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ABSTRACT

Arbitration has become one of the most popular methods of dispute resolution among business people in Indonesia because of its unique characteristics, such as being a less formal process, the proceedings are usually private, and the confidentiality of disputes is generally assured. More importantly, arbitration awards are enforceable in Indonesia under Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolutions (*Undang-Undang Republik Indonesia Nomor 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa*). Since using the Internet offers great opportunities for business people to expand their businesses, they may also have opportunities to select online arbitration to settle their disputes. The use of online arbitration has already been introduced in Indonesia as one of the mechanisms for business people to settle business disputes. However, many business people are still reluctant to use online arbitration because Law No. 30 of 1999 does not specifically deal with online arbitration. This research paper argues that the existing Indonesian national laws do support the use of online arbitration. To conduct this research a normative legal research method was adopted, using secondary data collected through document and literature study (library research). The data was analysed based on its contents (content analysis), using descriptive - qualitative approaches. The research found that Indonesian arbitration law should be interpreted more widely to cover traditional and online arbitration. It was also found that there are no provisions under Indonesian arbitration law to prohibit online arbitration proceedings and hearings, as long as they are conducted based on the principles of equality, transparency and due process. Consequently, online arbitration awards, which are rendered under the online arbitration proceedings, may be recognised and enforced based on Indonesian arbitration law.

Keywords: online arbitration, Indonesia

1. INTRODUCTION

Arbitration has become the most popular method of dispute resolution among business people in Indonesia because of its unique characteristics, such as it being a less formal process, the proceedings are usually private, and the confidentiality of disputes is generally assured (Fitch, 1989). More importantly, arbitration awards are enforceable in Indonesia under Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolutions (Budidjaja, 2002). In addition, international (foreign) arbitral awards may be

enforced in Indonesia since this country has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) through Presidential Decree No. 34 of 1981 (*Keputusan Presiden No. 34 Tahun 1981*).

Suraputra in Kansil and Kansil (1999) contends that arbitration constitutes a dispute resolution mechanism selected by parties in order to obtain a final and binding award that is decided by impartial arbitrators chosen by the parties (Leahy & Bianchi, 2000). In short, arbitration is a private method of solving disputes, since it is conducted by private persons (arbitrators) (Sanders, 1975).

Nowadays, electronic commerce and the Internet offer unprecedented opportunities for business people in Indonesia to expand their businesses (Wilikens et al., 2000). Similar to off-line businesses, e-commerce transactions may result in e-disputes; consequently, they should be resolved by an e-dispute resolution mechanism. Online arbitration is one of the dispute settlement mechanisms, which can be utilized by business people. Several unique characteristics of online arbitration suitable for them are as follows:

Table 1. Advantages of Online Arbitration

No.	Type of Advantage	Description
1.	Neutrality	The Internet is a neutral place for the disputing parties.
2.	Less Costly	The parties and arbitrators do not have to travel for the hearings.
3.	Flexibility	Audio and video conferencing capability allows the parties to conduct meetings and hearings remotely.
4.	Time Saving	The parties are able to initiate and defend a claim by accessing a website and completing forms electronically.
5.	Efficiency	Web-based document filing systems help the parties to submit many documents instantly and over any distance.
6.	More Convenient	Submissions can be archived by automated document management systems and reviewed from any location, at any time.

Source: Yüksel (2007)

Nevertheless, the legality and validity of online arbitration in Indonesia are questionable because Law No. 30 of 1999 does not specifically govern online arbitration. Hence, this research aims to analyse online arbitration based on Law No. 30 of 1999. In addition, Law No. 11 of 2008 concerning Electronic Information and Transactions (*Undang-Undang Republik Indonesia Nomor No.11 Tahun 2008 tentang Informasi dan Transaksi Elektronik*) is also used to support Law No. 30 of 1999 to clarify the meaning and the use of electronic requirements in online arbitration.

RESEARCH OBJECTIVES

The scope of arbitration may be divided into three phases as follows:

Phase 1: Prior to arbitral proceedings

A number of issues arise in this stage, for example, the capacity of the parties to enter into an arbitration agreement, the existence and validity of the arbitration agreement, and the enforceability of the arbitration agreement (Smit & Pechota, 2000).

Phase 2: During arbitral proceedings

The issues may include the power of the arbitrators to settle disputes, the representation and legal assistance, the basic standards of due process in the arbitral proceedings, and the issuance of awards (Smit & Pechota, 2000).

Phase 3: Post-arbitral proceedings

The issues may cover the recognition and enforcement of arbitral awards, the law governing the recognition and enforcement process, the formal conditions and procedures of the recognition, and the enforcement proceedings.

As mentioned previously Law No. 30 of 1999 does not specifically govern online arbitration, therefore, this research raises the following questions:

- a. Is an online arbitration agreement valid under the existing laws of Indonesia?
- b. Are online arbitration proceedings recognized by Indonesian arbitration law?
- c. Are online arbitration awards enforceable in Indonesia?

2. LITERATURE REVIEW

Indonesian Laws Relevant to Online Arbitration

On 12 August, 1999 the Indonesian Government enacted Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolutions to complete all of the regulations concerning arbitration in Indonesia. This law deals not only with arbitration but also governs other types of alternative dispute resolution, such as consultation, negotiation, mediation, conciliation and expert assessment. In addition to Law No. 30 of 1999, Law No. 11 of 2008 concerning Electronic Information and Transactions is also the legal base for online arbitration. This law was enacted to respond to the development of information technology and communications. The General Elucidation of this law clearly emphasizes that, “information technology becomes a double-edged sword, that is to contribute to the improvement of human welfare, advance and civilization, and at the same time, become an effective means for unlawful acts”. The enactment of this law was also driven by the realization that “electronic transactions for trade via electronic systems (electronic commerce) have been made a part of national and international trade. This fact shows that convergence in the field of information technology, media and informatics (telematics), inevitably keeps developing in line with invention in the field of information technology, media and communications” (General Elucidation of Law No. 11 of 2008)

3. RESEARCH METHODS

This research adopted a normative legal research method, which is also known as the doctrinal method (Amiruddin, 2004). Normative legal research constitutes a study of documents because it relies mostly on secondary data, such as legal theories, regulations,

court decisions and doctrines (Santoso, 2005). The secondary data used by this research consists of two types of legal materials, namely:

- a. Primary legal materials are the authoritative materials, which consist of legislation, and official records or minutes in the making of legislation (Marzuki, 2005). The primary legal materials of this research are on Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolutions and Law No. 11 of 2008 concerning Electronic Information and Transactions.
- b. Secondary legal materials are journals, books and Internet-based sources relevant to online arbitration and collaborative law, since these two components are the main focuses of this research.

The entire secondary data in this research was collected through document and literature study (library research) and analyzed based on its contents (content analysis), using descriptive – qualitative approaches. The following steps were conducted in this research prior to drawing conclusions.

- a. Formulating the research questions;
- b. Establishing the research aims;
- c. Preparing the legal, theoretical and conceptual framework;
- d. Determining the research methodology;
- e. Examining the secondary data;
- f. Analyzing the research findings and results;
- g. Summarizing the research results;
- h. Formulating the conclusions and future implications.

4. DISCUSSION

Is online arbitration agreement valid under the existing laws of Indonesia?

Online arbitration is not specifically governed by Law No. 30 of 1999, hence, it is questioned whether provisions under this law are adequate to support the applicability and validity of online arbitration. Article 1(1) of Law No. 30 of 1999 emphasizes that arbitration can only be conducted if the disputing parties agree to arbitrate, which is proven by their arbitration agreement. It is questioned whether online agreement to arbitrate has a legal standing under Law No. 30 of 1999. Prior to examining the validity of online arbitration agreement, it is significant to state the substance of Article 4(2) of Law No. 30 of 1999. This provision strictly requires that, “the agreement to resolve disputes through arbitration as specified in paragraph (1) must be contained in a document signed by the parties”. In other words, the arbitration agreement shall be in writing and signed by the disputing parties. The question is whether these requirements can be fulfilled by online arbitration agreement.

The requirement in writing is met by online arbitration since Article 4(3) of Law No. 30 of 1999 stipulates, “if an agreement is made to resolve a dispute by an exchange of letters, the sending of telexes, telegrams, faxes, e-mails, or any other form of communication it must be accompanied by a record of receipt by the parties”. This provision permits e-mails to be evidence of the written form of an arbitration agreement. The other requirement is the signature of disputing parties on the arbitration agreement. The use of electronic signatures in an arbitration agreement is valid since Article 11 of

Law No. 11 of 2008 states that (1) Electronic Signatures shall have lawful legal force and legal effect to the extent of satisfying the following requirements:

- a. Electronic Signature-Creation data shall be associated only with the Signatories/Signers;
- b. Electronic Signature-creation data at the time the electronic signing process shall be only in the power of the Signatories/Signers;
- c. Any alteration in Electronic Signatures that occurs after the signing time is knowable;
- d. Any alteration in Electronic Information associated with the Electronic Signatures after the signing time is knowable;
- e. There are certain methods adopted to verify the identity of the Signatories/Signers; and
- f. There are certain methods to demonstrate that the Signatories/Signers have given their consent to the associated Electronic Information.

Based on this provision, it is clear that electronic signatures are equal to manual signatures in general, with legal force and legal effect. Based on the explanations above, it can be defined that an online arbitration agreement is an agreement made by the disputing parties through the medium of technology to settle their dispute in arbitration.

Are online arbitration proceedings recognized by Indonesian arbitration law?

Online arbitration agreement is the legal base to conduct an online arbitration hearing. An online arbitration hearing can be fully conducted using electronic means, such as hearing witnesses via video conferences (Arsic, 1997), “where each participant to arbitration sits before sound and video camera equipment. On the screen the faces of the other participants appear” (Yuuksel, 2007). Another method of conducting an arbitration hearing is by transmitting documents electronically as long as the parties have equal access to the information (Hill, 1999). Since arbitrators do not physically meet, then another issue arises pertaining to the seat or place of arbitration. It is very significant for arbitrators who conduct online hearings and proceedings to ascertain the seat of arbitration because it will determine “the nationality of the award and the jurisdiction of local courts for setting aside the award” (Witt, 2001).

There shall be no problem if the disputing parties have determined the seat of arbitration prior to the hearings and proceedings. In this circumstance, the arbitrators only state the seat of arbitration in the award itself (Manevey, 2001). However, if the seat of arbitration has not been determined by the disputing parties, the question arises of how to determine the seat of arbitration. The answer to this question is provided by Article 31(3) of Law No. 30 of 1999, which stipulates, “If the parties have chosen an arbitration procedure, as contemplated in paragraph (1) they must agree on provisions for the timeframe and venue of the arbitration, and if the timeframe and venue are not determined, the arbitrator or arbitration panel will determine them”.

Based on the explanations above, it should be noted here that there are no provisions in Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolutions for prohibiting online arbitration proceedings and hearings, as long as they are conducted based on the principles of equality, transparency and due process.

Are online arbitration awards recognized and enforceable in Indonesia?

The most determinative phase in the context of arbitration is the recognition and enforcement of arbitration awards, because the awards have no legal effect in the absence of their recognition and enforcement, and the other phases of the arbitration process, such as the arbitration proceedings and the issuance of arbitration awards (Chukwumerije, 1994), therefore, become meaningless. Winning parties also feel frustrated because they have incurred costs and used time for arbitration, but their awards cannot be realized (Gautama, 1975). The question is whether online arbitration awards can be enforced in a similar manner as traditional arbitration awards. It should be noted here that arbitrators do not have executory power to recognize and enforce the online arbitration awards that they have made. As a result, the process of recognition and enforcement of the awards must be performed by the courts of the enforcing states according to their laws that govern such processes.

Law No. 30 of 1999 divides arbitration awards into two categories, namely domestic (national) arbitration awards and international (foreign) arbitration awards. Arbitration awards are categorized as domestic (national) arbitration awards if the proceedings and the seat of arbitration are in the jurisdiction of Indonesia. Article 1(9) of Law No. 30 of 1999 defines an international (foreign) arbitration award as “an award handed down by an arbitration institution or individual arbitrator outside the jurisdiction of the Republic of Indonesia, or an award by an arbitration institution or individual arbitrator which, under the provisions of Indonesian law, is deemed to be an international arbitration award”. The question arises of how to categorize online arbitration awards when all the processes of arbitration are conducted online. As previously mentioned, the seat of arbitration determines the nationality of the arbitration, therefore, the nationality of online arbitration awards also depends on the seat of arbitration written in the awards.

As previously stated, online arbitration awards can only be enforced by the courts of enforcing states according to their laws that govern such a process. In Indonesia, the enforcement of online domestic arbitration awards is governed by Article 59(1) of Law No. 30 of 1999, which states, that “within 30 (thirty) days from the date the award is rendered, the original text or an authentic copy of the arbitration award must be delivered to the Clerk of the District Court and registered there by the arbitrator or his/her/its proxy”. Article 59(4) of Law No. 30 of 1999 stipulates that, “non-fulfillment of the provisions contemplated in paragraph (1) above will render the arbitration award unenforceable”. Based on these provisions, it is clear that Law No. 30 of 1999 requires online arbitration awards to be printed and signed by the arbitrators. It is then clear that all phases of arbitration, but the last, can be conducted online in Indonesia. The last phase, namely the enforcement of arbitration awards, shall be conducted using the traditional approach, which is to print the online arbitration awards and have the arbitrators sign them directly.

5. CONCLUSION

The advantages of online arbitration may give business people opportunities to settle their disputes in a less costly, more flexible, convenient and efficient manner, because of the time saved and the fact that the neutrality of online arbitration is also guaranteed.

However, the validity of online arbitration and the enforceability of online arbitration awards may be doubted by business people in Indonesia because Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution does not specifically govern online arbitration.

Based on the examination of Law No. 30 of 1999, it is obvious that this law should be interpreted more widely to cover traditional and online arbitration. The issue of online agreement is resolved by Article 4(3) of Law No. 30 of 1999, which permits the use of emails or any other form of communication. This provision is also supported by Article 11 of Law No. 11 of 2008 concerning Electronic Information and Transactions, which clearly states that electronic signatures shall have legal force and legal effect. In addition, there are no provisions in Law No. 30 of 1999 prohibiting online arbitration proceedings and hearings, as long as they are conducted based on the principles of equality, transparency and due process. More importantly, the enforceability of online arbitration awards should not become an issue since they can be printed and signed by the arbitrators. Overall, it can be concluded that online arbitration in Indonesia can be utilized by business people, since the relevant Indonesian laws support the use of this type of arbitration.

It is suggested here that online arbitration be used by more Indonesian business people in the future, particularly those who engage in international business. This is because online arbitration can save time and costs. The use of online arbitration in Indonesia also reflects the flexibility of Indonesian arbitration law in adopting developed technology.

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