

# THE ROLE OF MEDIATION AS A FORM OF AMICABLE SETTLEMENT PRIOR TO ARBITRAL PROCEEDINGS UNDER BANI ARBITRATION CENTER RULES AND PROCEDURES

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## ABSTRACT

*In the matter of dispute settlement, there are various forms which can be pursued other than litigation. These methods are generally referred to as alternative dispute resolutions or ADR. Alternative dispute resolutions are typically classified as negotiation, mediation, conciliation and arbitration. This paper in particular will further discuss mediation and the responsibility it possesses as a form of amicable settlement before advancing to arbitral proceedings. Several arguments and insight will be presented based on existing arbitration regulations in order to further evaluate how arbitral proceedings progress as well as the role of mediation as a preexisting condition prior to an arbitration. The research method used in this paper is judicial normative research which will focus on the existing regulations, in particular their validity and enforceability. Furthermore, the statutory approach utilized in this article is applied with a literature review to enhance the discussions further elaborated. The author concludes that an arbitration is the last resort while a mediation, as an alternative dispute resolution, will provide a win-win solution.*

**Keywords:** Arbitration, amicable settlement, alternative dispute resolutions, mediation, validity

## 1. PREFACE

When a conflict arises between two parties, it is common practice for the matter to be settled through litigation which involves the parties to enforce their rights with the guidance of a judge in court. However, in the matter of dispute settlement, there are various forms which can be pursued other than litigation. These methods are generally referred to as alternative dispute resolutions or ADR. Overall, ADRs support in lessening court caseloads and mitigating animosity among parties whose matters have been resolved by the tribunal [9].

In addition to protecting privacy, ADR provides an opportunity for parties to move on quietly as the procedure is convenient and confidential [10]. As a result of ADR, parties can save significant time and energy, since the process is expeditious and unlikely to waste their time [9]. There are situations in which the method of ADR might be inappropriate and detrimental to the interests of the parties [11]. For instance, insolvency laws vary from country to country, however it is common practice that insolvency is generally considered non arbitrable [19-22]. Regardless of its shortcomings, alternative dispute resolutions have gained popularity in many legal systems [12].

Alternative dispute resolutions are typically classified as negotiation, mediation, conciliation and arbitration. This paper in particular will further discuss mediation and the responsibility it possesses as a form of amicable settlement before advancing to arbitral proceedings.

In order to assess even further regarding the matters of mediation, an amicable settlement, and arbitration proceedings, we will analyze it in accordance to the Badan Arbitrase Nasional Indonesia (BANI Arbitration Center) rules and procedures. The BANI Arbitration Center is a national arbitration institution, domiciled in Jakarta, Indonesia and in various other regions in Indonesia. Article 19 of BANI Arbitration Center 2022 Rules and Procedures (BANI Rules) elaborates on how the arbitration tribunal or the sole arbitrator shall first endeavor to encourage the parties to reach an amicable settlement either on their own or with assistance of an independent third party mediators/conciliators or with the assistance of the arbitration tribunal or the sole arbitrator if it is agreed upon by the parties [1].

### **Our Contribution**

This paper presents several arguments and insight based on existing arbitration regulations in order to further evaluate how arbitral proceedings progress as well as the role of mediation as a preexisting condition prior to an arbitration. It is evident that conflicts and disputes arise in some cases concerning the authority of an arbitral tribunal when in fact the parties previously already had matters which need the tribunal's assistance.

Subsequently, the authors of this paper hope to share a perspective as a means to support ADR processes. As a result, disagreements can be resolved quicker and solutions are attained faster.

A mediation is a process, whether referred to by the term mediation, conciliation or an expression of similar import, whereby parties request a third person or persons ("the mediator") to assist them in their attempt to reach an amicable settlement of their dispute. The mediator shall not have the authority to impose upon the parties a solution to the dispute [2].

Mediation is often viewed similar to negotiation which is a simple and commonly used method of friendly settlement that entails primarily discussions between the disputing parties with a view to reconciling their divergent views and finding common grounds [8].

Whereas, an amicable settlement is not explicitly defined in the BANI Rules, however we can conclude based on Article 19 of the BANI Rules and the definition of mediation previously stated that an amicable settlement is a decision which constitutes a win-win solution for the parties in dispute.

This decision is based on the discussions that occurred during the mediation and the agreement between both parties on the most appropriate manner to resolve the current issue.

The mediation process is conducted prior to arbitration proceedings in order to attain this amicable settlement. However, in the case where an amicable settlement is not met, the parties may continue to arbitration proceedings.

An arbitration is a flexible process to resolve disputes; the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the arbitral proceedings, subject to mandatory provisions of the applicable arbitration law [6].

Arbitral tribunals, which are private bodies, acquiring their dispute resolution power from party autonomy [13]. Parties could designate not only the seat of the tribunal, but also the composition of the tribunal, the law applicable to the arbitration agreement, the arbitration procedure and the

substance/merit of the dispute [14]. They can also exclude the application of the domestic law of any countries and subject the merit of their disputes to flexible international commercial norms, such as the *lex mercatoria* [15-18].

All of the aforementioned is dependent on the arbitration agreement between the parties in dispute. An arbitration agreement itself is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not [3].

An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement [3]. Therefore, an arbitral tribunal may have jurisdiction over matters that are brought to them on condition that it is pursuant to the agreement and the agreement is not null and void, inoperative or incapable of being performed.

However, there are occasions where the parties in dispute agree to set up a precondition that must be fulfilled before advancing to arbitral proceedings. Occasionally, in matters as previously mentioned, one of the respective parties in dispute does not fulfill the prerequisite. For instance, in the case where the parties agree to conduct a mediation attended by each party's chief executive officer (CEO) during the occasion when any dispute, controversy or claim arises out of or relating to the contract, or the breach, termination or invalidity of their agreement.

However, when a dispute emerges, leading the parties to carry out a mediation, one of the parties (Party A) attend the mediation represented by a person other than the CEO of their company yet with legal authorization, e.g. the director, head of division, or secretary. During the mediation, the counterparty (Party B) forgot the dispute resolution clause that the parties had agreed on, hence they (Party B) stayed silent and continued with the mediation procedure. Party A during the mediation had also disclosed towards party B that their (Party A) CEO was sick and therefore couldn't attend the mediation.

Unfortunately, an amicable settlement is not achieved by the parties in dispute. The tension undoubtedly increases as the party suffering the losses (Party A) submits the issue to the arbitral tribunal whereas the counterparty (Party B) who has now remembered about the dispute resolution clause, stating that both parties are to be represented by their CEOs during the mediation, argues that the tribunal does not have jurisdiction to adjudicate the dispute as the pre arbitration condition has not been met.

Consequently, it raises concerns whether the validity of a mediation process is recognized and enforceable pre arbitration. In practice, many courts or tribunals have adopted the same rule to decide the validity of an arbitration clause when it is seized to hear the dispute, for the purpose of consistent decisions or issuing an enforceable award [13].

Aside from the BANI Rules, the New York Convention itself which applies internationally has provided straightforward rules in enforcing foreign arbitral awards, subsequently contributing greatly to the success of international commercial arbitration [13]. It is remarked as the most successful international convention in the international commercial area [23-25]. However, diversity still exists between Contracting States when interpreting and applying refusal grounds in practice [13].

Hence, the author will discuss this matter further to seek out how the existence of a pre arbitration condition is perceived and the impact it has towards the arbitration.

## 2. RESEARCH METHOD

The research method used is judicial normative research which will focus on the existing regulations as a foundation to elaborate the case of pre arbitration conditions, in particular their validity and enforceability. Furthermore, the statutory approach utilized in this paper is applied with a literature review to enhance the discussions further elaborated. The type of data used in this study is secondary data which is data obtained from the results of a review of various literatures related to problems or research materials which are often referred to as legal materials.

### **Structural arguments supporting the pre arbitration condition has been fulfilled**

An arbitral tribunal's authority is dependent on the arbitral agreement between the parties in dispute. Therefore, BANI Arbitration Center may assume for instance that it has jurisdiction because according to the contract, the choice of forum shall be referred to BANI Arbitration Center. Furthermore, it is important for both Parties to have accepted in writing that conflicts in relation to their contract or transaction shall be referred to arbitration under the BANI Arbitration Center as the choice of forum. This emphasis on a written arbitral agreement is pursuant to Article 2(1) of the New York Convention that states,

*Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration [4].*

The Parties may argue in regards to the fulfillment of the precondition to pursue mediation within the arbitration clause. However, on one side, BANI Arbitration Center does state in Article 17(1) that the tribunal shall have the power to rule on any objection that it does not have jurisdiction, including any objection with respect to the existence or validity of the agreement to arbitrate [1]. Therefore, BANI Arbitration Center does have the authority to rule against any objections that the tribunal does not have the jurisdiction to adjudicate the case.

In the contract between the parties in dispute, it is determined that prior to a referral to arbitration, an amicable settlement pursuant to Article 19(1) of the BANI Rules should be sought. This clause indicates that in order to proceed to arbitration, the dispute is contingent upon the fulfillment of the aforementioned precondition. Consequently, party A may contend that because the dispute has been referred to BANI Arbitration Center, the tribunal then has jurisdiction to adjudicate the case.

Additionally, the absence of any clauses expressing the legal consequences if the pre arbitration condition is unfulfilled or in other words, the lack of agreement towards what would happen if the CEO of the parties weren't the ones attending the mediation may indicate that the mediation process does not become illegitimate by default if other than the CEO of the Parties are the ones representing each Party at the mediation. Subsequently, there is a lack of clarity towards how the unfulfilled pre arbitration condition should be dealt with.

Not to mention, if the parties in dispute are also contracting states of CISG, therefore viewing CISG as a supplementary regulation governing their contract, it must be verified whether their states have made a declaration under Article 96 of CISG stating that,

*A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State [5].*

Hence, the declaration towards Article 96 of CISG prohibits the actions of party A who modified the agreement verbally which would therefore result in the modified arbitration clause to be null and void. However, the circumstances in the existing case are different. Since the states did not form a declaration towards Article 96, it can be concluded that Article 12 of CISG is applicable which expresses that,

*Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article [5].*

That being the case, the presence of someone other than the CEO of party A is still debatable as to whether the oral modification towards the arbitration clause is acceptable.

Another issue which impacts the validity and enforceability of the mediation conducted was the fact that party B had forgotten concerning the pre arbitration clause and went along with the mediation proceeding despite party A not being represented by the CEO.

Pursuant to Article 19 of CISG [5] which explains several forms of how a reply is interpreted, party A may argue that the inactivity or silence of party B was considered to be a form of a derivation of acceptance since no objections were raised towards the mediation process. Party B's conduct which exhibits the acceptance of the mediation offer without any additional, limitations, or other modifications at the fixed time results in the evidence that the mediation which the parties had conducted to be licit.

### **Structural arguments supporting the pre arbitration condition has not been fulfilled**

Pursuant to what the parties had agreed on, the mediation is a concrete procedure that is mandatory to be carried out before arbitration proceedings. However, after they conducted a mediation, party B argues that mediation is incoherent towards the requisites in the contract. This is due to the failure that came from party A that led the mediation to be defective and the BANI Arbitration Center to lack in jurisdiction to adjudicate their case.

Party B may contend that factually, party A was the initial party that invited party B to participate in a mediation proceeding yet party A failed to be represented by their CEO that day

and felt no need to convey the information beforehand when party A knew as stated clearly in their contract that the parties were to be represented by each Party's CEO during the mediation.

It was feasible for party B to postpone the mediation until both CEO's are capable of being present. However, rather than discussing the inability of the CEO to be present and rescheduling the mediation with party B, party A instead chose to neglect the clause they had agreed on.

In compliance with Article 19(1) of the BANI Rules 2022, an amicable resolution should be held in order to proceed with the forward segment, as in tribunal. A mediation had been conducted by the parties in dispute. Regardless, party B may call attention to the amicable settlement which has not been exhausted as an absence from party A's CEO who holds a major responsibility in the settlement, has indeed become a default in appearance that made the mediation process to be incoherent towards the clause that is stated in the contract without any prior notice (from party A) to reschedule.

Therefore, in the case at hand, the parties should proceed to hold another mediation process, one that meets the requisites in the contract as it is clear that both parties are to seek an amicable settlement and to be represented by their CEOs. Otherwise, the tribunal does not have the jurisdiction to adjudicate their case.

Additionally, another reasoning that may support party B's argument which supports the validity of a mediation to be enforced before an arbitral tribunal, in particular BANI Arbitration Center, to have jurisdiction is that pursuant to Article 2.1.6 UPICC, silence or inactivity does not in itself amount to acceptance [7]. During the mediation process, party A's CEO was absent and had been replaced by the presence of another person from party A's company with legal authorization.

In terms of an amicable settlement, party B's representative went along with the preceding mediation despite their forgetfulness in regards to the arbitral clause in the party's contract stating that the parties shall be represented by their Chief Executive Officer. A different article within CISG elaborates on how silence in an agreement is perceived. Article 18(1) CISG mentions that "... Silence or inactivity does not in itself amount to acceptance." [5]. Hence, party B's silence in forgetfulness could not be apprehended as a form of acceptance by party A.

Correspondingly, although it is true that party B has forgotten about the condition that must be fulfilled in accordance with the existing contract, it can be deemed that party A is using the forgetfulness of party B which exhibits that party A only views the mediation process as an administration that must be fulfilled for the precondition of the arbitral tribunal when in fact the purpose of a mediation is to seek a win-win solution for both parties, not a mere requirement to be taken lightly.

Lastly, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards elaborates further regarding the enforceability of arbitral awards which can be applied to the current case yet depending on whether the parties in dispute are member states of the New York Convention (Article 1).

Assuming that the parties in dispute are member states of the New York Convention, party A may convince BANI Arbitration Center that the tribunal's award is enforceable as the award granted is enforced and recognized in the party's respective territory.

However, party B may argue that in accordance to Article V(1) of the New York Convention, the recognition and enforcement of the tribunal award may be refused, if the party against whom it is brought requests it, due to the fact that there had been a procedural error during the arbitration proceedings or a decision on matters beyond the jurisdiction of the tribunal.

Consequently, in respect to the current case concerned, if both parties advance with their current submissions to the tribunal, the award stands to be unenforceable considering the decision has been made on the grounds of an unresolved matter which had not gone through a proper mediation beforehand.

#### 4. CONCLUSIONS AND RECOMMENDATIONS

The existence of a mediation as a pre arbitration condition is valid and enforceable. Therefore, the amicable settlement is mandatory to be exhausted and this is done by the fulfillment of the requisite in regards to the mediation. BANI Arbitration Center as the arbitral tribunal does have jurisdiction over the dispute between party A and party B. However, as the precondition hasn't been fulfilled, the party's ought to try and settle through another mediation. If both parties are still unable to reach an amicable settlement, they may proceed to the arbitration. Ultimately, an arbitration is the last resort while a mediation, as an alternative dispute resolution, will provide a win-win solution.

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