already been submitted shall be provided; f) if the expert report has been translated, a statement as to the language in which it was

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	<p>originally prepared, and the language in which the party-appointed expert anticipates giving testimony at the evidentiary hearing;</p> <p>g) an affirmation of his or her genuine belief in the opinions expressed in the expert report;</p> <p>h) the signature of the expert and its date and place; and</p> <p>i) if the expert report has been signed by more than one person, an attribution of the entirety or specific parts of the expert report to each author.</p>
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As an Indonesian arbitration is not bound to follow the IBA Rules if the parties have not consented to it, the format and content of an affidavit may vary between arbitrations.

There are many styles of format that are used in the established Indonesian arbitration practice. The most popular formats are where the information is provided in a Q&A format, or where the statements are set out in essay writing style.

Nonetheless, the witness and/or expert may opt to adopt any format that he/she is comfortable with. There is no strict criteria governing the merit of any particular format, so long as the affidavit is readable, clear, and delivers the message that the writer wishes to express to the tribunal.

Content of Affidavit – General Versus Specific Details

Given that there is no guidance on what the affidavit should contain, it is easy to lose track of the information that needs to be delivered in the affidavit.

In formulating the affidavit of a witness or expert, a party in an arbitration needs to have an idea of the potential questions that the opposing party may address to the witness/expert. Bearing in mind that the tribunal would be likely to eliminate questions that have been answered in the affidavit, an affidavit should address, with specific details, the key information, statements, or opinions of the expert. By taking this approach, the opposing party may have a very limited opportunity to challenge or contest the testimony.

Furthermore, the parties may also consider addressing potential questions from the opposing parties in the affidavit. Although the testimony elicited may not be in favour of the party calling the witness or expert, it may still be less harmful if the question is raised by a friendly party instead of the counterparty. This will help the relevant party to water down the adverse impact from that testimony. That said, this approach may not be applicable in all instances – for example, if the opposing party would not otherwise have identified the flaw in the first party’s position.

It is important to note limitations in Indonesia on the type of information that can delivered by a witness or expert. As it is rooted in Indonesian Criminal Procedural Law, the general practice of arbitration in Indonesia requires a

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witness to only testify on facts that he/she hears, sees, and experiences (i.e. not hearsay) without providing an opinion on it. If the witness testimony includes hearsay, the counterparty will likely challenge the statement, although it is the Tribunal who will decide on whether those statements still can be weighed and taken into consideration in rendering the decision.

With regard to expert examination, the major difference with international arbitration practice is that an expert witness is not allowed to provide testimony or opinion based on the facts of the present case. Instead, the expert will need to give an illustration on how his/her opinion will be implemented or how it will work in a real-life situation.

Structure of Affidavit

As we have mentioned, there is no specific format and structure for an affidavit and thus there are many styles of format that can be found in the practice. Nonetheless, there are several key points which are essential in structuring the affidavit.

Witness affidavits

For the structure of witness affidavits, facts should be arranged in a coherent manner. It will be helpful for the reader if the facts are established in chronological order. In this sense, the information can be easily absorbed by the reader given that the information provided is clear and systematic.

Prior to elaborating the facts that the witness will testify on, it is of utmost importance for a witness to provide the background of his/her standing as the witness in the affidavit. It should be clearly provided in the affidavit that the witness has the capacity to provide testimony on the fact that he/she heard, saw or experienced.

In cases which involve many witnesses, it would be beneficial if the affidavits are expressed in the form of a question and answer (Q&A) structure. This type of structure can efficiently guide the focus of both the witness who will give testimony and the reader on the information provided in the respective witness affidavits. This structure would also be helpful for the tribunal as they can focus on the issues that the witnesses will testify on.

Expert affidavits

For an affidavit of an expert, it is common for the affidavit to start with a description of his/her background, qualifications, training, and experience. This section is important as it informs the tribunal that the said expert has the necessary expertise to provide his/her opinion on the case at hand. The affidavit should also contain a statement of his/her independence from the parties, their advisors and the tribunal.

In establishing the expert affidavit, it is important to start with the analysis of the most important issues being disputed. Opening the affidavit with the most important issues will help the tribunal to be more focused on key issues rather than the less important ones.

For complex cases, it would also be helpful for the expert affidavit to be presented in the Q&A structure as it will help the tribunal focus on expert opinion on the issues being disputed. However, if the experts are needed to shed

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light on technical issues being disputed, it might also be favourable if the affidavit is structured in an essay writing style so that the opinion can be delivered in full.

The information delivered in the affidavits will be relied upon by the tribunal and the counterparty during the examination. Therefore, it is of paramount importance for the affidavit to be clear and comprehensible.

Concluding Remarks

The lack of Indonesian law that regulates the affidavit can bring advantages to the parties in arbitration, as the witness and/or expert can formulate their affidavit in the most suitable manner. Considering that Indonesian arbitral tribunals are prone to rely on affidavits, it is critical for the affidavit to be able to deliver clear information and shed light on the issues being disputed so that it can help the tribunal render the arbitral award in the favour of the party that called the witness and/or expert.

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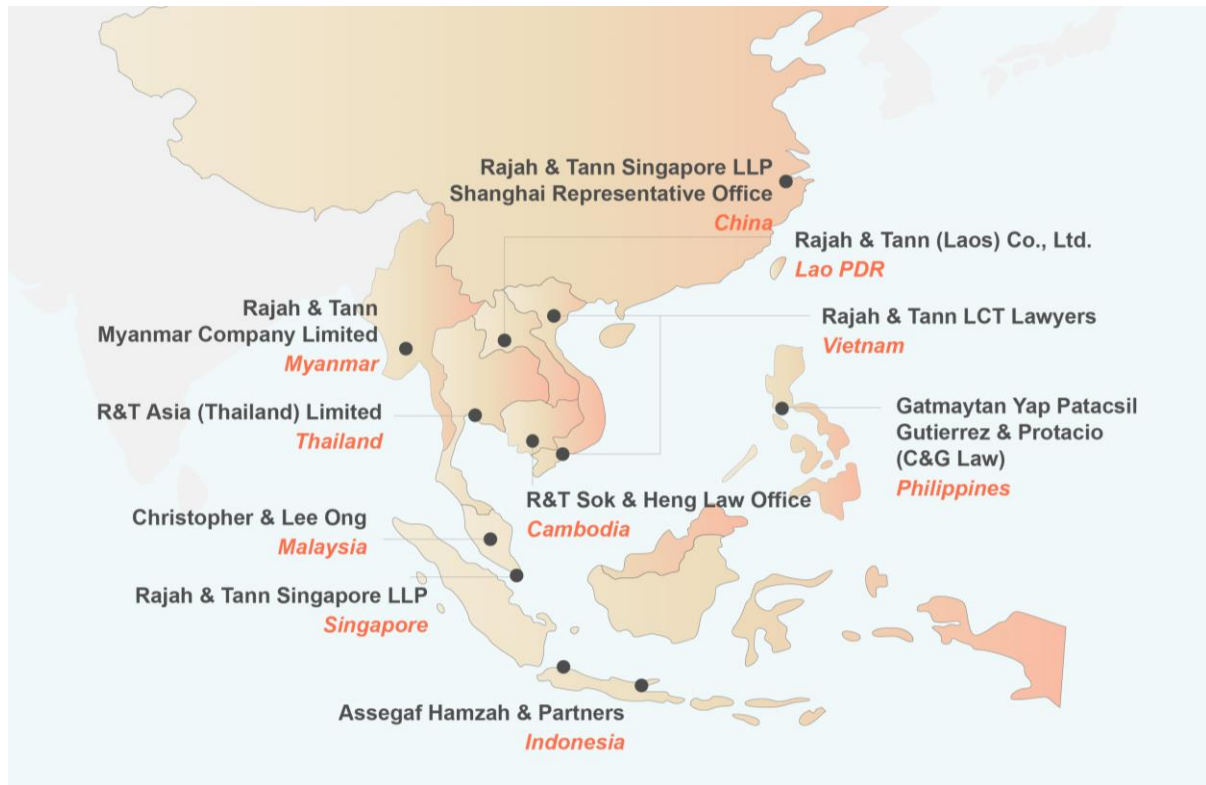
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