

# THE IMPLEMENTATION OF ONLINE ARBITRATION LAW AS A MODERN DISPUTE SETTLEMENT IN INTERNATIONAL CHAMBER OF COMMERCE (ICC)

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## ABSTRACT

The rapid development of Information Technology has influenced the pattern of community life, it cannot be denied it is also influenced the people on how they settle the dispute at the moment which known as Online Dispute Resolution (ODR). Online Arbitration is a part of ODR which commonly used by the parties. As the world's largest business organization, International Chamber of Commerce (ICC) has successfully implement Online Arbitration by issuing a rules that have to be obeyed by the parties who wish to settle the dispute among them under ICC. As the world's leading Arbitration Institution, it is proven that ICC have been handled more than 22.000 disputes in 137 countries and territories until 2017. The issue of online Arbitration itself arises and comes to rectify the disadvantages of conventional Arbitration because in a practice, conventional Arbitration often takes a long time and the cost of Arbitration is not as cheap as previous presumption. With the increase of e-commerce activity through Internet media, which often causes disputes among the parties concerned, the international community needs a way of dispute resolution which is faster, cheaper and more effective than through conventional arbitration.

**Keywords:** Arbitration; online arbitration; dispute; dispute settlement, International Chamber of Commerce (ICC).

## INTRODUCTION

In 2016, according to preliminary statistics, a total of 966 new cases administered to the International Chamber of Commerce (abbreviated: ICC) – involving 3,099 parties from 137 countries. From the data, it can be concluded that ICC reflects continuing growth of the world's leading arbitral institution. It is assumed that people over the world still prefer Arbitration to be their choice of dispute settlement because international commercial disputes are particularly suitable for resolution by Arbitration. Long before that, Arbitration arises because the active activities of commerce that become a benchmark of country's economic level.

The data above proves that a commerce gives the significant contribution as the factor of globalization. At the moment, globalization in the economic sector have developed rapidly. For example, the businesses are greatly facilitated by the interconnected networking (abbreviated: Internet) as the speedy communication media that able to connect them anywhere. That is even make commercial considered as an engine of growth. As the time progress, the commercial transaction by facilitating Internet has changed the business world from traditional method to more modern, it is known as electronic commerce (abbreviated: e-commerce). In its development, e-commerce was appear from the society's request who require faster, simpler, easier, and better quality service because e-commerce is a recent and rapidly evolving phenomenon.

The only institution that people used to know to resolve the dispute is only the Court, but accomplishing the dispute through litigation got assumed not professional to deal with business case (especially for international case), not independent, even the judges are losing the moral integrity while performing their duties, and considered as a place that is ineffective and not efficient to resolve business disputes. Therefore, the parties tend to switch from litigation to non-litigation which used to called as Alternative Dispute Resolution (abbreviated: ADR) , for example through Arbitration. The Arbitration is one of the dispute settlements that provides many advantages, i.e: cheaper and faster, kept confidential, final and binding decision. Arbitration is usually must faster, far less expensive, and just as fair as litigation, which is why many parties prefer to use Arbitration as the best way. That is why the Arbitration become the most frequently alternative dispute resolution.

But practically, Arbitration often takes a long time and the cost of Arbitration is not as cheap as previous presumption. It is not doubtful that sometimes the party failed in submitting the Arbitration because the cost is not affordable to reach. Arbitration as the method of dispute settlement has develop from time to time, by answering party's needs, the issue of online Arbitration arises and comes to rectify the disadvantage of conventional Arbitration. At present, the world has changed so very much, developed technology has penetrated business transactions. Electronic commerce and the use of Internet has influence the dispute settlement and propose unprecedented opportunities for involving party to expand their business. It is also happen to Arbitration that using an Internet which used to be called as online Arbitration.

## **RESULTS AND DISCUSSION**

### **The Applied Rules**

The rapid development of Information Technology (abbreviated: IT) has influenced the pattern of community life, it can not be denied that technology has indulge a people. It is also influenced to the people on how they settle the dispute at the moment which known as Online Dispute Resolutions (abbreviated: ODR). Online Arbitration is a part of ODR which make use of IT as the tool to settle the commercial dispute. Broadly speaking, every arbitration institutional body has its own rules as the basis of their procedural law in order to fulfill the material aspect or known as substantive law.

At present, an applied arbitration procedural laws of ICC rely on its Rules which known as 2017 International Chamber of Commerce Rules of Arbitration & Mediation (abbreviated: ICC Rules). ICC has issued a Rules that used by the parties who desire to

settle different argument or dispute among them with third party assistance. ICC Rules itself has defined into Foreword, Arbitration Rules which consist of 6 Appendix, and Arbitration Clause. In addition, the parties who are agreed to bind themselves in ICC Rules have to pay attention with Notes to the Parties and Arbitral Tribunals on the Conduct of the Arbitration. This Note is intended to provide parties and arbitral tribunals with practical guidance concerning the conduct of Arbitrations under the ICC Rules of Arbitration (“Rules”) as well as the practices of the International Court of Arbitration of the International Chamber of Commerce (“Court”). Besides that, ICC has ease the parties in terms of cost calculation by providing Cost Calculator in ICC official website, it is mainly to enable parties to produce an estimate of the likely costs of an ICC Arbitration according to the scales in Appendix III to the Rules. The Cost Calculator will generate the amounts for the ICC administrative expenses and for the arbitrators’ fees.

In terms of legal status of Online Arbitration under ICC Rules, it is stated in Paragraph (f) of ICC Arbitration Rules Appendix IV about Case Management Techniques:

*“The following are examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost. Appropriate control of time and cost is important in all cases. In cases of low complexity and low value, it is particularly important to ensure that time and costs are proportionate to what is at stake in the dispute: Using telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT that enables online communication among the parties, the arbitral tribunal and the Secretariat of the Court.”*

In addition, the existence of ICC Commission Report on Information Technology in International Arbitration answers the question of governing law of Online Arbitration in ICC. ICC argued that when used – and especially when used effectively – IT can help the parties in International Arbitration to save time and costs and to ensure that the Arbitration is managed and conducted efficiently. Indeed it is in line with the needs of the parties who wish to settle the dispute in the most effective and efficient ways. On the other hand, it is to give a chance to obtain dispute settlement that arise an acceptable and satisfying award for the parties. The use of IT as a characteristic of Online Arbitration shall agreed by the parties.

Here is the sample wording for pre-dispute agreement on IT use that offered by ICC:

*“The Parties, by an express provision in the agreement, adopt the following procedures regarding the use of information technology (“IT”). The interpretation of such provision is subject to the law of the arbitration agreement: The Parties recognise that, in principle, the use of IT in a possible arbitration between them may result in a more cost-effective and less timeconsuming proceeding. Therefore, they shall favourably consider the use of IT for this purpose and shall endeavour to discuss in good faith how to frame it in such a way as may be deemed most suitable at the time of arbitration, taking into consideration, as may be appropriate, relevant developments that have occurred in IT, as well as any observations and suggestions that the Arbitral Tribunal may express, without prejudice to the right of the Arbitral Tribunal to issue directions for case management.”*

## **The Examination Stage**

According to Huala Adolf, another concept of Arbitration Procedural Law that can be taken as a role model is a Arbitration Procedure in ICC. ICC Rules have been applied widely. The use of this Rules also in line with many cases that have been settled by the ICC Arbitral Body. The case examination procedure as a part of curial law of ICC procedural law itself has developed time by time starting from 1927, 1931, 1933, 1939, 1947, 1955, 1975, 1988, 1998, 2012, and the last on 2017. Basically, the ICC Procedural Law is a quite similar with any others Arbitration Procedural Laws in general. The procedures can be divided into 3 parts into registration stage, examination stage, and post-award stage.

As soon as it has received the file from the Secretariat, the arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference (abbreviated: ToR). ToR become one of the characteristics of ICC Procedural Law as stipulated in Article 23 of ICC Rules. As soon as it has received the file from the Secretariat, the arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its ToR. After receipt of the Request, the Secretary General may request the claimant to pay a provisional advance in an amount intended to cover the costs of the arbitration until the ToR have been drawn up; or when the Expedited Procedure Provisions apply until the case management conference. Any provisional advance paid will be considered as a partial payment by the claimant of any advance on costs fixed by the Court. The Arbitrator(s) in settling the dispute by Online Arbitration is absolutely passive and waiting the case from claimant/plaintiff, it is mainly because the party is the one who register or fill the lawsuit through the facility that have been offered by ICC. Arbitrator(s) only decide based on their scope that filed to them. It is in accordance with the principle of civil procedural law in general.

In terms of Online Arbitration which needs IT, the ICC propose the sample wording in the ToR as mentioned in ICC Commission Report on Information Technology:

*“The Parties recognise that the use of information technology (“IT”) may result in a more cost effective and less time-consuming proceeding. Thus, they favourably consider this use, and undertake to negotiate in good faith between them regarding how such technologies may best be utilised in the present arbitration and to take into account any observations and suggestions that the Tribunal may express, without prejudice to the right of the Tribunal to issue directions for case management.”*

In terms of General Use of IT, The Tribunal may issue directions regarding the use of appropriate IT at any presentation to or conference with all parties or at any hearing before the Tribunal unless a party reasonably objects. The Party using IT shall deploy commercially reasonable efforts to ensure that the IT functions properly at all relevant times and does not impair the progress of the arbitration. If a Party does not comply with the preceding requirements, the Tribunal retains full discretion to take appropriate action and issue appropriate directions, including adverse cost findings. In this regard, the Tribunal shall place particular weight on whether that Party acted in good faith.

The ICC Procedural Law in the examination stage can be consists of petition and its answer, answer-to-answer session, verification, award making process, the cost until recognition and implementation of the award. But after all, it is depend on the parties to choose what Law that they deal with. Regarding to the issues relevant to the hearings, it should be addressed that whenever a party intends to use IT during oral hearings, it

should allow enough time to prepare and test the IT so that any technical problems can be identified and corrected before the hearing begins. The tribunal and the other party or parties should be informed of the planned use of IT before the hearing.

It can be concluded that ICC allows the Online Procedural Hearings as long the parties followed the sample rules and wording that ICC has been offered as stated in Article 24 of ICC Rules about Case Management Conference and Procedural Timetable: *“Case management conferences may be conducted through a meeting in person, by videoconference, telephone or similar means of communication. In the absence of an agreement of the parties, the arbitral tribunal shall determine the means by which the conference will be conducted. The arbitral tribunal may request the parties to submit case management proposals in advance of a case management conference and may request the attendance at any case management conference of the parties in person or through an internal representative.”*

The enforcement of Online Arbitration (international) is quiet alike with the enforcement of traditional Arbitration which refers to the provisions under New York Convention 1958. It is also applied in ICC. It should be paid attention that the award must be made in a written form as it is agreement in the beginning even though the party agreed to use IT as a tool of their dispute settlement. In terms of how a country implement the Arbitration award, it depends on the choice of Law that chosen by the parties. As an example, if there is one party coming from Indonesia and desire to implement Arbitration award then he/she shall registers the award to the domestic Court.

If the parties reach a settlement after the file has been transmitted to the arbitral tribunal, the settlement shall be recorded in the form of an award made by consent of the parties, if so requested by the parties and if the arbitral tribunal agrees to do so. Once an award has been made, the Secretariat shall notify to the parties the text signed by the arbitral tribunal, provided always that the costs of the arbitration have been fully paid to the ICC by the parties or by one of them. Additional copies certified by the Secretary General shall be made available on request and at any time to the parties, but to no one else. An original of each award made in accordance with the Rules shall be deposited with the Secretariat. Every award shall be binding on the parties.

## CONCLUSIONS

Arbitration as the method of dispute settlement has develop from time to time. By answering party's needs, ICC implements Online Arbitration as a new method of dispute settlement to rectify the disadvantages of conventional Arbitration. Based on the previous elaboration and discussion, it can be concluded:

1. Online Arbitration under ICC has successfully settle the dispute among parties, it is supported that ICC Rules have been applied widely. ICC also facilitates the parties to ease them by providing the sample wording for their agreement including agreement to use information technology or known as a part of Online Arbitration.
2. The case examination of Online Arbitration Procedural Law starting from registration phase until post-award stage have been concluded under ICC Rules of Arbitration, ICC Notes to Parties and Arbitral Tribunals on the Conduct of the Arbitration, ICC Cost-Calculator and ICC Commission Report on Information Technology in International Arbitration.

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