

“Emergency Arbitration”; Comparative Analysis

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ABSTRACT

In contractual relationships with respect to Business to Business (B2B) trade transactions, disputes that occur can be related to the object of the transactions, which may involve any kind of goods. Disputes in relation to the goods as object of disputes can take consequences that the goods may be damaged or destroyed. In some disputes, evidence of the disputes may also be destroyed by one of the party to the disputes, for the lost of the other party. The issue of destruction become more important, because the process of destruction can even happen before the formation of the tribunal in arbitration cases. To avoid the destruction of either case, an emergency arbitration to safeguard the goods become important. The aim of this research is to explore the concept and application of emergency arbitration, and the possibility to implemented in Indonesia. This research used secondary data with qualitative and comparative approach of analysis. Data were obtained through literature review. Findings showed that in many jurisdictions, the concept of emergency arbitration has been accepted. However there were some differences in the regulations and applications. Analysis proved that emergency arbitration can be implemented in Indonesia, however some considerations must be attended. In view of these, amendments to the Law No.30 Year 1999 regarding Arbitration and Alternative Dispute Resolution must be made.

Keywords: *Emergency Arbitration, Emergency Award, Provisional Award*

I. INTRODUCTION

Disputes can be settled either through litigations or non-litigations. There were also many kinds of disputes that need special attentions, which were different from othe kind of disputes. Construction disputes and trade disputes, even both of them can be resolved by means of arbitration, have different characteristics in nature. However arbitration remains as one mean to provide the best solution for the disputants.

The main principles of arbitration as an alternative dispute resolution are that arbitration must be fast, relatively cheap, confidential, effective and efficient. In an emergency arbitration, the idea is not to resolve disputes as fast as possible, but it may refer to the possibility that the object being disputed may be destroyed or damaged. These may happen because the objects of dispute are goods that can be naturally damaged because of it got rotten or one or more evidences are suspected will be destroyed by any party in dispute. The destruction of the objects can occur even the tribunal were completed. It means it is necessary to have clear reason of when and why emergency arbitration can be used. Emergency arbitration requires the arbitrator(s) to issue interim awards or interim measures.

Peter Hillerstrom said that since arbitrator's powers to order interim measures are solely based on the parties' agreement, the powers that only extend to the parties to arbitration are an important limitation to an arbitrator's powers, in comparison with national courts. National courts can make interim decision over an asset which are in the possession of a third

party, for example a bank. Meanwhile arbitrator only has power when it was given by the parties [1].

This research aimed to find out and explain the concept and process of emergency arbitration and and the the possibility to implemented in Indonesia by means of amending Law No.30 Year 1999 regarding Arbitration and Alternative Dispute Resolution (“AADR Law”).

II. METHOD AND MATERIALS

This research is a normative legal research. As a normative legal research, data used in this research are secondary data, that are collected through literature review. The main data are primary legal sources, that consisted of law and other prevailing governmental regulations. The main regulations used in this research are Indonesia Civil Code, “AADR Law” [2], SIAC (“Singapore International Arbitration Centre”) Rules [3], FCC (“Finland Chamber of Commerce”) Rules [4], SCC (“Stockholm Chamber of Commerce”) Rules [5], and UNCITRAL (“United Nations Commission on International Trade Law”) Model Law [6] and UNCITRAL Rules [7]. The Rules will be used as comparative analysis to explore the current regulations on emergency arbitration.

To analyze the data, the researcher used qualitative and comparative approach. Discussion were made in order to understand the current development in arbitration regulations of emergency arbitration, especially in search of the possibility to regulate and implemented emergency arbitration in Indonesia through amendment of “AADR Law”.

III. RESULTS AND DISCUSSIONS

The definition of arbitration and arbitrator in Black's Law 8th Edition are as follows [8].

"arbitration, n. A method of dispute resolution involving one or more neutral third parties who are usu. agreed to by the disputing parties and whose decision is binding;" and "arbitrator, n. A neutral person who resolves disputes between parties, esp. by means of formal arbitration".

The way they the arbitrator as third parties to solve a dispute in civil law is bound by the law and agreement of the parties in dispute. These conditions made tribunal (arbitrator), who was formed by the parties, sometimes, unable to freely made decision to carry out his mandate to settle the dispute. However, in certain circumstances, many regulations have provided the authorities to any of the parties to seek emergency arbitration to safeguard justice, to protect the disputing parties, so they will not incur much more losses, even when the tribunal were not been formed yet.

Below are some explanations given by the arbitrations' body with respect to emergency arbitration. Emergency arbitration is regulated in Article 30.2 SIAC Rules 2016, which was then explained in detail in Schedule I of SIAC Rules 2016. Article 30.2 of SIAC Rules clearly stated that "despite of the interim measures, any party that wishes to seek emergency interim relief prior to the constitution of the Tribunal may apply for such relief pursuant to the procedures set forth in Schedule 1." Article 1 of the Schedule I SIAC Rules provided regulation on emergency arbitration. Based on the article "any party who wishes to seek emergency interim relief may, concurrent with or following the filing of a Notice of Arbitration but prior to the constitution of the Tribunal, file an application for emergency interim relief with the Registrar." It is furthermore explained that "the party shall, at the same time as it files the application for emergency interim relief, send a copy of the application to all other parties." The application for emergency interim relief shall include:

- a. "the nature of the relief sought;
- b. the reasons why the party is entitled to such relief; and
- c. a statement certifying that all other parties have been provided with a copy of the application or, if not, an explanation of the steps taken in good faith to provide a copy or notification to all other parties."

We can see from the Rules that, both of parties can submit an emergency arbitration application that requires a temporary decision. This means that an application for emergency arbitration is deemed to be incorporated in the arbitration agreement of the parties when the parties selected SIAC Rules as the applicable rules to settle the dispute [3].

For the application of emergency arbitration, under the SIAC Rules, a party wishing to seek temporary assistance in an emergency may coincide with or submit an Arbitration Notification before entering the constitutional court level, by submitting an application for emergency temporary assistance to the arbitral institution. The party must, at the same time as submitting the application for emergency temporary assistance, send copies of the application to all other parties. Arbitration procedures with temporary assistance in urgent or emergency conditions include:

- a. "the nature of the assistance sought;
- b. the reason why the party is entitled to the assistance; and

- c. a statement stating that all parties have given approval with a copy of the application or, if not, an explanation of the steps taken in good faith to provide a copy or notification to all other parties."

Every request for emergency temporary assistance must be accompanied by payment of a non-refundable administrative fee and the deposit required under these Regulations for the costs and expenses of the Emergency Arbitrator. In the right case, the Registrar can increase the amount of deposit requested from the party making the application. If additional deposits are not paid within the time limit determined by the Registrar, the submission will be considered withdrawn. Art. 11 on Emergency Arbitration regulated in Schedule I Singapore International Arbitration Centre Rules (SIAC Rules, 2016), stated that "any interim order or Award by the Emergency Arbitrator may be conditioned on provision by the party seeking such relief of appropriate security [3]."

Article 17 (2) of the 2006 UNCITRAL Model Law provides provision of interim measures in arbitration. Article 26 (2) of the UNCITRAL Arbitration Rules (which was revised later in 2010), also provides similar provision with Article 17 (2) of the Model Law. Both are in conflict with most national arbitration laws and institutional arbitration rules, which fail to determine the type of interim action that an arbitration court may give. The general characteristic of many arbitration rules is to give arbitrators the power to order "all temporary actions" which are necessary or appropriate. Subject to the mandatory provisions of the *lex arbitri*, the forms of temporary assistance available in international arbitration are very broad, and not limited to those that can be ordered by the judicial authority at the place of arbitration [6].

While the arbitrator's authority to order provisional protection' measures is widely recognized in contemporary international arbitration, subject to such important limitations. Some of them came from the basic features of arbitration as a mechanism for resolving contractual disputes between the parties in accordance with certain arbitration agreement. As a result, if there are no exceptional circumstances, the arbitral tribunal may not issue provisional measures that will have a binding effect on third parties not bound by the arbitration agreement from which the tribunal obtains its authority. The UNCITRAL Model Law [6] and UNCITRAL Rules [7] itself, while giving interim measures awards, does not provide the terms on emergency arbitration.

1. Art. 37(1-3) of Arbitration Regulation, Stockholm Chamber of Commerce (SCC Regulation, 2017), stated that:
2. "The Arbitral Tribunal may, at the request of a party, grant any interim measures it deems appropriate.
3. The Arbitral Tribunal may order the party requesting an accept measure to provide appropriate security in connection with the measure.

- a. An interim measure shall take the form of an order or an award."

Such powers terminate on referral of the case to an Arbitral Tribunal pursuant to Article 22 of the Arbitration Rules. In 2010, the new Appendix II was added to SCC Rules, which provide possibility of a party who need a prompt interim relief to require and obtain emergency arbitrator decision prior to the constitution of the tribunal [5].

Appendix II allows any party in a dispute to apply for the appointment of an emergency arbitrator, prior to the establishment of an arbitral tribunal. The application may be made even before the initiation of regular arbitral proceedings, or during the pending of the case before the

SCC Secretariat or the SCC Board – after a request for arbitration has been submitted. In the event the dispute has been referred to the tribunal, then the authority to grant interim relief shall be exclusively given to the tribunal, in accordance with Article 37 of the SCC Rules. Nowadays, most but not all applications for the appointment of an emergency arbitrator have been received prior to the initiation of regular arbitral proceedings [5].

The powers of an emergency arbitrator to grant interim relief are the same as those of the arbitral tribunal, as set out in Article 37 (1)-(3). This means that the emergency arbitrator may “grant any interim measures it deems appropriate” and order the party requesting the interim measure to provide appropriate security. An application for the appointment of an emergency arbitrator must conform to Article 2 of Appendix II of the SCC Rules. It should include “(i) the names, addresses, telephone numbers and e-mail addresses of the parties and their counsel; (ii) a summary of the dispute; (iii) a statement of the interim relief sought and the reasons therefor; (iv) a copy or description of the arbitration agreement or clause under which the dispute is to be settled; (v) comments on the seat of the emergency proceedings, the applicable law(s) and the language(s) of the proceedings [5].” Article 36.5 of FCC Rules stated that “any party in need of urgent interim measures of protection that cannot await the constitution of an arbitral tribunal may apply for the appointment of an Emergency Arbitrator in accordance with Appendix III, unless the parties have exercised their right to opt out of the application of the provisions contained in Appendix III [4].”

An application for the appointment of an Emergency Arbitrator under FCC shall be submitted to the Institute in the number of copies required to provide one copy for each party, one for the Emergency Arbitrator and one for the Institute. The Application shall contain the following information:

- (a) “the name and contact details of the parties and of their counsel or other representatives;
- (b) identification of and, where possible, a copy of the arbitration agreement under which the dispute is to be settled;
- (c) identification of any contract, other legal instrument or relationship out of or in relation to which the dispute arises;
- (d) a brief description of the circumstances giving rise to the Application and of the underlying dispute referred or to be referred to arbitration;
- (e) a statement of the relief sought from the Emergency Arbitrator;
- (f) the reasons why the Applicant needs urgent interim measures of protection that cannot await the constitution of an arbitral tribunal;
- (g) any agreement as to the seat of arbitration, the law or rules of law applicable to the substance of the dispute, or the language of the arbitration; and
- (h) proof of payment of the Application Deposit.”

The Emergency Arbitrator shall have the same power to grant any interim measures of protection as the arbitral tribunal. However, the Emergency Arbitrator can only exercise his/ her power only if he/ she is satisfied that the Applicant is really in need of an interim relief to protect the applicant’s interest even prior to the constitution of the arbitral tribunal. Where the urgency requirement is not fulfilled, the Emergency Arbitrator shall dismiss the Applicant’s request for interim measures of protection [4].

From the above finding, it can be said that In Indonesia there

was a clear possibility to implement emergency arbitration, subject to the amendment of Law No.30 Year 1999 regarding Arbitration and Alternative Dispute Resolution. The amendment must take consideration of the following:

1. Arbitration Rules shall apply to the emergency proceedings, taking into account the urgency inherent in such proceedings (See on Art.23 Arbitration Rules on Art,7 Emergency Arbitration, Stockholm Chamber of Commerce) (SCC,2017).
2. There must be a qualified selection of arbitrators to make a final award as interim measures on the emergency arbitration procedure
3. An interim measure shall take the form of an order or an award, the final award cannot neglect it, or no decision can be found that could be detrimental to the parties
4. Regarding the time limit to produce a temporary decision, adjusted to the cases, but regarding systematic and procedural matters it is necessary to set a clear and definite time.

It needs to be determined by regulations regarding the determination of the number of arbitrators participating on emergency arbitration.

IV. CONCLUSION

Because of the various procedures that have been established from other countries' regulations, based on comparative studies, it is very possible to be regulate emergency arbitration in Indonesia. The presence of emergency arbitration can optimize and change the role of the arbitration in Indonesia. Based on the regulations that were explain above, Indonesia can copy or combine those rules with modification to be adjusted with Indonesian private procedural law.

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