Contents

1. Introduction. ................................................................. 03
2. Definitions ................................................................. 04
3. Dispute resolution clauses ............................................. 08
   3.1 What are your options? ............................................. 08
   3.2 Litigation .............................................................. 09
   3.3 Domestic arbitration ................................................ 10
   3.4 International arbitration ......................................... 15
   3.5 Other dispute resolution mechanisms ....................... 17
   3.6 Issue checklist ....................................................... 18
4. Governing law clauses .................................................. 23
   4.1 When should you apply Indonesian law? .................... 24
   4.2 Choice of foreign law .............................................. 24
   4.3 Are there mandatory rules of Indonesian law not
       ousted by a foreign choice of law clause? ................. 25
   4.4 What happens if there is no governing law clause? ...... 26
   4.5 Checklist for contracts governed by Indonesian law ...... 27
Appendix ............................................................................. 29
Contacts ............................................................................ 31

Publisher’s note

This guide is published by Herbert Smith Freehills in association with Hiswara Bunjamin
& Tandjung.

The contents of this guide are for reference purposes only. They do not constitute legal
advice and should not be relied upon as such. Specific legal advice should always be sought
separately before taking any action based on this guide. The information provided in this
guide is accurate as at 1 February 2020.
1. Introduction

What is this guide?
This guide is primarily intended to assist in-house counsel of multinational companies who handle commercial contracts with a nexus to Indonesia (e.g., where one of the contracting parties is Indonesian, where the subject matter or performance under the contract is in Indonesia, or where Indonesian law is the governing law). It is intended to help readers understand:

- whether there are applicable legal or other restrictions on a party’s ability to select a governing law and/or dispute resolution clause and when these restrictions apply;
- what issues should be considered when selecting a governing law and dispute resolution mechanism for your Indonesia related contracts;
- drafting tips.

Section 2 contains a list of defined terms used in this guide.

What are the key points?
When selecting and drafting the dispute resolution clause, the key points are:

- arbitration is generally preferred to civil litigation unless there are compelling reasons otherwise;
- arbitration seated outside Indonesia is generally a better option for non-Indonesian parties than arbitration seated in Indonesia;
- if arbitration seated in Indonesia is necessary, it is generally best to opt for either ad hoc arbitration under the UNCITRAL Arbitration Rules, or arbitration administered by institutions such as the SIAC, ICC, PCA (typically where the State or an SOE is involved), LCIA, or any other established arbitral institutions.

Section 3 explains these points in greater detail, provides a flow chart and a checklist as guidance on drafting a more effective dispute resolution clause.

When selecting the law governing the contract, the key points are:

- parties are generally free to select any system of law to govern their Indonesia-related contracts, unless mandatory sector-specific laws in Indonesia prescribe otherwise;
- there is a risk that a choice of foreign law will not be given effect by the Indonesian court if proceedings relating to the contract are brought before it. This risk is increased where the contract and/or parties have no foreign nexus, other than the selection of foreign law or an offshore dispute resolution forum; and
- certain mandatory laws in Indonesia apply to Indonesian parties, or to certain types of contracts, and may not be displaced by the selection of foreign governing law.

Section 4 discusses these issues and circumstances in greater detail.
3. Dispute resolution clauses

3.1 What are your options?

The two basic options for finally resolving disputes are litigation and arbitration. Litigation is discussed in Section 3.2 below. Arbitration, which is the focus of this guide, is discussed in Sections 3.3 and 3.4. Section 3.5 briefly discusses other alternative dispute resolution mechanisms, such as negotiation, mediation, and expert determination, and Section 3.6 provides a checklist of issues, tips, and pitfalls to avoid when drafting your arbitration agreement.

The flowchart summarises the issues to consider in selecting the appropriate dispute resolution mechanism for your contract. This flowchart should be read in conjunction with the explanation in the following Sections.

Is your contract a commercial contract?

Yes

Arbitration unless it requires litigation (see below)

Are there any specific regulations requiring the arbitration to be seated in Indonesia?

Yes

Domestic arbitration (see Section 3.3)

No

International arbitration (see Section 3.4)

No

Does your contract concern enforcement against property located in Indonesia (eg pledge of shares in Indonesian company, sale or mortgage of land)?

Yes

Onshore litigation (see Section 3.2)

No

Seek specialist advice on whether it is possible to opt for offshore litigation, whether on exclusive or non-exclusive basis (see Section 3.2)
Contacts

Key contacts

- Alastair Henderson
  Managing Partner, Southeast Asia
  Head of International Arbitration Practice, Southeast Asia
  T +65 6868 8058
  alastair.henderson@hsf.com

- David Dawborn
  Partner (Herbert Smith Freehills)
  Senior International Counsel
  T +62 21 3973 6102
  david.dawborn@hbtlaw.com

- Narendra Adiyasa
  Partner
  +62 21 3973 6108
  narendra.adiyasa@hbtlaw.com

- Debby Sulaiman
  Partner
  T +62 21 3973 6103
  debby.sulaiman@hbtlaw.com

- Gitta Satryani
  Partner
  T +65 6868 8067
  gitta.satryani@hsf.com

Other contacts in Southeast Asia

- Peter Godwin
  Managing Partner, Kuala Lumpur
  Regional Head of Dispute Resolution Practice, Asia
  T +60 3 2777 5104
  peter.godwin@hsf.com

- Chinnawat Thongpakdee
  Managing Partner, Bangkok
  T +66 2 857 3829
  chinnawat.thongpakdee@hsf.com

- Warathorn Wongsawangsiri
  Partner
  T +66 2 857 3828
  warathorn.wongsawangsiri@hsf.com

- Elaine Wong
  Partner
  T +65 6868 8084
  elaine.wong@hsf.com

- Tomas Furlong
  Partner
  T +65 6868 8085
  tomas.furlong@hsf.com

- Daniel Waldeke
  Of Counsel
  T +65 6868 8068
  daniel.waldeke@hsf.com