

Arbitration Settlement in the ASEAN Economy Community

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ABSTRACT

Arbitration of business disputes is the most popular choice for business people, especially in the current MEA era. The focus of this research is: 1). What is the process of resolving business disputes through arbitration in the era of the ASEAN Economic Community (AEC)? 2). What is the ideal concept of Arbitration within the framework of the ASEAN Economic Community (AEC)? This research is a normative juridical with legislation, conceptual, historical, and case approaches. In the ASEAN region there are several arbitration institutions that handle the issue of arbitration, namely: in Indonesia the Indonesian National Arbitration Board (BANI) and in Malaysia, namely the Kuala Lumpur Arbitration Center. From the results of the discussion it is known that: there are some differences and similarities in the process of dispute resolution through arbitration between the State of Indonesia and Malaysia from several aspects including aspects: regulation, trial process, decision strength, time and cost. And of the two countries that have the prospect of arbitration settlement in the MEA era is arbitration in Indonesia by having several advantages in the arbitration settlement process, namely the period and cost of the arbitration process. In conclusion, the arbitration process in the State of Indonesia has good prospects compared to the State of Malaysia, so it can be used as an example to equalize the arbitration process in the ASEAN region even though countries in ASEAN have different legal systems.

Keywords: *dispute resolution, arbitration, MEA*

1. INTRODUCTION

In trade activities, it is not only about profits, losses and business strategies that must be faced by business actors, but also about the legal aspects when a dispute occurs. If a trade dispute occurs, there are two ways to resolve the issue, namely dispute resolution with litigation or non-litigation. Litigation is the process of resolving disputes in court, while non-litigation is resolving disputes outside the court. Traders tend to choose non-litigation dispute settlement paths because of quick and efficient non-litigation settlement. In addition, the settlement of cases outside the court is recognized in the legislation in Indonesia.

First, in Article 38 paragraph 2 of Law Number 48 Year 2009 concerning Judicial Power, it is stated: Functions relating to judicial authority as referred to in paragraph 1 include:

- a. investigation and investigation;
- b. prosecution;
- c. implementation of decision;
- d. provision of legal services;
- e. dispute resolution outside the court.

There are two types of dispute resolution methods that have been applied so far, namely through litigation and non-litigation. One non-litigation path is the arbitration process. In Indonesia as a rule of law, Indonesia has long known that there is an arbitration process that can be seen based on the legal system of arbitration.[1]

Arbitration is the choice of business actors to solve problems without going through a judicial institution which is often long because of the appeal, cassation, and review process. Besides arbitration has principles such as efficiency, accessibility, protection of the rights of the parties, final and binding, fair and just, and in accordance with the sense of justice of the community thus, the "deterrent" element of the violator, and the dispute, will be guaranteed will be preventable.[2]

One way to resolve non-litigation disputes is through an arbitration process. The advantage of arbitration in terms of procedural law is the flexibility that remains within the legal corridor. On the other hand, the arbitrator who has knowledge both in legal and technical terms, as well as the timeliness of the trial, becomes an advantage of the arbitration itself so that the hearing can run effectively. In addition, the continuation of business relations between the parties was also considered. It does not even rule out the possibility of good relations and cooperation can still be continued.[3]

Settlement of disputes outside the court is closed to the public (close door session) so that the confidentiality of the parties is guaranteed, then the process of proceeding is faster and more efficient and the decision given is a win-win solution. The process of resolving disputes outside the court avoids delays caused by administrative procedures as proceeded in a general court. Settlement of disputes outside the court is called Alternative Dispute Resolution.[4]

There are several arbitration institutions in the world, including in Indonesia there is the Indonesian National Arbitration Board (hereinafter referred to as BANI), BAMUI, BAPMI, etc. While in some ASEAN countries there are also arbitration institutions, for example in Singapore: Singapore International Arbitration Center (SIAC), in Malaysia: Kuala Lumpur Regional Center for Arbitration (KLRCA) Kuala Lumpur Regional Center for Arbitration (KLRCA). For international arbitration institutions, for example: The International Center for Settlement of Investment Dispute (ICSID), WIPO Arbitration Center, International Chamber of Commerce (ICC), The London Court of International Arbitration (LCIA), and many other international arbitration institutions. If the perpetrators of international trade have a dispute, then the parties get the freedom to choose the domicile of the law to carry out arbitration in accordance with the agreement made.

BANI is the founder of the Asia Pacific Regional Arbitration Group (APRAG) which consists of 42 arbitration institutions from various countries in the Asia Pacific region, according to data on dispute resolution by business actors through arbitration institutions that continues to increase from year to year. Data from the BANI Arbitration Center said that cases registered at BANI in the 2007-2016 period were 728 cases. This number increased to 238% compared to 1997-2006 with 215 registered cases. Previously, in the period 1987-1996 there were 56 cases registered.[5]

The legal issues in this study are about: 1). What is the process of resolving business disputes through arbitration in the era of the ASEAN Economic Community (AEC)? 2). What is the ideal concept of Arbitration in the framework of the ASEAN Economic Community (AEC)?

2. METHODS

This legal research is normative juridical, namely formulating legal research as a process to find a rule of law, legal principles, and legal doctrines in order to answer the legal issues at hand.[6] In this study using a comparative method: statue comparative, historical, conceptual and case Source of Legal Materials used are: a. Primary Legal Material[7] which consists of legislation, official records or minutes in the making of legislation and decisions of judges. Primary legal materials in this study include: 1) Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, 2). Supreme Court Regulation Number 1 of 1990 challenges the Procedure for Implementing Foreign Arbitration Award, 3). Presidential Decree Number 34 Year 1981, 4). Malaysia Arbitration Act 2005 (revised in 2011). For secondary legal material, namely legal material that can provide an explanation of primary legal material. Secondary legal materials in the form of legal books, legal journals, legal writing or legal expert views contained in the mass media that are relevant to the subject of writing this law. Legal Material Collection Techniques are carried out by means of studies: documents, literature and the Internet. For Technical Analysis of Legal Materials, which is describing legal materials in the form of sentences that are good and right, while the analysis used in this study is by analyzing the problem with qualitative legal concepts and materials. Qualitative research methods are a way / more effort to find aspects of in-depth understanding of a problem. Qualitative research is research that is descriptive in nature, tends to use analysis and further emphasizes the process of meaning.

3. RESULTS AND DISCUSSION

A. *The Process of Resolving Business Disputes Through Arbitration in the Era of the ASEAN Economic Community*

1. *Arbitration in Indonesia*

In Indonesia, interest in resolving disputes through arbitration began to develop along with the enactment of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (APS). One of the institutions authorized to settle cases through arbitration is BANI with the adoption of SK.No.SKEP/152/DPH/1997 on 30 November 1997 and managed and supervised by the Management Board and Advisory Board consisting of community leaders from the business sector. In the period 2007-2016 BANI successfully

completed 782 cases. BANI is domiciled in Jakarta and has representatives in several major cities in Indonesia, namely Surabaya, Bandung, Medan, Denpasar, Palembang, Pontianak and [8]

In the provisions of the clarification of Article 66 of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (APS), the scope/issues that can be resolved through arbitration can be determined, namely[9]: Commerce; Banking; Finance; Investment; Industry; Property and Rights; Intellectual Property (IPR).

2. *Arbitration in Malaysia*

In the State of Malaysia arbitration is regulated in regulations, Arbitration Rules 2017 and Malaysian Arbitration Act. The institution that houses it is the Kuala Lumpur Regional Center for Arbitration (KLRCA). KLRCA/AIAC are independent in settling the arbitration case. The institution in 2016 completed 522 cases with the following details[10]:

- a. 61% of all arbitrations are disputes from the construction sector and other related sectors;
- b. 60% of all mediations are disputes from the construction sector and related sectors;
- c. 84% of appointments are for adjudication;
- d. 50% increase in cases of ADNDR (Asian Domain Name Dispute Resolution) compared to 2015;
- e. 71% of all arbitration matters are governed by the KLRCA rules (2013 KLRCA arbitration rules and KLRCA rapid arbitration rules);
- f. A total of 416 pledges made by KLRCA for all disputes;
- g. 134% increase in adjudication cases compared to 2015;
- h. Total of RM 1,537,979,679.80 amount of funds in dispute for adjudication;
- i. A total of USD 295,470,992.84 and RM 468,209,113.39 amounts in the arbitration dispute.

In the introductory part of the 2017 Arbitration Rules, the main issues that can be resolved through the arbitration institution are all the disputes that the parties have agreed to settle the case of the existing arbitration institution unless the case is contrary to public policy.

Appointment of Arbitrators, that the party completing arbitration is free to determine the number of arbitrators with a period of 30 (thirty) days. If the parties fail to determine the number of arbitrators, the KLRCA determines it and if the KLRCA appoints a single arbitrator, the member of the arbitration or the emergency arbitrator must comply with the regulations. The KLRCA determines the number of arbitrators by determining[11]: a) In the case of international arbitration, consisting of three arbitrators, b) In the case of domestic arbitration, consisting of one single arbitrator.

Regarding the trial process that a single arbitrator or panel of arbitrators must announce that the hearing will be held in private. Submission of proceedings must be closed and the hearing date must be conveyed in writing to the parties. The Arbitrator gives 3 (three) months for technical review. The deadline starts when the arbitrator announces a closed trial. The time limit can be extended by the arbitrator with the agreement of the parties and after consultation with the Chair of the KLRCA. The Chair of the KLRCA can influence the arbitration decision regarding perceived irregularities regarding the form of awards and errors in the calculation of interest and fees. But if it is deemed appropriate, the Chair of the KLRCA must notify the arbitrators in writing that the technical review has been completed. The parties undertake to carry out the decision

immediately without delay, and irrevocably relinquish their right to any form of review appeal or recourse to the Court or other judicial authorities. Decisions can be made legally, and the parties agree that the award is final and binding on the parties from the date the decision was signed.[11] The duration of the dispute resolution in the KLRCA is settled by the timeframe agreed by the parties, but the KLRCA offers a fast track arbitration process with a maximum settlement of 160 (one hundred and sixty) days.[12] Arbitration is carried out at the place of the arbitrator, if it does not agree to that, then the place of arbitration can be carried out at the place of the parties' choice by determining by considering the circumstances and according to the purpose[13].

Based on the results of research on the arbitration process in Indonesia and Malaysia, it can be seen in the following table:

*Table 1
Comparison of Arbitration Settlement Process in
Indonesia and Malaysia*

1.	Indikator		
	Indonesia	Malayasia	information
	Indonesian National Arbitration Board (BANI)	Kuala Lumpur Regional Center For Arbitration (KLRCA)	There are similarities of nomenclature
2	Legal Basis		
	1. Law of 1970 concerning Basic Provisions for Judicial Power. 2. Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. 3. Presidential Decree No34 of 1981.	1. Arbitration Rules 2017. 2. Malaysian Arbitration Act.	There is a difference
3.	Arbitration Process		
	1. Registration 2. Appointment of Arbitrators 3. Respondent's response 4. Feedback 5. Inspection Hearing	1. Registration 2. Appointment of Arbitrators 3. The trial process	There is a difference
4.	Number of Arbitrators, Appointment		
	1 (one) or 3 (three) arbitrators. (article 8 (2) Law No. 30 of 1999 concerning Arbitration and APS)	1. Parties are free to choose the number of arbitrators. 2. 1 (one) or (three) arbiter of rule 4 number 3 KLRCA ARBITRATION RULES (As revised in 2017).	There is a difference
5.	Period of time		

	The latest time is 180 (one hundred eighty) days. (Article 48 of Law No. 30 of 1999 concerning Arbitration and APS)	1. Agreement of the parties 2. fast track arbitration process with a maximum of 160 (one hundred sixty) days.	There is a difference
6.	Courtroom		
	The place of the hearing has been determined by the arbitrator, but if agreed by all parties the place of the hearing may change. (Article 37 of Law No. 30 of 1999 concerning Arbitration and APS)	The parties may determine for themselves or be determined by the arbitrator. (Rule 7 Number 1 KLRCA ARBITRATION RULES (As revised in 2017))	same
7.	Form of Decision		
	Decisions are final and binding. (Article 60 of Law No. 30 of 1999 concerning Arbitration and APS)	Decisions are final and binding. (Rule 12 Number 10 KLRCA ARBITRATION RULES (As revised in 2017).	same
8.	Cost		
	Cost provisions are based on the value of the claim.	Cost provisions are based on the value of the claim.	There is a difference

In the MEA era, which opened a free market between ASEAN countries, the high intensity of trade between international business actors can potentially increase disputes both in quality and quantity and business actors prefer to settle disputes with non-litigation processes compared to litigation, because litigation process has quite complicated aspects in dispute resolution where the parties are related to the standard rules of the court, and the chosen non-litigation settlement process is by arbitration.

The need for uniformity of arbitration regulations in the ASEAN region although it is realized that each legal system in an ASEAN country is different. This author's view is in line with the spirit and purpose of the ASEAN economic community which provides the ease and simplification of bureaucracy/regulations to encourage the development of the world of trade in ASEAN.

B. The Ideal Arbitration Concept Regarding Demands for Dispute Resolution in the Era of the ASEAN Economic Community (AEC)

From the presentation of the author's study of the process of resolving business disputes through arbitration, the authors argue the ideal concept of arbitration related to the demands of dispute resolution in the MEA era as follows:

- a. Regulation; the need for uniformity of arbitration regulations in the ASEAN region although it is realized that each legal system in an ASEAN country is different. This author's view is in line with the spirit and purpose of the ASEAN economic community which provides the ease and simplification of bureaucracy/regulations to encourage the development of the world of trade in ASEAN.
- b. Appointment of Arbitrators, appointment of Arbitrators which does not take a long time, as explained in Article 8 letter f of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution in which the determination of the number of arbitrators is not regulated but the applicant can submit proposals regarding the number of arbitrators desired in odd numbers 1 or 3
- c. Duration, in Indonesia the arbitration process takes a maximum of 180 (one hundred and eighty) days, which makes the parties more efficient in the time used in arbitration. In Malaysia and Thailand do not specify the exact time the arbitration process is completed, but Malaysia offers an arbitration process with a time of 160 (one hundred and sixty) days at a cost that is different from ordinary arbitration. But in a fixed period of time often makes the arbitration award does not see the case, the decision tends to be decided because the specified time should not be passed.
- d. The costs of arbitration in Malaysia differ between the costs of the arbitrator and the costs of the institution, while in Malaysia they also distinguish between the costs of international arbitration and the costs of domestic arbitration. The ideal concept is the cost of arbitration in Indonesia where there is no distinction in costs.

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Arbitration is chosen by business actors because arbitration is efficient in time and cost, the identity of the parties to be kept secret and the award is final and binding. And the reason the authors chose Indonesia as the prospect of arbitration in the AEC era as described above is in line with the spirit and purpose of the AEC which provides the ease and simplification of bureaucracy/regulation to encourage the development of the world of trade in ASEAN. The completion of the arbitration in the MEA era must be faster, practical and efficient which is in accordance with the soul of the MEA.

4. CONCLUSION

Based on the results of research and discussion it can be concluded:

1. That the process of resolving business disputes through arbitration institutions in the MEA era is increasingly needed by considering that in this MEA era, the intensity of trade transactions between traders both domestic and between countries is increasing both in quality and quantity. In line with the developing world of trade, it certainly has

the potential to increase legal problems (conflicts), which are getting more intense both quality and quantity. However, the results of studies produced by the author of 2 (two) arbitration institutions in Indonesia and Malaysia, there are differences related to the legal basis, the arbitration process, the time period and costs. With the different aspects of the impact/influence for traders who involve traders in the region of the countries in ASEAN, who are given the freedom to choose arbitration institutions in ASEAN countries. With the different ways in which 2 (two) arbitration institutions work in Indonesia and Malaysia, and there is no standardization of the same settlement process, it is possible to have a tug of war in selecting the arbitration institution. Of the two arbitration institutions, namely Indonesia and Malaysia, which have an impact on the dispute resolution process mainly related to the arbitration process, the time period and costs.

2. Based on the differences above, according to the authors, Indonesian arbitration institutions have more positive prospects to serve as models for arbitration institutions in ASEAN countries, although it is realized that each legal system in an ASEAN country is different. This author's view is in line with the spirit and purpose of the ASEAN economic community which provides the ease and simplification of bureaucracy/ regulations to encourage the development of the world of trade in ASEAN.

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