

“Online Arbitration”; Comparative Analysis

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ABSTRACT

Advancement in technology must be used to benefit human life. One among the issues is that technology must be used to create more efficient and effective disputes resolutions through arbitration. Arbitration needs to resolve the disputes in a faster and cheaper procedure. Nowadays, arbitration shall be able to be conducted by online system, without the requirement for the parties and tribunal to meet face to face. This research aimed to explain the concept and the method of online arbitration and to seek the possibility to be introduced in the amendment of Law No.30 Year 1999 regarding Arbitration and Alternative Dispute Resolution. This research used secondary data. It used qualitative and comparative approach to analyze and discuss all data obtained through a literature review, to provide conclusions. Researchers find that online arbitration can be fit in and used in Indonesia however some consideration must be attended in view of amendment of the Law Number 30 Year 1999 regarding Arbitration and Alternative Dispute Resolution.

Keywords : *e-Arbitration, online Arbitration*

I. INTRODUCTION

Article 60 of Law Number 30 Year 1999 regarding Arbitration and Alternative Dispute Resolution (“the AADR Law” declares that “the arbitration award is final and has permanent legal force and is binding on the parties” [1] [2]. When exploring the existence of online arbitration in Indonesia, what is still being discussed is the validity of the arbitration award which is final, permanent and binding for the parties. The issue arises if the parties or one of them cannot appear for a hearing directly at the arbitration hearing for an unauthorized reason that can be declared as the failure of one of the parties in accordance with those regulated in article 44 (2) jo. article 43 AADR Law [1].

In arbitration process, which required the presence of the parties and tribunal at the same time, sometimes, and especially in international commercial arbitration, the time and cost for the arbitration become longer and longer. This could happen because not everybody can arrange his/ her time to be at the same place and at the same time easily. This could take, sometimes more than one year to do so. Therefore, with the advancement of technology, most of arbitration submission in international commercial disputes and the reply were currently made through email. In several hearing, there were tele-conference took place in order to hear and cross exam some witnesses or expert witnesses’ opinion when one or more of them cannot come to the hearing and the cross examination is a must.

The email submissions and all the replies following the submission as well as the witness statements and affidavits have significantly reduced the costs and time for arbitration. The procedure of tele-conference somehow has also taken part

in reducing the cost and time in the total arbitration process. It means that as technology develops, it is natural that the existence of the internet should be able to assist the parties in arbitration to seek awards faster, effective and efficiency while remain confidential.

Along with the changing times, now Indonesia has entered the digital era with the 4.0 industrial revolution. Industry 4.0 is a production system automation using technology and big data. Some sectors are starting to use new technologies such as IoT (internet of things). IoT (internet of things) has the ability to connect and facilitate the communication process between machines, devices, sensors, and people through the internet network. Therefore, the existence of this technology needs to be accommodated by Indonesian regulations, in order to support economic development activities. In the case of online arbitration, the internet should not be the main problem, it should have been able to facilitate and assist the whole process in online arbitration.

The aim of this research is to explain the concept, method and procedure of online arbitration, using comparative regulations from several jurisdictions and further seeking the possibility to be incorporated the online arbitration procedure through the amendment of Law No. 30 Year 1999 regarding Arbitration and Alternative Dispute Resolution.

II. METHOD AND MATERIALS

This research is a normative legal research. As a normative legal research, data used in this research are secondary data, that are collected through literature review. The main data are primary legal sources, that consisted of law and other

prevailing governmental regulations. The main regulations used in this research are Law Number 30 Year 1999 regarding Arbitration and Alternative Dispute Resolution [1], Asian International Arbitration Centre (AIAC) Rules [3], Swiss Code [4], International Commercial Arbitration Court (ICAC) [5], and United Nations Commission on International Trade Law (UNCITRAL) [6] as comparative approach.

For the purpose of analyzing the data, the researcher used qualitative and comparative approach. Discussion were made in order to understand the current development in online arbitration, especially in search of incorporating online arbitration in Indonesia for the purpose amending Law Number 30 Year 1999 regarding Arbitration and Alternative Dispute Resolution.

III. RESULTS AND DISCUSSIONS

Redfern and Hunter said that, in each arbitration process, strict requirements for procedural principles are required. Independence and impartiality are so central in the process that online arbitration cannot be categorized as true arbitration without the independence and impartiality of the arbitrators and elements which cannot be compromised if any [7]. When compared with the other countries' regulations, many Civil Law countries have agreed to the terms of the New York Convention in their national law with respect to the Recognition and Enforcement of the 1958 Arbitration Award ("NYC"). In Article 178 (1) of the Swiss Code on Private International [4], it stated that, "as to form, the arbitration agreement shall be valid if it is made in writing, by telex, telegram, or any other means of communication that establishes the terms of the agreement by e-mail." This will provide the beginning conceptualization of the meaning online. If the arbitration agreement to be made in writing by means of electronic exchange (through email) then there should not be a problem to recognize the submission of claim and the further replies to be conducted by means of electronic email submission.

With respect to the prevailing regulations in Indonesia, Article 1 point 1 AADR Law said that "arbitration is a way to settle a civil dispute outside the general court based on an arbitration agreement made "in writing" by the parties to the dispute" [1]. Under NYC "in writing" it doesn't always mean the arbitration agreement must be signed, however there must be sufficient evidences "in writing" that showed that the intention of the parties was to submit their disputes to an arbitration. Article 15 UNCITRAL Model Law on E-Commerce with Guide to Enactment 2016 stated that "unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business". For the purposes of this paragraph:

- (a) "if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;
- (b) if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence." in other words, an agreement occurs in a data message (e-mail) received by the other party [6]."

Electronic document will be play important role when evidence is required to make an electronic document valid and be able to be accounted for. Based on Article 1 (4) Law Number 19 Year 2016 regarding Changes to law number 11 year 2008 regarding Information and Electronic Transactions currently enforced in Indonesia, electronic document means "any electronic information that is created, transmitted, sent, received or stored in analog form, digital, electromagnetic, optical, or the like, which can be seen, displayed and/ or heard through a computer or electronic system, including but not limited to writing, sound, images, maps, designs, photographs or the like, letters, signs, numbers, access codes, symbols or perforations that have meaning or meaning or can be understood by people who are able to understand it [8]."

Based on the explanation above, in arbitration, written documents nowadays, event they are still important but need not to be realized in the physical form provided directly by each party as an arbitration procedure. When the validity of online arbitration is questioned, then to strengthen the existence of the document itself can be confirmed using digital signature. The intended digital signature which is based on Article 1 point 6-7 Government Regulation Number 82 Year 2012 regarding Management of Electronic Systems and Transactions. Article 1 pint 6 of the Government Regulation stated that electronic information is one or a collection of electronic data, including but not limited to text, sound, images, maps, designs, photographs, electronic data interchange (EDI), electronic mail (electronic mail), telegram, telex, telecopy or the like, letters, signs, numbers, access codes, symbols, or processed perforations that have meaning or can be understood by people who are able to understand them [9].

Article 4 (3) AADR stated that, "in the case of an agreed dispute settlement through arbitration occurring in the form of exchange of letters, the transmission of telex, telegram, facsimile, e-mail or in the form of other communication means, must be accompanied by a record of acceptance by the parties [1]." This statement doesn't mean Indonesian regulation about traditional arbitration already regulate online procedure, but this is only the beginning that make the parties can exchange the documents using electronic means of document exchange. Online arbitration must have its own procedure. Using online submission through email can be used as the basic procedure.

On hearing process, in traditional arbitration, parties may also agree to hold hearings online to the extent permitted, either by national law or by the rules of the arbitral institution. The arbitral tribunal will see the technical feasibility and in the hearing process whether it is able to support the arbitration proceedings. Regulation 2017 of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation ("ICAC") provides provision under Article 30 (6) mentioned that "any party has the right to request to participate in a trial by video conferencing, namely e-hearing [5]."

About online arbitration procedure, with respect to the notice and calculation of periods of time of when the arbitration process that has been declared to have begun, Article 2 (5) i-Arbitration Rules from Asian International Arbitration Centre (AIAC) stated that, the notice shall be deemed to have been received on the day it is delivered in accordance with paragraphs 2, 3 or 4, or attempted to be delivered in accordance with paragraph 4. A notice transmitted by electronic means is deemed to have been received on the day it is sent, except that a notice of arbitration so transmitted is only deemed to have been received on the day when it reaches the addressee's electronic address [3].

In various arbitration procedures, many parties need an online arbitration procedure which is able to increase the capacity of the arbitration character itself which is useful to facilitate the dispute resolution process. If the parties are limited because of the territory, which causes the parties cannot meet, the online arbitration is the answer closest to technological developments. Here is some advantages and disadvantages while using online arbitration procedure. The advantages of conducting online arbitration are:

1. Neutrality, i.e. the internet is a neutral media for the parties in dispute
2. Online dispute resolution, approved remotely, without the agreement of the parties or legal representatives who are physically present. The parties only need to connect from their workplaces to the chosen organization's website and transfer documents and data messages for the cost of local telephone calls. This is an important interest in international disputes, where, usually, one party must travel to appear before a court in the other party's country. This will also be the case in the form of traditional arbitration or ADR (including mini trials and rapid arbitration), all of which require hearings and physical meetings between the parties. (See, United Nations Conference on Trade and Development, *Dispute Settlement about International Commercial Arbitration. 5.9 Electronic Arbitration*. United Nations-New York and Geneva. 2003)
3. More efficient, by arranging online arbitration, it can save time and increase efficiency, online arbitration can accelerate time and efficiency in the arbitration process; using a website can collect documents instantly, wherever appropriate, and there is no need to pay.
4. Can save time, shipping and checking documents can be done anytime and anywhere.

In addition to its advantages, there are also weaknesses in online arbitration that needs to be considered and addressed so that the existence of this procedure can be safely used by the parties, they are:

1. Online procedures are very much dependent on internet access, which can occur signal interference to security problems. In sending documents online, there is no domain or application container that holds securities rather than document transfers between parties
2. Online arbitration procedures do not yet have strong power in regulation in Indonesia, so they need to be developed following the changing times
3. During direct execution, many decisions rather than online arbitration experience problems
4. Signature verification of online documents is more difficult, but it can still be carried out with more complex evidence procedure.

Online arbitration is not entirely just to meet the needs of the parties from the inability of the presence of the parties in dispute, but it can facilitate the parties with contractual relationship, from business to business (B2B) relations of the parties with bilateral and multilateral relations to be more effective and efficient.

For the purpose of amending AADR, it must be noted that:

1. The procedure carried out solely to facilitate the parties and reduce the costs of the arbitration process which incidentally incur huge costs;
2. Online arbitration is not the same as traditional arbitration, not only in sending documents or by using tele-conference, but all procedures are carried out online, without any face-to-face meeting.

3. Arbitrators are chosen by being determined unilaterally or by both parties in accordance with the provisions of the regulations that adjust to the case of arbitration.
4. The agreement in using the online arbitration procedure is not a written procedure that must be ratified by the parties with e-signature, but by sending the submission document from each party online, he has stated his agreement to submit the arbitration online.

IV. CONCLUSION

Arbitration between parties has been concluded between them, when one of the parties sent the submission of the arbitration claim. In this case of online arbitration, the process starts when the submission was sent using e-mail, as well as with other digital methods that support the validity of the arbitration process. Online arbitration needs its own procedure, even the procedure may look similar to the usual conventional arbitration. An intention to made submission online, or using tele-conference in hearing, or providing awards through online communication cannot be concluded that there is an online arbitration. In facts there are still many advantages and disadvantages that exist in online arbitration, when the success of the arbitration is based on procedures that are carried out properly by the parties or not using the internet media. By looking at the regulations of many countries as a comparative study that has applied many online arbitrations, it is not impossible to be implemented in Indonesia. With the support of regulations in information technology and clear amendment of Law No.30 Year 199 regarding Arbitration and Alternative Disputes Resolution, online arbitration can be conducted in Indonesia.

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