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Reinterpreting the Arbitration Legislation for Online Awards in Indonesia

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ABSTRACT

Objective – The use of online arbitration is more convenient for disputing parties as their submissions can be archived by automated document management systems and be reviewed from any location, at any time. Yet, the process of online arbitration in Indonesia remains uncertain due to the fact that Indonesian arbitration legislation does not contain any provisions relating to online arbitration. It is also questioned whether online arbitration awards are domestic or international under that legislation. In order to answer the questions, this research examines and reinterprets Indonesian arbitration legislation to argue for the status of online arbitration and its awards in Indonesia.

Methodology/Technique – This study adopts normative legal research by examining existing legislation and literatures relating to arbitration.

Findings – The findings of this study show that the legislation does permit online arbitration because Indonesian IT legislation facilitates the use of electronic communication and devices for this type of arbitration. However, the status of awards rendered in the online arbitration process remains uncertain. This is because Indonesia has not adopted the UNCITRAL Model Law. Consequently, the legislation merely categorizes online arbitration awards based on whether they are rendered within Indonesian territory (domestic awards) or outside of Indonesia (international awards).

Originality/value – The use of technology has penetrated business transactions and in some cases can give rise to legal disputes. Therefore, those who engage in online transactions should consider the type of dispute resolution mechanism they employ. In the context of online businesses, it may be beneficial for disputing parties to settle their disputes through online arbitration due to its ability to transcend national boundaries, and the potential enforceability of its awards.

Type of Paper: Review.

Keywords: Online Arbitration; Awards; Dispute Resolution; Arbitration Law; Indonesia.

JEL Classification: K2, K29

1. Introduction

Arbitration has been used by Indonesian business people to resolve both their domestic and business disputes. In 1999, the Indonesian government enacted the Law of the Republic of Indonesia Number 30 of

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1999 with respect to Arbitration and Alternative Dispute Resolution ('the Legislation') to modernize Indonesian arbitration law (Budidjaja, 2002). The Legislation does not adopt the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006; consequently, the criteria of domestic and international arbitration awards is merely determined based on whether they are rendered in or outside the territory or jurisdiction of Indonesia. It is clear that the Legislation imposes a 'territorial limitation' on arbitration awards. Due to this limitation, the Legislation only recognizes domestic and foreign arbitration awards even though it uses the term 'international arbitration awards'.

The rapid development of technology has also penetrated the mode of arbitration. In addition to traditional arbitration, online arbitration is also an available option to businesses for the timely resolution of disputes. The Legislation does not specifically deal with online arbitration, and this begs the question as to whether online arbitration is in fact permitted under the Legislation. If the answer is in the affirmative, then it is further questioned whether online arbitration awards are categorized as domestic or international (foreign-rendered) awards. Hence, this research specifically aims to examine and reinterpret the Legislation to establish arguments pertaining to the status of online arbitration and its awards in Indonesia. The reinterpretation of the Legislation is significant as it establishes a new approach to arbitration in Indonesia being online arbitration. Hence, both Indonesian and foreign business people may utilize this type of arbitration, even though their business transactions are predominantly off-line (Shahrullah and Syarief, 2017).

2. Literature Review

2.1 Conceptual and Legal Framework

Arbitration is defined in Article 1(1) of the Legislation as 'a means of settling civil disputes outside the general courts, based on an arbitration agreement made in writing by the parties to the dispute'. Today, business people prefer to use arbitration as their dispute resolution mechanism because of its flexibility as compared to court proceedings (St. John Sutton, 2007). Confidentiality of arbitration awards is also a selling point, and publications of awards in the Journal of Arbitration remain anonymous (Lazic, 2009). In contrast to traditional arbitration, the process of online arbitration is conducted entirely online, 'from the concluding of the arbitration agreement to the rendering of the arbitral award' (Betancourt and Zlatanska, 2014). To business people, particularly those engaging in international business, online arbitration is preferable because it uses a web-based document system (Barendrecht and Honeyman, 2014).

Arbitration awards, which are analogous to court decisions, are rendered by an arbitrator(s) upon the finalization of the process of arbitration. Awards can be rendered conventionally or online. The perceived issue with online arbitration awards in Indonesia is that the term "online arbitration award" is not defined in the Legislation. Only two types of arbitration awards are recognized in the Legislation, being 'domestic' and 'international' arbitration awards. For example, pursuant to Article 1(9), 'arbitration awards are international if they are made outside the jurisdiction of the Republic of Indonesia or categorized as international awards under Indonesian laws'.

It is apparent that the Legislation adopts the 'territorial criteria' or the criterion of foreign jurisdiction to determine the nationality of arbitration awards. This approach was adopted by the Central Jakarta District Court in *Bankers Trust Company and Bankers Trust International Plc. vs PT. Mayora Indah, Tbk.* in its Decision No.001/Pdt/Arb.Int/1999/PN.JKT.PST vide No.002/Pdt/Arb.Int/1999/PN.JKT.PST. vide No.02/Pdt.P/2000/PN.JKT.PST.; Decision No.02 K/Ex'r/Arb.Int./Pdt/2000. The Court held that the award could be described as an international arbitral award because it was rendered by the London Court of International Arbitration. In this regard, the Court determined the internationality of arbitration award according to the territorial criteria. The Court also used the term 'international arbitration award' interchangeably with the term 'foreign arbitration award'. It may therefore be argued that whether an award is an international arbitration award does not merely depend on the criterion of foreign jurisdiction because

the provision of the Legislation also stipulates that arbitration awards can be categorized as international ones if other Indonesian laws decide so. The problem is that Indonesia has not adopted the UNCITRAL Model Law which provides a broad definition of the term 'international' under Article 1(3). As a result, the Indonesian courts only adopt the territorial criteria when examining the internationality of arbitration awards. This approach was applied in *PT. Sinar Mas Multiartha v Vikram Talwar* and Associated LLC in the Decision No.001/Pdt/Arb.Int/2000/PN.JKT.PST., and *Noble Americas Corp. v PT. Wahana Adhireksa Wirawasta* in Decision No.002/Pdt/Arb.Int/2000/PN.JKT.PST. Accordingly, only arbitration awards which are rendered outside the jurisdiction of Indonesia (foreign arbitral awards) are categorized as international arbitration awards.

Although the Legislation focuses on domestic arbitration, there is no specific provision defining what constitutes domestic arbitration awards. Since foreign jurisdiction is the only criterion to determine the internationality of arbitration awards in Indonesia, arbitration awards may be considered as domestic if they are made in the jurisdiction of Indonesia. In *Ascom Elektro AG vs PT. Manggala Mandiri Sentosa* in Decision No.02/Pdt/Arb.Int./Pdt/1993., the Supreme Court returned all of the documents to the Chairman of the Central Jakarta District Court. The letter of the Supreme Court addressed to the Chairman of the Central Jakarta District Court stipulated that the award was not an international award but merely a domestic award. The reasoning behind this was that although Article 12.2 of the agreement in question between the parties stated that disputes shall be settled by a sole arbitrator applying the UNCITRAL Arbitration Rules (UAR), Article 13.6 of that agreement clearly stipulated that the agreement governed by the law of Indonesia and Indonesia was also appointed as the jurisdiction of arbitration. The Supreme Court noted that the choice of jurisdiction determined the status of arbitration awards. This means that any arbitration award rendered, and to be enforced, in Indonesia is automatically considered a domestic award despite the fact that the disputing parties' business relationship is of an international nature (Mills, 2002).

Based on the approach of courts thus far, the 'territorial criteria' contained in the Legislation is rigidly applied as the only approach to interpretation of the nationality of arbitration awards. Some have argued that this is an outdated approach and is not suitable in the context of online businesses. These comments give rise to a need to reinterpret the Legislation to accommodate the requirement of flexibility and efficiency of such businesses.

2.2 Theoretical Framework

This research adopts the progressive legal theory by Satjipto Rahardjo who asserts that the law has to be progressive in order to respond to the changing needs of society (Rahardjo, 2006). The theory emphasizes that laws are established for the benefits of society, therefore, legal disputes give rise to the need to engage in law reform and amendment.

3. Research Methodology

This research uses normative legal research which is the study of documents, and it is often referred to as doctrinal research (Soerjono and Abdurrahman, 2003). A qualitative method is used to analyze the secondary data (Denzin and Lincoln, 2005). The secondary data used includes primary, secondary, and tertiary legal materials (Soekanto, 2008). The authoritative legal materials include Law Number 30 of 1999 regarding Arbitration and Alternative Dispute Resolution (the Arbitration Legislation) and Law Number 11 of 2008 regarding Electronic Information and Transactions (IT Legislation). The secondary legal materials used to explain the primary legal materials are obtained from the Elucidation of Legislation and includes books, journals and research reports. The tertiary materials used include the Indonesian and English Dictionary to translate the Arbitration and IT Legislation from Bahasa Indonesia.

4. Results

Based on the approach of the progressive legal theory, the results show that the reinterpretation of the Legislation is needed to keep up with the trends and requirements of online businesses. In addition, most of the provisions of the Legislation use the word 'may' instead of 'must'. This implies that the Legislation is inherently open for interpretation. The interpretation of the Legislation cannot be conducted independently of the IT Legislation which is used to support the applicability and validity of online arbitration and its awards (Shahrullah and Syarief, 2017).

The results of the examination of the Legislation shows that both laws support online arbitration even though the Arbitration Legislation does not adopt the term 'online arbitration'. Article 4(3) of the Legislation allows the use of telexes, telegrams, faxes, e-mails or any other form of communication to conclude an arbitration agreement. This indicates that the use of online arbitration is permitted. The requirement of the signature of disputing parties on the arbitration agreement pursuant to Article 4(2) of the Arbitration Legislation is in turn supported by Article 11 of the IT Legislation. That Article stipulates that electronic signatures have legal force and effect to the same extent as manual signatures.

Article 31(1) of the Arbitration Legislation states that disputing parties are free to determine their arbitration proceeding in their agreement provided it does not conflict with any provisions within the Legislation. This gives the parties absolute freedom in determining the nature of the arbitration process, including the use of online arbitration. This is further supported by the fact that Article 27 to 51 of the Arbitration Legislation pertaining to arbitration procedures and witness examinations do not require parties to meet in person. Article 54 of the Arbitration Legislation only requires that arbitrators must sign arbitration awards as the finalization of arbitration proceedings. The signature requirement is also supported by the IT Legislation which permits the use of digital signatures.

5. Discussion

5.1 Nationality of Online Arbitration Awards from the Perspective of the Arbitration Legislation

Based on the research findings, it is clear that the Arbitration Legislation permits the use of online arbitration. However, the nationality of online arbitration awards raises a potential issue in Indonesia where disputing parties do not explicitly prescribe a nationality to the award in their online arbitration agreement. This is because Indonesia adopts and implements the territorial criteria. Even if the disputing parties wish for their online arbitration awards to be international due to the international nature of their business relationships, the award may still be domestic if they are rendered within the jurisdiction of Indonesia.

Online arbitration awards are only considered to be international if they are rendered overseas or otherwise outside of the jurisdiction of Indonesia. In *Bankers Trust Company and Bankers Trust International Plc. vs PT Mayora Indah, Tbk.*, the Court used the terms 'international arbitration award' and 'foreign arbitration award' interchangeably indicating that there is no difference between the two terms. Hence, it is important for parties to explicitly state the seat of arbitration when using online arbitration. Since the seat of arbitration will determine the nationality of the awards, whether they are domestic or international under the Indonesian Arbitration Legislation, the disputing parties must determine the seat of online arbitration prior to the commencement of online hearings and proceedings (Witt, 2001).

However, if the seat of arbitration has not been determined by the disputing parties within their online arbitration agreement, the question remains as to how this must be determined. The answer to this question is provided in Article 31(3) of the Arbitration Legislation which stipulates that if the parties have chosen an arbitration procedure, they must agree on the timeframe and seat of the arbitration, and if the timeframe and seat are not determined, the arbitrator or arbitration panel will make the decision on behalf of the parties. This in itself may give rise to issues, if arbitrators are not familiar with territorial criteria adopted in the Arbitration Legislation in Indonesia. Even though the relationship between disputing parties are partly or

entirely international, their arbitration awards may be domestic simply because the arbitrators select Indonesia as the seat of online arbitration.

Similarly, arbitrators may render international online arbitration awards even though the dispute arises from a domestic business relationship. As a result, this study argues that in relation to online arbitration, the nature of disputing parties' business relationships should form the basis for the seat of online arbitration by arbitrators. A progressive interpretation of the Arbitration Legislation² based on the progressive legal theory may facilitate this development. In addition, It is further submitted that in the absence of an explicit seat of arbitration in an online arbitration agreement, the seat of arbitration must be determined based on the nature of the business relationship of disputing parties.

5.2 Offline Enforcement for Online Arbitration Awards

Online arbitration awards have no legal effect in the absence of their recognition and enforcement. This poses a significant challenge for online arbitration because arbitrators do not have executorial power to recognize and enforce online arbitration awards. As a result, the process of enforcing them must be performed by the enforcing courts where they are rendered, based on their governing laws (Wagner, 2014). Table 1 below demonstrates that online arbitration is supported by the Arbitration and IT Legislation up to and excluding the enforcement of online arbitration awards.

Table 1. Online Arbitration Phases

Online Arbitration Phases	Online Methods	Arbitration Legislation	IT Legislation
Agreement	Email and other online communication devices, digital signatures	Article 4(3)	Article 11
Proceedings	Video conferences	Article 31 (1)	
Awards	Online awards, digital signatures	Article 54	Article 11
Recognition and Enforcement	OFFLINE (Article 59 and 67)		

Source: Data analyzed by the authors

The enforcement of arbitration awards in Indonesia is dependent on the nationality of the award. Accordingly, the process of enforcing online arbitration award is the same. If an award is classified as domestic, then it is governed by Article 59(1) of the Arbitration Legislation, which explicitly requires that the original text or an authentic copy of the arbitration award must be delivered to the Registrar of the District Court. Article 59(4) further notes that a non-fulfillment of the requirements will make the arbitration award unenforceable. It is clear that the Arbitration Legislation requires a hardcopy of online domestic arbitration awards for their enforcement process.

The enforcement of international online arbitration awards is the same as the domestic awards. This is because Article 67(2a) and (2b) of the Arbitration Legislation also requires the original text or an authentic copy of the awards and arbitration agreement to be submitted to the Registrar to the District Court of Central Jakarta for the enforcement process. This means that all phases of arbitration proceedings can be conducted online with the exception of the last phase, being enforcement of the award. The enforcement process must be conducted offline using a hardcopy of the award. This requirement is imposed on both domestic and international online arbitration awards. Hence, 'fully autonomous software agents' cannot replace the role of court in the enforcement process of online arbitration awards (Carneiro, et.al, 2014).

6. Conclusion

The use of online arbitration presents a new approach in the interpretation of the Arbitration Legislation in Indonesia. To that end, the nationality of online arbitration awards may raise issues where disputing parties do not appoint the seat of arbitration in the online arbitration agreement. In the absence of this, the decision is left to the arbitrators. In this respect, it is suggested that the selection of the seat of arbitration should be dependent on the nature of the relationship between the disputing parties. The process of online arbitration does not include the process of recognition and enforcement of online arbitration award; this process is governed by the conventional methods contained in the Arbitration Legislation which requires a hardcopy of the online arbitration award for its enforcement. Hence, new approaches to the interpretation of the Arbitration Legislation cannot be fully adopted as it raises potential barriers to the enforcement process of online arbitration awards.

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