

# E-Arbitration: A Way Forward to Improve Quality and Service Delivery in Malaysian Dispute Resolution Industry

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**Abstract**— The Malaysian legislative framework governing traditional arbitration still relies on the traditional method. Parallel with the current COVID-19 pandemic, the question arises here, does traditional arbitration improves the quality and service delivery in the Malaysian arbitration industry? By using legal research methodology, this contribution endeavours to examine how electronic arbitration (hereinafter referred to as e-arbitration) could be a potential cure for improving the quality and service delivery in the Malaysian arbitration industry. The collected data then is analytically and critically scrutinised using content analysis method. This contribution found that COVID-19 pandemic shows clearly the disability in the Malaysian arbitration industry. Therefore, the contribution recommended that the Malaysian legislators should renovate the existing arbitration laws in order to totally legalise e-arbitration because of its ability to improve the quality and service delivery in the Malaysian arbitration industry. Finally, the contribution concluded that e-arbitration system should be considered as a supplementing to the traditional arbitration system.

**Keywords**— Arbitration; Arbitration System; Alternative Dispute Resolution; E-Arbitration; Dispute Resolution Mechanism.

## 1. Introduction

Malaysian dispute resolution industry contains two dispute resolution mechanisms, litigation and alternative disputes resolution (hereinafter referred to as “ADR”), such as arbitration, mediation and negotiation. As far as this contribution aims to examine the role of electronic arbitration (hereinafter referred to as “e-arbitration”) in improving the quality and service delivery in Malaysian dispute resolution industry, reference is made to traditional arbitration as a starting point.

From the legal standpoint, according to the Civil Code of the Ottoman Empire, arbitration refers to consists of the parties to an action agreeing together

to select some third person to settle the question at issue between them, who is called an arbitrator [The Civil Code of the Ottoman Empire, article 1790].

In the realm of Malaysia, the legislative framework governing traditional arbitration has been subjected to many amendments and evolutions. The latest amendment came on 8<sup>th</sup> May 2018, it brought several amendments to Arbitration Act 2005 (Act 646) (hereinafter referred to as “Act 646”) and announced the new era of development in the arbitration law in Malaysia.

Unsurprisingly the new amendment is following the modern revision of the UNCITRAL Model Law on International Commercial Arbitration 2006 (hereinafter referred to as “MLICA 2006”). Among the protracted amendments, for example, the name from Kuala Lumpur Regional Arbitration Center replaced to Asian International Arbitration Center (hereinafter referred to as “AIAC”) [Act 646, section 13 (1) (4) (b)].

Besides, the international and domestic parties are allowed to be represented by any person of their choice (not only a lawyer) [Act 646, section 3A]. Further, the 2018 amendment offers additional sections starting from 19A to 19J, they are relating to the granting of interim measures by both the Malaysian High Court and the arbitral tribunal. These new sections establish a system in respect of requests for interim measures and provided useful guidance on operation, recognition and enforcement of interim orders.

Moreover, section 33 of Act 646 expressly gives the arbitral tribunals the authority to award compound or simple interest for pre-award and post-award. Also, section 40A and 40B provide definite and distinct sections that are ensuring the confidentiality of arbitration and the court proceedings, which are associated with the arbitration. While sections 42 and 43 are no more available. Meaning that the Malaysian High Courts have no authority to review the arbitral award on

questions of the law emerging from the arbitral award. So, it is believed that the 2018 amendments could play a vital role in making Malaysia a more friendly and safe seat of arbitration.

When it comes to the institutional arbitration in Malaysia, the relevant body that has a direct connection with arbitration is the AIAC. This body provides institutional support as an independent and neutral venue for the conduct not only international but also domestic arbitration proceedings. Generally, AIAC provides several rules governing arbitration, such as AIAC Arbitration Rules 2018, Fast Track Arbitration Rules 2018 and I-Arbitration Rules 2018 which created to appropriately meet the raised needs of commercial transactions based on Islamic principles [1]. Regardless of the level of development in the legislative framework governing traditional arbitration, Malaysian arbitration industry is somehow still not sufficient to cater to the parties' needs and expectations.

This contribution discusses how e-arbitration can play a vital role in enhancing the quality and service delivery in Malaysian arbitration industry, especially in the era of COVID-19 pandemic. In this regard, this contribution answers very critical questions. Section two examines whether traditional arbitration could improve the quality and service delivery in Malaysian arbitration industry. Section three analysis the difficulties facing parties in the Malaysian traditional arbitration industry. While section four devotes to scrutinizes to what extent e-arbitration could be a potential cure for improving the quality and service delivery in the Malaysian arbitration industry. Finally, section five answers the question of whether e-arbitration is an alternative to the traditional arbitration system or is it only supplementing the traditional arbitration system.

## **2. Does Traditional Arbitration Improves the Quality and Service Delivery in the Malaysian Arbitration Industry?**

In general, there is no doubt that the use of traditional arbitration has been significantly encouraged because of several factors, including but not limited, traditional arbitration is a private and confidential dispute resolution method [2]-[3]-[4]. It leads to a win-win situation [5], and the level of the hostile relationship among the parties in the arbitration is low, this might be because the relationship between the disputants continues after issuing the arbitral award by the arbitrator.

In theory, traditional arbitration is assumed to be faster and cost-effective. Add to that, the inherent

flexibility in the traditional arbitration appears exactly in two aspects, firstly, the application of party autonomy that gives power to the parties to design the arbitral proceedings based on their preferences [Act 646, section 21 (1)] secondly, the discretionary power of the arbitral tribunal to adapt the suitable arbitral procedures to the resolve the dispute [Act 646, section 21(2)]. Thus, it is tangible that the traditional arbitration could be an attractive method of dispute resolution compared to the litigation in which the parties are not able to design prepossess of resolution.

Regardless of the facts mentioned above, the traditional arbitration in Malaysia is not the real cure for the interested parties because of several factors, such as high-cost, less-speed and high level of formality [6]. Narrowing down, our assumption is that the COVID-19 pandemic shows the deficiency of the Malaysian arbitration industry and supports the notion that the quality and service delivery in Malaysian arbitration industry has been affected negatively. The following discusses the difficulties facing the parties in the Malaysian traditional arbitration industry.

## **3. The Difficulties Facing Parties in the Malaysian Traditional Arbitration Industry**

Unfortunately, the spread of the COVID-19 pandemic has created significant business disruptions in all of the world, including Malaysia. All the countries have applied strict policies "domestic and international quarantine" in order to contain the spreading of the virus.

Surprisingly, the virus has affected not only the people daily lives in Malaysia and also the Malaysian arbitration industry. This is because, firstly, when a claimant wants to initiate arbitration, he/she simply sends to the opposing party "counterparty" a written document known as a "request for arbitration" or a "notice of arbitration." For example, in Malaysia, the general rule states that the traditional arbitral proceedings commence from the time when the respondent received a request in writing from the other party that the dispute is referred to arbitration [Act 646, section 23]. Similarly, the request for arbitration is usually submitted in writing to the relevant institution by the claimant [I-Arbitration Rules 2018, rule 2].

From the used language in the sections mentioned above, it is argued that the Malaysian arbitration laws do not envision the possibility of using electronic methods in order to submit a request for arbitration, but rather they are based on the traditional approach "paper-based approach". So,

during this crisis, future arbitration cases could be affected.

Secondly, in traditional arbitration, the disputants prefer to submit a large number of files and attachments to the arbitral tribunal. This argument supported in the case *Quintette Coal Ltd. v. Nippon Steel Corp* [(1988) 29 B.C.L.R.2d 233], which decided by the Supreme Court of British Columbia, became well-known case since it contained fourteen thousand (14,000) pages of testimony.

In the context of Malaysia, either Act 646 or I-Arbitration Rules 2018 do not include any section that determines the way of the exchange and submission of documents. Therefore, by the application of analogy, the exchange and submission of documents might be taken place in the traditional way (paper-based approach). As a result of that, the parties would suffer from delaying since they should send their arguments and documents to each other besides the arbitral tribunal in a traditional way by using third party couriers who would also suffer from movement restrictions and reduced staffing.

Thirdly, according to Act 646, oral hearings requiring the physical presence of disputants and their legal representatives (lawyers) [Act 646, section 26]. So, when the oral hearing is required during this unusual circumstance, those who are involved in the arbitration cannot attend due to the disparate locations of the arbitrators, lawyers, parties, experts and witnesses. For that reason, two options could be adopted; the first option could be the suspension of an oral hearing. This might not be an attractive option and lead to the delaying of the access to justice since it is quite challenging to expect when the pandemic could finish.

The second option when the arbitral tribunal decided on conducting the arbitral proceedings without the need for an in-person hearing. This approach might not be appropriate because it could open the door for refusing the recognition and enforcement of the arbitral award on the ground of violation the parties' rights in presenting their case or arguments "right of hearing" [Act 646, section 39(1)(a)(iii)]. For instance, in the case of *Bauer & Grossmann OHG v. Fratelli Cerrone Alfredo e Raffaele*, the court rejected the enforcement of an arbitral award on the ground that the respondent did not afford an adequate time to attend the hearing, because the area of the respondent was hit by a significant earthquake [7].

Frothily, the arbitral award is not similar to the judgement because the winning party cannot execute against the assets of the losing party by using the arbitral award unless the winning party

has converted the arbitral award into a court judgment by request the judicial assistance and support from the competent Malaysian court [Act 646, section 38(1)]. In Malaysia, the High Court is responsible for handling arbitration cases because Act 646 in some of its sections expressly mention that the Malaysian High Court is the only court, which can carry out such functions including but not limited, the recognition and enforcement of arbitral awards [Act 646, section 38].

At the time of writing this contribution, the spread of the COVID-19 would create a real difficulty in front of the winning party who wants to enforce his/her arbitral award because of two interrelated factors, firstly, the urgent public health measures intended at containing the spread of the virus (such as, Movement Control Order "MCO"). Secondly, the interested party seeking to enforce the arbitral award must resort to Malaysian High Court, and in-person submit the required documents, such as the duly authenticated original award or a duly certified copy of the award and the original arbitration agreement or a duly certified copy of the agreement [Act 646, section 38(2)].

Based on the facts indicated above, it is clear that the Malaysian arbitration industry is shaking and might collapse because the parties to the traditional arbitration are vulnerable to the risk of not being able to access justice effectively. Therefore, it is very important to recommend that at the first stage, Act 646 and I-Arbitration Rules 2018, should be renovated in order to legalise manifestly the use of e-arbitration.

#### **4. E-Arbitration as a Potential Cure for Improving the Quality and Service Delivery in the Malaysian Arbitration Industry**

First of all, in our perception, the crisis generated by COVID-19 might provide a real and true opportunity to revolutionise the arbitration industry in Malaysia. The following discusses to what extent e-arbitration could be a potential cure for improving quality and service delivery in Malaysian arbitration industry.

E-arbitration is very similar to traditional arbitration; however, it differs only in the way it is performed [8]. Because, e-arbitration is a dispute resolution method, in which all the processes and activities from A to Z (from the beginning until the end) should be carried out through the cyberspace [9]-[10]. Add to that, e-arbitration can be employed for resolving online and offline disputes [11]-[12].

In general, the usage of e-arbitration opens the door for greater efficiency and several valuable benefits to the parties. Among them, e-arbitration assists in reducing the cost [13]-[14] since the arbitral proceedings are conducted partially or wholly online [14].

Likewise, e-arbitration is undoubtedly time-saving [11]-[15] fast and more valuable than traditional arbitration [16] and litigation [17]. In this regard, those who are involved in the e-arbitration can achieve more tasks in the arbitral proceedings within a short time.

In addition, e-arbitration procedure is simple and flexible [17]- [18]. Due to that, the parties can design how they are going to settle their disputes. Besides, e-arbitration is convenient and efficient [11]-[19] and able to bridge the distances between the involved parties because all the e-arbitration procedures take place in the online environment and no need for physical appearance.

It is also less intimidating and less formal compared with traditional arbitration [20]. This might be because of its ability in reducing the jeopardy feeling associated with face to face meeting "F2F". Moreover, e-arbitration helps in reducing the carbon dioxide and global warming because the parties and arbitrators are able to carry out the arbitral proceedings remotely without the need for using any kind of transportations [21].

With respect to the role of e-arbitration in enhancing the quality and service delivery in Malaysian arbitration industry, it is argued that the specific characteristics of the e-arbitration may bring overriding benefits to the interested parties, such as domestic and cross-border dispute during the crisis of COVID-19 will be easier to execute and resolve because of several reasons.

Firstly, the submission of a request for e-arbitration is made electronically [22]. For instance, article 14 of Shenzhen Court of International Arbitration-Online Arbitration Rules 2019) states that;

"A party applying for arbitration shall submit a Request for Arbitration, evidentiary materials, and its certificate of qualification through the Online Arbitration Service Platform."

Secondly, the exchange and submission of documents in the e-arbitration are done electronically, either by using basic technologies, such as e-mail (as applied in the Virtual Magistrate project) or by using advanced and sophisticated technologies, such as the "e-arbitration platform." For instance, rule 3.1.1 of the Russian Arbitration

Association-Online Arbitration Rules 2015 states that;

The party initiating the Online Arbitration (the "Claimant") shall forward to the other party (the "Respondent") its statement of claim, together with attachments ("Statement of Claim") by uploading the materials in electronic form to the RAA System.

Therefore, the parties to e-arbitration can exchange and submit their claims and documents electronically and instantly along with the ability to access the contents of the case easily, present documents anytime and anywhere [23] without any place for time pressure because the disputants do not require to take time off from their work, similar to what often done in the traditional arbitration processes.

Thirdly, e-arbitration replaces the traditional way of conducting oral hearing because it is conducted online by using several types of technologies, such as teleconferencing or video conferencing [24]. For instance, article 33 of China International Economic and Trade Arbitration Commission - Online Arbitration Rules 2015 states that;

Where an oral hearing is to be held, it shall be conducted by means of online oral hearings such as video conferencing or other electronic or computer communication forms. The arbitral tribunal may also decide to hold traditional oral hearings in person based on the specific circumstances of each case.

In this regard, it is submitted that using e-arbitration might help the parties and arbitrators to evade the obstacles of the travel restrictions and social distancing imposed during COVID-19 since they would be able to carry out all the arbitral proceedings, such as requesting for arbitration, submission of documents and attending of an oral hearing, without unnecessary delay.

Fourthly, even if the current arbitration laws have been amended in order to legalise the enforcement of the electronic arbitral award in the national court, this would still not enough to provide the desired quick remedy since there is still a need for going to a court for the enforcement of the electronic arbitral award [25]. In this regard, it is suggested that the Malaysian High Court should be prepared to meet the requirement for recognition and enforcement of the electronic arbitral award. Because following the traditional procedures applied in the traditional arbitral award (the need to resort to Malaysian High Court and in-person submit the required documents) are less practical

and do not achieve the primary objective of e-arbitration which aims to resolve the dispute quickly.

This can be achieved by establishing a Malaysian electronic High Court that tasked with matters relevant to the enforcement and recognition of the electronic arbitral awards. Hence, the winning party, who is willing to enforce the electronic arbitral award, does not need to submit in-person the required documents for the enforcement and recognition of the electronic arbitral award. This is because the interested party will submit the required documents electronically to the Malaysian electronic High Court.

### 5. E-Arbitration Improvises the Traditional Arbitration System?

After providing an overview regarding the role of e-arbitration in improving quality and service delivery in Malaysian arbitration industry, it is crucial to raise the question whether the e-arbitration system is an alternative to the traditional arbitration system or it is only supplementing the traditional arbitration system.

The relevant literature shows that e-arbitration is viewed as a tool that is able to replace traditional arbitration [26]. In contrast, e-arbitration magnifies some of the advantages of traditional arbitration, making it an even more viable choice than otherwise [27]. In a nutshell, the authors believed that e-arbitration is a logical result of the technological innovations that excited in the modern era. Therefore, e-arbitration should not undermine the considerable advantages of the other ADR mechanisms, such as traditional arbitration. Therefore, it should supplement the traditional arbitration system because, at the end of the day, the using of e-arbitration should always be based on the stakeholders' preferences and interests.

### 6. E-Arbitration Improvises the Traditional Arbitration System?

The threat of COVID-19 could be an exceptional circumstance that is temporarily affecting the Malaysian arbitration industry. However, the Malaysian authorities should look at the COVID-19 pandemic as a starting point to evolve the arbitration industry totally because traditional arbitration is not able to some extent to provide high quality and service delivery to the interested parties to the Malaysian arbitration industry.

In this regard, it is suggested that the Malaysian authorities must take the step forward and build more efficient arbitration industry by implementing

e-arbitration, which is totally based on a digital environment. This can be achieved when the Malaysian legislators and decision-makers renovate the existing arbitration laws, such as Act 646 and I-Arbitration Rules 2018 in order to keep pace with technological developments and totally legalise the use of e-arbitration. Doing so could avoid putting a hold on the access to justice in the Malaysian arbitration industry, and help in resolving disputes in such complicated situations similar to what we are countering right now. Meaning that enhancing the quality and service delivery in the Malaysian arbitration industry.

Finally, according to Alexander Graham Bell "when one door closes, another opens, but we often look so long and so regretfully upon the closed door that we do not see the one which has opened for us." In the context of this contribution, perhaps a door of using traditional arbitration has been closed somewhat suddenly, but e-arbitration could be the reason to open a new door immediately.

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