
Legality Aspect of Conducting Documents-Only Arbitration in Indonesia

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Abstract

Documents-Only Arbitration (DOA) is a type of arbitration that is carried out entirely by written documents-only. DOA is beneficial when the burden and substance of the dispute are relatively simple and when there are obstacles to conduct a face-to-face proceeding (for example, in the Covid-19 Pandemic or limitation of cost). This study examined the DOA trial method and how it is based on Law No. 30 Year 1999 concerning Arbitration and Alternative Dispute Resolution as the lex arbitri in Indonesia. Regulations, Rules, procedures, and practices of DOA from arbitration institutions, both national and international, are also studied to understand the problem better. This study aimed to explain the legality of arbitration based on Documents-Only Arbitration in Indonesia. This study concluded that the conduct of DOA is possible to be implemented in Indonesia and does not conflict with Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (Arbitration Law).

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1. Introduction

A contract binds an agreement between two legal subjects, which obligates the parties to do something. The parties who have entered into a contract are expected to have the same understanding regarding the substance of the contract. However, the potential for disputes always exists. Disputes are considered to occur when the parties disagree with the implementation of the contract, either as a result of the default, ambiguity of definition, force majeure, or other reasons.¹ As the dispute grows and becomes more complex, one of the parties can activate the dispute settlement clause according to the chosen method.

There are two dispute resolution methods, especially in the business sector, namely litigation (Court) and non-litigation (outside of Court). Litigation dispute resolution is a method that has been better known for a long time in Indonesia which involves a trial in district courts (in civil disputes). On the other hand, non-litigation dispute resolution is a method that is increasingly used in the business sector. Furthermore, there are two types of non-litigation disputes: Alternative Dispute Resolution (ADR) (which includes expert judgment, negotiation, mediation, conciliation, consultation) and arbitration. This article mainly focuses on the latter. The arbitration process is more akin to a court in terms of the final output of the proceeding is an executable decision and has a third party acting as a "judge." Because it is similar to trials in Court, arbitration also has a procedural law that regulates the procedures for conducting arbitration proceedings according to Law Number 30 of 1999 concerning Alternative Dispute Resolution and Arbitration (ADR & Arbitration Law).

There are several advantages to arbitration dispute resolution, one of which is the flexibility it offers. Arbitration places the parties as to the highest authority in determining the method, decision-maker, procedure, language, and other matters related to the trial proceedings. This principle is known as the doctrine of the law of the parties. This feature is attractive to business actors since the parties are not bound by rigid provisions, provided the parties agree. It is on this basis that arbitration settlement is often referred to as a creature of contract.

¹ Hernoko, A. Y. (2013). *Hukum Perjanjian: Asas Proporsionalitas Dalam Kontrak Komersial*. Jakarta: Kencana.

One of the innovations in the arbitration process that will be the main focus of this research is document-only arbitration (DOA). DOA is a concept that emerged to support the flexible nature of the arbitration. As the name implies, the DOA trial process does not require the parties to appear before the Court since the entire trial process only involves exchanging documents via courier or online. This settlement method can provide significant benefits for the parties when the parties are not allowed to hold face-to-face hearings, for example, during the pandemic of infectious diseases.

In practice, DOA is rarely discussed in Indonesia at both the practical and academic levels. The authors instead found many references related to DOA from foreign academicians:

- a. Paula Hodges, in her writing entitled "Drive for Efficiency and the Risks for Procedural Neutrality - Another Tale of the Hare and the Tortoise?" published in the *Journal of Dispute Resolution International* Vol 6 No. 2 October 2012, explains the regulations for the implementation of DOA which are regulated in the Rules and Procedures for proceedings in international arbitration institutions such as ICC, LCIA, UNCITRAL, and others.
- b. Mauro Rubino-Sammartano, in his book "International Arbitration Law and Practice (3rd Edition)" discusses the due process in implementing DOA.
- c. Lim Seok Hui (CEO of the Singapore International Arbitration Center (SIAC)), in his column on the Bar and Bench website entitled 'Documents-only' Arbitration: An effective mechanism for the expeditious resolution of disputes, explains the various advantages of using DOA, especially for simple disputes.

The above references indicate that the DOA concept has not been explored much in Indonesia. Even though regulations regarding arbitration in Indonesia have regulated DOA. Article 36, paragraph 1 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (Arbitration Law) provides that examination of disputes in arbitration must be submitted in writing. Furthermore, paragraph two states that an oral examination may be carried out if the parties agree or are deemed

necessary by the arbitration or arbitral tribunal. In that provision, the word "may" means that an oral examination or face-to-face meeting is not obligatory at an arbitration hearing. Furthermore, the Official Explanation of Article 36 paragraph (2) states:

In principle, the arbitration procedure is carried out in writing. If there is an agreement between the parties, the examination can be carried out orally. Based on these regulations, the implementation of DOA is possible in Indonesia. However, there are still few references related to the implementation of it. Although DOA is an extension of the flexible nature of arbitration, its implementation must, of course, be adjusted to the provisions and principles of procedural law in Indonesia.

2. Problem Statement

Based on this background, this research aims to explain the legal aspects related to the validity of the implementation of an arbitration proceeding with documents only (documents-only arbitration) in Indonesia.

3. Methods

This research is juridical normative, namely examining library materials or secondary data as the primary material for research by tracing regulations and literature related to the problem under study. An approach of legal analysis is needed to obtain information from various aspects of the issue being tried to find answers. In this case, the author uses a conceptual approach to answer the questions raised regarding the legality of arbitration with documents-only arbitration in Indonesia. The approach used refers to Prof. Dr. Peter Mahmud Marzuki, SH., MS., LL.M., in his book titled *Legal Research*.²

The author uses a conceptual approach because "there is no legal rule for the problem at hand." Specific regulations relating to documents-only arbitration do not yet exist, both in the form of complicated law (regulations or laws) and arbitration rules and procedures. This concept is formed from the practices carried out in the business sector. Based on this approach, information regarding the concept of DOA is gathered

² Marzuki. P. M., (2008). *Penelitian Hukum*. Jakarta: Kencana. Pg 93

from the views of scholars or legal doctrine. The author also gathered data on the DOA concept in the practice of several leading international arbitral institutions such as the Singapore International Arbitration Centre (SIAC) and the Asian International Arbitration Centre (AIAC). This is done to have a better understanding of DOA and how it is implemented. An analysis is conducted by examined DOA with Arbitration Law as the Indonesian *lex arbitri* to conclude the legality of conducting DOA in Indonesia.

4. Analysis and Discussion

4.1. Overview of Documents-Only Arbitration

Based on the terminology, Documents-Only Arbitration interpreted by legal experts Guy Pendell, Richard Bamforth, and Anuj Moudgil as, "*...are those in which tribunals base their determinations entirely on written submissions and documentary evidence, with no opportunity to hear from counsel or take evidence from witnesses at oral hearings.*"³

Thus, DOA may be interpreted as an arbitration trial entirely based on the determination to submit written documents and documentary evidence without the opportunity to hear testimony from lawyers or collect evidence from witnesses orally.

On the other hand, CIArb's introduction to the guidelines of Documents-Only Procedure confirmed that "*....., references to 'documents-only procedures' should be understood as encompassing (1) arbitral proceedings conducted entirely based on written submissions and (2) issues within an arbitration dealt with by way of written submissions only.*"

Civil law litigation is generally carried out by submitting written documents and oral examinations with relatively short time and no or limited witness examinations. On the other hand, several other arbitral institutions (including LCIA, ICC, HKIAC, SIAC,

³ Pendell, G., Bamforth, R., and Moudgil, A. (ed. 26 March 2020). *Doing Arbitration Differently: Documents-Only Arbitration during the COVID-19 Pandemic and Beyond*. Retrieved from: <https://www.lexology.com/library/detail.aspx?g=6b969224-c412-404e-858f-81d3a3f22d76>. (Accessed 5 July 2021)

SCC, and ICSID) allow trials to be conducted by document procedure only. However, the regulatory approach requires the agreement of the parties.⁴

Many arbitral tribunals conduct trials by 'exchanging' written documents only. Redfern and Hunter stated that arbitration hearings of this kind are joint in specific categories of domestic cases with relatively simple claims. For example, a complaint by a traveler to a tour agency regarding the claim of rights mentioned in the insurance agreement letter.⁵

In the international context, document-only dispute resolution is also carried out at the London Maritime Arbitrators Association concerning disputes from the parties' articles of association and other related documents. Problems can also arise in commodity buying and selling, for example, the case of Foods Ingredients LLC v Pacific Inter-Link Sdn Bhd.⁶ Article 26 of the Malaysian Arbitration Act 2005 specifically considers and permits document-only arbitration procedures. The KLRCA Fast Track Arbitration Rules also state that the aggregate number of claims unlikely to reach the US \$ 75,000 in international arbitrations or do not reach RM 150,000 in domestic arbitrations shall be followed by document arbitration procedures only unless the arbitrator conferred with the parties and agreed to carry out oral hearings.

Document-only dispute resolution is beneficial when the burden of the dispute is relatively simple to find facts and laws, where costs are a consideration in this dispute. A simple case example is a consumer dispute with a seller/producer. The document-only method cannot be used in disputes where the facts are obscure, so the arbitrator does not have the advantage of cross-examining witnesses.

This method is based solely on the claimants' written reports and claims. In principle, the parties can submit documents in contracts, correspondence, receipts, and others. Then, the parties submit the relevant documents to the arbitrator. Written

⁴ *Ibid.*

⁵ Rajoo, S. (2016). *Law, Practice, and Procedure of Arbitration Second Edition*. Malaysia: Lexis Nexis.

⁶ Foods Ingredients LLC v Pacific Inter-Link Sdn Bhd (2012) 8 MLJ 585.

submission can be in the form of a letter to the arbitrator from the parties or their attorney or a formal document by the parties' lawyers.⁷

When the document submission is complete, the arbitrator(s) will immediately consider and decide the case in writing (award) from the documents that have been submitted to them. If the arbitrator(s) needs further explanation from the parties to decide the case, the arbitrator(s) can ask the parties to write an explanation. In practice, an arbitrator(s) will decide a claim without any information from the parties.⁸

The DOA method is similar to Online Arbitration. The fundamental difference between online arbitration and DOA is that face-to-face proceedings still exist in online arbitration, even through a liaison medium (internet). In an online arbitration, it is possible to have an in-person examination process. Thus, online arbitration proceedings are not prohibited as long as they are based on the principles of equality, transparency, and due process.

The benefits of resolving disputes through documents-only are apparent, especially amid the Covid-19 pandemic, where there are limitations and social distancing so that arbitrators and attorneys can still work without an examination process and hear the parties' statements. The parties can also avoid substantial travel costs to attend the trial.⁹

Although the implementation of DOA is not commonly used in international arbitrations, such procedures are commonly used in industry-specific disputes. The London Chamber of Commerce's London Chamber of Arbitration and Mediation (LCAM) implements document-only procedures so that costs charged are more affordable, provides legal certainty for the parties (secure case management delivery), thus saving costs because there is no need for the disputing parties to meet

⁷ Rajoo, S. *Op. Cit.*

⁸ *Ibid.*

⁹ Pendell, G., Bamforth, R., and Moudgil, A., *Op Cit.*

and conduct a legal presentation.¹⁰

Article 1, part c Documents-Only Arbitration Procedure established by CIARB, explains the criteria for disputes that can be resolved through this method:¹¹

- (1) *the evidence is limited and contained in contemporaneous documents;*
- (2) *there are limited areas of factual and technical issues in dispute;*
- (3) *the issues can be decided without oral testimony from factual and expert witnesses;*
- (4) *the issues do not involve complex and technical matters that may merit a hearing and/or are limited to the construction of a document or documents; and*
- (5) *where a party fails to participate in the arbitral proceedings if the arbitrators do not consider it necessary to hold a hearing to clarify certain aspects of the case.*¹²

Furthermore, Article 1 part d explains the factors that must be considered when determining whether some or all disputes are more appropriate to be resolved using documentary procedures, of course, with sufficient evidence/information, including (1) *the nature of the dispute;* (2) *the complexity of the issues;* (3) *the amount at stake;* (4) *the nature of the evidence and arguments to be adduced and by whom;* (5) *any time and costs savings;* (6) *whether it is an effective and efficient way of resolving all, or some, of the issues in dispute in the arbitration.*¹³

4.2. Procedure for Documents-Only Arbitration

In proceedings, each arbitration institution certainly has its respective guidelines to support the trial process. The Documents-Only Arbitration approach method has the rules outlined by the Chartered International Arbitration (CIARB). Therefore, other arbitral institutions have "benchmarks" in conducting DOA. Article 1 of the Rules

¹⁰ Hui, L. S. (ed. 22 July 2019). *Documents-only' Arbitration: An effective mechanism for the expeditious resolution of disputes*. Retrieved from <https://www.barandbench.com/columns/documents-only-arbitration-an-effective-mechanism-for-the-expeditious-resolution-of-disputes>. (Accessed 12 October 2020)

¹¹ *Ibid.*

¹² CIARB. *International Arbitration Practice Guideline, Documents-Only Arbitration Procedure*. retrieved from: <https://www.ciarb.org/media/4202/guideline-8-documents-only-arbitration-proceedings-2015.pdf>. (Accessed 5 July 2021)

¹³ *Ibid.*

explains the general provisions that apply and bind the parties to the dispute, namely:¹⁴

1. If an arbitration agreement contains provisions for implementing document procedures only, then these agreements must be fulfilled.
2. If an arbitration agreement does not contain provisions for document procedures only, but all parties involved agree to adopt the procedure for all or part of the dispute in the arbitration, the arbitrator(s) is obliged to respond on that basis by following the applicable arbitration rules and / or provisions as well as the law of the place where the arbitration procedure is carried out (*lex arbitri*).
3. If a party requests the implementation of a document-only procedure and / or the arbitrator(s), on their initiative, considers that all or part of the dispute in the arbitration is appropriate to be handled by that procedure, the arbitrator(s) shall consult all parties and seek the consent of each party involved before conducting document-only arbitration procedures.
4. Suppose it is decided to carry out the documents-only arbitration procedure. In that case, the arbitrator(s) is obliged to provide clear directions to the parties involved, including the various stages that must be followed so that the arbitrator(s) can determine the dispute by following the procedures determined based on documents only.
5. In any situation, the arbitrator(s) is obliged to ensure that each party has the same opportunity to present cases related to disputes while following the documents-only arbitration procedure.¹⁵

It is further stated that each party has the freedom to agree to the procedure according to a reasonable standard, and the arbitrator(s) is obliged to respect the agreement of each party, provided that this does not violate the mandatory rules and/or general rule principles in the place where the arbitration procedure is carried out. In a condition where both parties do not give consent or where the arbitrator(s)

¹⁴ *Ibid.*

¹⁵ *Ibid.*

considers that the agreement agreed upon is not feasible, the arbitral judge has the freedom to regulate the procedure deemed appropriate.¹⁶

If all parties agree to the procedure suggested by the arbitrator(s), they are obliged to record evidence of the agreement of all parties following the applicable procedure. Suppose a party does not agree with the procedure suggested by the arbitrator(s). In that case, the arbitration procedure will be carried out following the prior agreement of all parties. If the action requires them to adopt "unreasonable adjudicatory standards," they will need to consider whether it is better to terminate the procedure, taking into account every condition and the extent of the current arbitration process. Termination may result in adverse consequences for the "personal liability" of the arbitrator(s) concerned based on the provisions in the arbitration agreement, the provisions of the agreement, and/or *lex arbitri*.¹⁷

In the proceedings, the powers and obligations of arbitrator(s) are described in Article 2, namely:

- a. The arbitrator(s) must feel confident that each party has been given a fair opportunity in collecting documents and evidence so that they can resolve all disputes via document-only procedures.
- b. If during the process of document only procedures, one of the parties who initially given up the right to request a hearing comes before the Court to request a hearing, then the arbitrator(s) must comply with the request of the party concerned by referring to the applicable arbitration rules and / or *lex arbitri*.
- c. If during the process of documents-only procedures, one of the parties who initially have given up the right to request a hearing come before the Court to request a hearing, the arbitrator(s) is obliged to consider, with all the documents and evidence that has been collected, whether a hearing is necessary or not, only if all parties agree.
- d. If neither party requests a hearing and / or all parties have agreed to use the documents-only procedure, but the arbitrator(s), on their initiative by considering

¹⁶ *Ibid.*

¹⁷ *Ibid.*

all the documents and evidence that has been collected, considers that a hearing is necessary, they may request a hearing is held if all parties agree.

In cases where neither party has requested a hearing and all parties have given their consent to use the document-only procedure, but the arbitrator(s) considers that a hearing is necessary, they are obliged to explain the reasons in question to all parties and ask the approval of each party to carry out hearing. However, if one or more parties do not agree to the request for a hearing from arbitrator(s), they must continue the dispute process with documents-only procedures as previously agreed.¹⁸

On the other hand, after receiving documents and evidence from both parties, the arbitrator(s) is obliged to review and consider whether the documents submitted are sufficient for dispute resolution conducting through documents-only. Suppose the arbitrator(s) believes that the documents and/or evidence are insufficient. In that case, they need to request in writing the party concerned to submit documents or complementary evidence relating to the dispute within a reasonable time.¹⁹

After the submission of all documents and evidence has been carried out, or when the time limit for the submission has passed, and the arbitrator(s) considers that each party has been given a fair opportunity to submit the documents sufficient for the judge to determine a decision based on documents only procedures, the arbitrator(s) needs to announce that the trial is closed and inform all parties when they will announce the award.²⁰

4.2. The legality of Conducting Documents-Only Arbitration in Indonesia

Efficiency in the procedure is one of the advantages of the arbitration dispute resolution process. This principle enables the disputing parties to freely choose the procedures they deem most suitable to be applied in their dispute resolution. This principle is known as "party autonomy". This principle is regulated in Article 31 paragraph (1) of Arbitration Law:

¹⁸ *Ibid.* Art 2

¹⁹ *Ibid.* Art 2

²⁰ *Ibid.* Art 3

“The parties of a firm and written agreement are free to determine the arbitration procedure used in the proceeding of disputes as long as they do not conflict with the provisions of this Law.”

However, the implementation procedure of the DOA itself needs to be considered since party autonomy is limited by the fact that the arbitration process is a civil law dispute settlement process in which there are various civil principles that may apply it.

The provisions in Article 31 paragraph (1) are a reflection of the parties' freedom to determine arbitration procedures but at the same time also regulate the concept of public order as the limit of such freedom. So it is necessary to analyze the provisions in the Arbitration Law as *lex arbitration* in Indonesia related to the arbitration procedure to conclude the legality of conducting DOA in Indonesia.

F. Badiei extracted several elements that constitute a dispute settlement method as an arbitration:²¹

- a) Mutual consent to submit to arbitration
- b) Choice of arbitrators
- c) Due process
- d) A Binding decision

In order to ensure that the implementation of DOA is effective and efficient and at the same time legal and binding, these elements must be considered by the parties and the arbitrator. Discussions regarding this are as follow:

a) Agreement of the Parties to Submit a Dispute to Arbitration

As discussed in the previous chapter, parties' agreement is a fundamental principle in arbitration and crucial for legitimizing the arbitration process. Article 4 paragraph (2) of the Arbitration Law provides that:

²¹ Badiei, F. (2010). “Online Arbitration Definition and its Distinctive Features” ODR, (684): 87-93

"The agreement to settle the dispute by arbitration as referred to in paragraph (1) shall be contained in a written document signed by the parties."

Furthermore, Article 4 paragraph (3) stated:

"If it is agreed that dispute resolution conducting via arbitration in the form of an exchange of letters, consequently telex, telegram, facsimile, e-mail or other forms of communication, must be accompanied by a note of acceptance by the parties."

Based on this provision, the DOA process has been implemented since the agreement was made to resolve the dispute through arbitration. The agreement to arbitrate is made in writing either before or after the dispute occurs. A further question that needs to be answered is whether the arbitration clause or agreement should state explicitly if the parties wish to resolve the dispute through DOA. Returning to the principle of agreement, it is highly recommended that the parties specify the DOA in their arbitration clause. Suppose the parties agree to use the DOA method after the dispute has occurred; hence, the arbitrator should require the parties to form a written agreement to assure the certainty and validity of the arbitration trial's process and results.

b. Choice of Arbitrators

Regarding the choice of arbitrators, the Arbitration Law stipulates in Article 8 that the notification of arbitration must contain:

(2) The notification letter to hold arbitration as mentioned in paragraph (1) shall contain: ...

a. ...

b. an agreement entered into by the parties regarding the number of arbitrators or, if no such agreement has been made, the applicant may submit a proposal of the desired number of arbitrators in odd numbers:

Based on this provision, the choice of the number and / or appointment of the arbitrators shall be made in writing through a notification letter. Furthermore, other processes related to the appointment of the arbitrator's name, acceptance, and rejection of the arbitrator shall be carried out in writing.

Article 13 regulates the event of disagreement between the parties regarding the appointment of an arbitrator. Submission to the District Court to determine an arbitrator is made through a written request:

- 1) If the parties are unable to reach an agreement regarding the choice of the arbitrator or no provisions have been made regarding the appointment of the arbitrator, the Chairman of the District Court shall appoint the arbitrator or arbitration panel.
- 2) In an ad-hoc arbitration for any disagreement in the appointment of one or several arbitrators, the parties may submit a request to the Chairman of the District Court to appoint one or more arbitrators in the context of resolving the dispute between the parties.

The appointment of a single arbitrator is regulated in Article 14 concerning the appointment in writing:

- 1) Suppose the parties have agreed that the dispute that arises will be examined and decided by a single arbitrator. In that case, the parties are obliged to reach an agreement regarding the appointment of a single arbitrator.
- 2) The applicant by registered mail, telegram, telex, facsimile, e-mail, or using an expedition book must propose to the responding party the person's name who can be appointed as the sole arbitrator.

Furthermore, Article 16 regulates the acceptance or rejection of the appointment of the arbitrator submitted in writing. The appointment and acceptance of the arbitrator in writing constitute a written agreement between the party-appointed and the arbitrator who confirmed the appointment. In performing their duties, an arbitrator must be based on the principles of independence and impartiality. This principle

must be strictly complied with in implementing DOA, given the absence of face-to-face meetings between the parties and the arbitrator.

c. Due Process

Due process is a vital component in conducting the arbitration. The due process relates to the parties' rights to be heard and the parties' rights to be treated the same or known as the principles of Audi et al. *in Partem*. Article 29 of the Arbitration Law regulates these principles:

The parties to a dispute have equal rights and opportunities to express their arguments, respectively.

In the CIArb DOA Procedure, this principle is reflected in the provision of "fair opportunity to present their cases." In its application to the DOA, the arbitrator must ensure that all parties have been given equal and fair opportunities to submit their arguments, ensuring that each party is given sufficient time to prepare for filing documents. Each party must also be given a fair opportunity to respond to documents submitted by the opposing party.²²

The discussions regarding the due process are divided into 4 (for the part), namely 1) regarding summoning of parties; 2) Regarding evidence; 3) regarding examination; 4) reading of awards.

1. Regarding Summoning of Parties

Regarding the summons of the parties, the Arbitration Law in Article 40 states:

"... the arbitrator or chairman of the arbitral tribunal orders the parties or their proxies to appear before the arbitral tribunal which is determined no later than 14 (fourteen) days from the day the order was issued."

The phrase "appear" Indonesia in Article 40 paragraph (2) can become an obstacle in implementing DOA. Unlike conventional examinations and online arbitration, DOA

²² Hui, L. S., *Op. Cit.*

proceedings do not require the parties to meet each other face to face. The consequences of violating Article 40 have fatal consequences for the trial process. Article 43 of the Arbitration Law states that if the applicant does not appear before the Court, their Notice of Arbitration will be declared invalid. Article 44 of the Arbitration Law regulates that the absence of the respondent after being properly summoned twice will result in the trial being continued without the respondent's presence (*verstek*).

DOA procedures issued by the Chartered Institute of Arbitrators (CI Arb) state that the implementation of DOA should not violate the law and / or public policy principles (public order). The Arbitration Law, as *lex arbitri* becomes the legal basis for arbitration in Indonesia, must be considered to ensure the legality of the trial. The obligation to appear in Article 40 contradicts the essence of DOA. So, the question that arises is whether Article 40 can be bypassed to conduct DOA properly.

Article 18 par. BANI Rules and Procedures (R&P) stipulate that the arbitrator can determine whether the dispute is resolved by trial (face-to-face) or just a document. For this reason, the arbitrator "may" summon the parties to the first hearing in order to confirm the filing of documents, if any, or regarding the trial, if it is held, or regarding other procedural matters. The same provision is found in Article 20 par. 1 BADAPSKI rules and procedures (R&P). Furthermore, the parties' obligations to appear before trial are regulated in Article 22 of the BANI R&P, where the legal consequences of the applicant's absence at the first trial will result in the arbitration request being canceled, while the absence of the respondent until the second time causes the trial process to proceed without a respondent.

This provision is an adoption of the Civil Procedure Code regulated in Article 124 of the *Het Herziene Indonesisch Reglement* ("HIR") that stipulates If the plaintiff does not appear before the Court on a determined day, even though they are adequately summoned, or does not order other people to appear to represent them. Accordingly, the lawsuit is deemed invalid. Moreover, Article 127 HIR stipulates that if one or more of the defendants do not appear or do not order other people to appear on their behalf, the examination of the case will be postponed until the next trial day, of the

closest. The defendant, who did not appear, was ordered to be summoned by the Chairman on another trial day. At the time the case was examined, it was decided for all parties in one decision, of which the challenge of the award was not allowed (*verzet*).

Extensive interpretation of the provisions "appear" in article 40 Paragraph 2 of the Arbitration Law is needed to accommodate DOA implementation. It should be noted that arbitration proceedings should not be too fixated on the formal procedure of the Civil Procedure Code. Arbitration should be seen as an effort to present an alternative dispute resolution that is truly efficient. Furthermore, in the practice of arbitration proceedings, whether or not one of the parties appears before the Court (the applicant or respondent) is usually associated with the parties' willingness to continue the trial process. This situation can be avoided by ensuring a clear understanding between the parties regarding the DOA method. For this reason, the authors argue that the agreement of the parties at the beginning of the trial to use the DOA method means that the provision to "appear before the court" in the Arbitration Law may be distorted or at least extensively interpreted so that the DOA method can be efficiently conducted.

2. Regarding Evidence

Regarding evidence, the DOA settlement process will continue to be carried out following the principles in civil procedural law.²³ According to Article 1866 of the Civil Code, evidence is:

- a. Written evidence
- b. Evidence with witnesses
- c. Prejudices
- d. Recognition
- e. Oath

The emphasis of evidence in the DOA method is on documentary evidence. Hence

²³ Basarah, M. (2011). *Prosedur alternatif penyelesaian sengketa Arbitrase tradisional dan modern (online)*. Yogyakarta: Genta Publishing.

submitting evidence may be done via e-mail if it is in digital form. If the documents are not digital, they may be sent by post package to the arbitrator.²⁴ If the arbitrator still needs to ask the parties to explain the evidence, the party may submit an explanation in writing to be sent to the arbitrator.

3. Regarding Examination

Case examination in DOA is possible to do. The most substantial basis for arbitration hearings by documents-only is provided for in Article 36:

“(1) Examination of disputes in arbitration proceeding must be carried out in writing.
(2) An oral examination can be carried out if the parties agree or deemed necessary by the arbitrator or arbitration panel.”

Referring to article 36 above, it can be interpreted that the primary method of arbitration hearing procedure is carried out in writing. When referring to the Formal Elucidation of Article 36 paragraph 2, which stipulates:

"In principle, the arbitration procedure is carried out in writing. If there is an agreement between the parties, the examination can be carried out orally. Also, the expert witness testimony, referred to in Article 50, may occur orally if deemed necessary by the arbitrator or arbitration panel."

In the case of examining witnesses and expert witnesses, Article 37 paragraph (2) provides that the arbitrator may hear the witness testimony or hold a meeting if deemed necessary. The phrase "may" indicates that the witness examination process is not obliged to be carried out before the arbitrator.

In the BANI R&P, the provisions regarding examination stipulate that the arbitrator can hold the arbitration in a manner that can be considered proper. The parties are treated with equal rights and are given a fair and equal opportunity at each case examination stage. Although the BANI R&P regulates the venue for the hearing, namely "at the place determined by BANI and the agreement of the parties," the

²⁴ *Ibid.*

following provisions provide freedom for the arbitrator and the parties to determine "at another place". The same is regulated in the LAPSPI R&P, which regulates that "the LAPSPI Arbitration examination/trial will be held in Jakarta or other places determined by the Administrator together with the arbitrator". The freedom to determine another place by the arbitrator or the parties can be the basis to conduct the DOA examination following the DOA concept.

Furthermore, the implementation of the examination in the DOA must also be considered to not deviate from the principle of civil case examination, for example, giving the defendant the right and opportunity to refute the plaintiff's argument. On the other hand, the plaintiff also has the right to challenge the defendant's argument. Also, the examination must ensure that the principles of *audi et alteram partem* are still implemented, namely that they must provide equal opportunities to both parties to defend their respective interests.²⁵

4. Regarding Reading of Awards

The regulation regarding the reading of decisions is regulated in Article 55 of the Arbitration Law:

When the dispute examination has been completed, the examination will be closed immediately, and the day for the hearing to the reading of the arbitration award is determined.

Furthermore, Article 57 of the Arbitration Law:

The award is pronounced within 30 (thirty) days after the examination is closed.

The reading of the award in conventional arbitration is done by means of the arbitrator reading the award in front of the parties, which is not following the concept of DOA. There was no further explanation regarding the "pronouncement of the award" method, whether it should be done face-to-face or not, or its implications. This needs to be taken into account because determining when the reading of the

²⁵ *Ibid.*

award is very crucial since it will have an impact on the implementation of the arbitration award.

In the DOA, the date of pronouncing the award cannot be determined based on the award reading. Once again, extensive interpretation should be used to define "pronouncing awards". Since the date of the reading of the award is the basis for calculating the deadline for submission and registration of the arbitral award to the District Court (Article 59), which will then become the basis for the implementation/execution of the decision by the Court, the date that can be referred to as the date of pronouncement of the award is the date stated in the decision, namely the date of signing the decision by the arbitrator.

5. Conclusion

The DOA procedure can be a fast and cost-effective alternative to resolving business disputes. DOA is a reflection of the principle of procedural flexibility, which is the main principle of arbitration. In the DOA, the parties agree that the dispute should be decided without a face-to-face hearing. Therefore, the arbitrator (to be following the objectives of the DOA which prioritizes efficiency and fast-track, it is better if opt for a single arbitrator) reviews the written documents submitted by the parties but does not accept the defense or oral testimony at the evidentiary hearing before making a decision. Then the DOA process may include defense, evidence, and witness statements. DOA is beneficial in cases where there is no need for cross-examination of witnesses.

The DOA allows the arbitrator to deliver the award in a shorter period and eliminates the high costs associated with hearings, including travel costs, lawyers, and witnesses. DOA also generally increases efficiency and convenience because travel is not required, and e-mail is the primary means of communication. This efficiency is needed, especially when there is a situation where travel is not possible (for example, in the event of the COVID-19 pandemic or limited funds).

The key to implementing DOA is party autonomy, so it is essential to ensure that all parties agree on implementing DOA procedures, thus officially waiving their rights to

conduct face-to-face trials, examine witnesses and experts orally or make oral arguments. There are concerns that DOA will limit the parties' freedom to provide a comprehensive defense. However, in fact, most of the arbitrations that have been carried out so far have been very document-centric. In fact, oral examination is added to the burden of time and money for the parties.

The implementation of DOA should be facilitated by developing procedures for its implementation by arbitration institutions in Indonesia. Although several arbitration institutions have regulated DOA, most of these provisions are only stated in the Rules and Procedures and are not further regulated in separate provisions. This should be done to provide convenience for the parties and as an effort to establish a uniform implementation of DOA in Indonesia. The DOA method is very suitable for small-scale disputes whose orientation is small and medium business actors. Socialization and introduction to stakeholders are needed so that DOA can be a means to introduce simple, fast, and inexpensive arbitration dispute resolution methods.

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