

“Fast Track Arbitration”; Comparative Analysis

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ABSTRACT

Arbitration at present takes a lot of time and costs, which may create more burden to the losing party. The basic principle of being fast and efficient is one of the requirements of arbitration. Instead of going through the arbitration process, disputes parties may take simpler way to settle their disputes through arbitration. This is known as “fast track arbitration”. However not all cases can be conducted by “fast track arbitration”. The objective of this research is to understand and find out which cases can be settled using “fast track arbitration” and whether it is possible to be incorporated into Law No.30 Year 1999 regarding Arbitration and Alternative Dispute Resolution. This research used secondary data. This research uses qualitative and comparative approach to describe and discuss concept of “fast track arbitration”, which is also known as Expedited Arbitration. Researchers want to explore how “fast track arbitration” can be implemented in Indonesia by applying descriptive-comparative methods which compare regulations from several countries that may be used to support the amendment of the Law

Keywords: “fast track arbitration”, Expedited Arbitration

I. INTRODUCTION

The fast track procedure cannot be chosen by the parties to be implemented in all existing cases. Fast track was chosen only to reduce time and costs. As in court of law, in some jurisdiction, the main differences for expedited procedures from other kinds of court procedures in settling dispute is the monetary threshold, without reducing the meaning of fair trial.

Looking at the fact of the ongoing arbitration nowadays, the time needed for tribunal to reach an arbitral award is quite long. In ICC’s cases it may took up to 2 or 3 years, which make the fast time of arbitration being reduced. Sometimes it becomes important for the parties that a certain dispute must be settled as soon as possible. Indeed, as for court of justice, many jurisdictions have tried to regulate and implement the possibility of having faster arbitration process, known as fast tract arbitration.

The purpose of this research is to find out the concept of “fast track arbitration” and the implementation of fast tract arbitration in several jurisdictions around the world. This finding will be used to seek the possibility to incorporate fast tract arbitration in Indonesia through the amendment of Law No.30 Year 1999 regarding Arbitration and Alternative Dispute Resolution (“the AADR Law”).

II. METHOD AND MATERIALS

This research is a normative legal research, it used 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 Indonesia Civil Code, Law Number 30 year 1999 concerning Arbitration and Alternative Dispute Resolution, SIAC (“Singapore International Arbitration Centre”) Rules, AIAC (“Asian International Arbitration Centre”) Fast Track Rules, JCAA (“Japan Commercial Arbitration Association”) Rules, ICC (“International Chamber of Commerce”), and ICDR (“International Centre of Dispute Resolution”) Rules as comparison.

To analyze the data, the researcher used qualitative and comparative approach. Discussion were made in order to understand the current development in “fast track arbitration” for the purpose of the amendment of Law Number 30 Year 1999 regarding Arbitration and Alternative Dispute Resolution (“AADR Law”).

III. RESULTS AND DISCUSSIONS

Fast tract arbitration procedure was first introduced in 1992 by Geneva Chamber of Commerce, which now become part of Swiss Chamber of Commerce. The need of efficiency in time and cost were the main issue when fast tract arbitration procedure was initiated. Nowadays, fast tract arbitration procedure can be found in many jurisdictions using the name expedited arbitration.

Under International Chamber of Commerce (ICC) Rules (2017), ICC used the term of expedited procedure rules to imply the “fast track arbitration”. Expedited procedure was only introduced in the 2017 amendment. It provides a

streamlined arbitration with a reduced scale of fees. This expedited procedure is “automatically applicable in cases where the amount in dispute does not exceed US\$ 2 million, unless the parties decide to opt out.” The Rules with expedited arbitration will apply only to arbitration agreements concluded after 1 March 2017 [1].

The Rules stated that one of the important features of the expedited procedure Rules is that “the ICC Court may appoint a sole arbitrator, even if the arbitration agreement provides otherwise.” The expedited procedure can be used based on an opt-in basis for cases with higher amounts of disputes and will be a solution for those who is very concerned about time and cost. For the efficacy of ICC arbitrations, the time limit for the establishment of Terms of Reference was reduced from two months to one month, and there are no Terms of Reference in the expedited procedure [1].

The ICC 2017 Rules is a default Rules that bind the parties in dispute. It is enough that by agreeing to arbitration under the Rules, the parties have agreed that the “Expedited Procedure Provisions regulated in Article 30 and the Expedited Procedure Rules set forth in Appendix VI shall take precedence over any contrary terms of the arbitration agreement. In such an event, the Expedited Procedure Rules set forth in Appendix VI shall apply whether there was a request for expedited arbitration or not as long as the amount in dispute does not exceed the limit set out in Article 1(2) of Appendix VI at the time of the communication referred to in Article 1(3) of that Appendix [1].

The Expedited Procedure Provisions shall not apply if: “a) the arbitration agreement under the Rules was concluded before the date on which the Expedited Procedure Provisions came into force; b) the parties have agreed to opt out of the Expedited Procedure Provisions; or c) the Court, upon the request of a party before the constitution of the arbitral tribunal or on its own motion, determines that it is inappropriate in the circumstances to apply the Expedited Procedure Provisions [1].”

Besides ICC Rules of 2017, Singapore International Arbitration Centre (SIAC) Rules of 2016 [2], Asian International Arbitration Centre (AIAC) Rules [3], Japan Commercial Arbitration Association (JCAA) Rules [4], and International Centre of Dispute Resolution (ICDR) [5] also provided expedited arbitration procedure. Under ICDR, the features of the International Expedited Procedures [5]:

1. “Parties may choose to apply the Expedited Procedures to cases of any size;
2. Comprehensive filing requirements;
3. Expedited arbitrator appointment process with party input;
4. Appointment from an experienced pool of arbitrators ready to serve on an expedited basis;
5. Early preparatory conference call with the arbitrator requiring participation of parties and their representatives;
6. Presumption that cases up to \$100,000 will be decided on documents only;
7. Expedited schedule and limited hearing days, if any; and
8. An award within 30 calendar days of the close of the hearing or the date established for the receipt of the parties’ final statements and proofs.”

Based on Rule 5.1, Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules) (6th Edition, 1 August 2016), it is stated that prior to the constitution of the Tribunal, a party may file an application with the Registrar for the arbitral proceedings to be conducted in accordance with

the Expedited Procedure under this Rule, provided that any of the following criteria is satisfied [2]:

1. “the amount in dispute does not exceed the equivalent amount of S\$6,000,000, representing the aggregate of the claim, counterclaim and any defense of set-off;
2. the parties so agree; or
3. in cases of exceptional urgency.”

The party applying for the arbitral proceedings to be conducted in accordance with the Expedited Procedure under this Rule 5.1 shall, at the same time as it files an application for the proceedings to be conducted in accordance with the Expedited Procedure with the Registrar, send a copy of the application to the other party and shall notify the Registrar that it has done so, specifying the mode of service employed and the date of service [2].

Where a party has filed an application with the Registrar under Rule 5.1, and where the President of SIAC determines, after considering the views of the parties, and having regard to the circumstances of the case, that the arbitral proceedings shall be conducted in accordance with the Expedited Procedure, the following procedure shall apply [2]:

1. “the Registrar may abbreviate any time limits under these Rules;
2. the case shall be referred to a sole arbitrator, unless the President determines otherwise;
3. the Tribunal may, in consultation with the parties, decide if the dispute is to be decided on the basis of documentary evidence only, or if a hearing is required for the examination of any witness and expert witness as well as for any oral argument;
4. the final Award shall be made within six months from the date when the Tribunal is constituted unless, in exceptional circumstances, the Registrar extends the time for making such final Award; and
5. the Tribunal may state the reasons upon which the final Award is based in summary form, unless the parties have agreed that no reasons are to be given.”

The conditions stipulated in SIAC was different from International Chamber of Commerce Rules of Arbitration which stated that Expedited Procedure Provisions apply if [1]:

1. “the arbitration agreement was concluded after 1 March 2017; and;
2. the amount in dispute does not exceed US\$2,000,000, and;
3. the parties have not opted out of the Expedited Procedure Rules in the arbitration agreement or at any time thereafter.”

In expedited arbitrations speed is achieved principally by simplifying the procedure and imposing strict deadlines on the parties and tribunal. The Expedited Procedure Provisions shall also apply, irrespective of the date of conclusion of the arbitration agreement or the amount in dispute, if the parties have agreed to opt in. Such opt in agreements can be concluded at any time

If we look into Article 1 (4) ICDR Rules, it is stated that, “unless the parties agree or the Administrator determines otherwise, the International Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds USD \$250,000 exclusive of interest and the costs of arbitration.” The parties may also agree to use the International Expedited Procedures in other cases. The International Expedited Procedures shall be applied as described in Articles E-1 through E-10 of the Rules, in addition to any other portion of these Rules that is not in conflict with the Expedited Procedures. Accordingly “where

no party's claim or counterclaim exceeds USD \$100,000 exclusive of interest, attorneys' fees, and other arbitration costs, the dispute shall be resolved by written submissions only unless the arbitrator determines that an oral hearing is necessary [5]."

When compared to traditional arbitration, which is often very time-consuming for the tribunal to prepare, approve and submit decisions, the whole process in fast tract arbitration is simplified to ensure that the final award is issued within a strict timeframe. Based on art. 31 (1) ICC Rules, "time limit within which the arbitral tribunal must render its final award is six months, which shall be calculated from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference or, in the case of application of Article 23 (3) of the Rules, it will be calculated from the date of the notification to the arbitral tribunal by the Secretariat of the approval of the Terms of Reference by the Court." However the Court may fix a different time limit based upon the procedural timetable established pursuant to Article 24 (2) of ICC Rules [1]. The same can also be found in Article 5 (2) of SIAC Rules 2016 [2].

Art. 89 JCAA, 2019 stated that "The arbitrator shall make reasonable efforts to render an arbitral award within 3 (three) months from his or her confirmation or appointment by the JCAA. [4]" Art. 4 Appendix VI, Expedited Procedure Rules on Arbitration Rules stated that "the time limit within which the arbitral tribunal must render its final award is 6 (six) months from the date of the case management conference." The Court may extend the time limit pursuant to Article 31(2) of the Rules [1].

Art. 84 JCAA stated that "the provisions of Part 2 (the expedited procedure) shall apply where the amount or economic value of the claimant's claim(s) is not more than JPY50,000,000 (in the case of a foreign currency, the applicable amount shall be converted into Japanese yen at the TTM rate or any other reasonable exchange rate designated by JCAA as of the business day immediately preceding the date of filing of the Request for Arbitration [4]." Art. 5(1) SIAC Rules stated that "the amount in dispute does not exceed the equivalent amount of S\$6,000,000, representing the aggregate of the claim, counterclaim and any defense of set-off [2]." Under ICDR Rules, the Expedited Procedures shall apply in any case "in which no disclosed claim or counterclaim exceeds USD \$250,000 exclusive of interest and the costs of arbitration [5]." The parties may agree to the application of these Expedited Procedures on matters of any claim size.

Even though that there would be difficult to make a single conclusion that can be used as to determine the type of disputes, scope, amount, and time need in fast tract arbitration, however it can be said that the basis of the implementation of fast track (expedited) arbitration procedure is the attempt to solve the problem based on urgency matters that made it simpler than usual arbitration, especially on procedural basis. For such purposes it could take the following kinds of simplification:

1. "No Terms of Reference;
2. A case management conference within 15 days after the date on which the file was transmitted to the arbitral tribunal;
3. The arbitral tribunal may decide on documents only;
4. The arbitral tribunal may limit the number, length and scope of written submissions and written witness evidence;
5. The final award is rendered within six months from the

case management conference."

For Indonesian cases, the procedure of fast tract arbitration can be incorporated into AADR Law. However for the amendment, the content of the amendment must clearly state:

1. That there will be "no terms of reference"
2. The main reasons for submission of expedited procedure;
3. The requirement of a comprehensive filing accompanied with the reasons on the urgency matters that may or shall be used as the based for the decision as whether the expedited procedure will be awarded or not;
4. The scope of disputes that can be subjected for expedited procedure; with possible extension for several kinds of transactions or issues, as regulated in AADR Law and JCAA;
5. The awards may be granted based on documentations without any further requirements;
6. The limits of the amount that can be brought before expedited arbitration;
7. The time limits for arbitrator to make its final awards;
8. The clear statement as whether the parties may opt out the expedited procedure.

As explain before, fast track cases are usually decided by a single arbitrator. Based on a single arbitrator in the "fast track arbitration" Option, Article 14 (4) AADR Law states that "the Chair of the District Court will appoint a single arbitrator based on a list of names submitted by the parties, or obtained from the arbitration organization or institution as referred to in Article 34, taking into account both recommendations as well as objections raised by the parties against the person concerned [6]." From this point of view, it can be said that the current regulation which allowed the appointment of single arbitrator has supported and can be used for "fast track arbitration" procedure.

IV. CONCLUSION

"Fast track arbitration" or expedited procedure can be incorporated for the amendment of AADR Law. However there are still many things that need to be discussed and determined further if fast tract arbitration would be implemented in Indonesia.

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REFERENCES

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- [4] Commercial Arbitration Rules of Japan, 2019.
- [5] International Dispute Resolution Rules and Procedures, 2014.
- [6] Indonesian Law No.30 Year 1999 regarding Arbitration and Alternative Disputes Resolution.