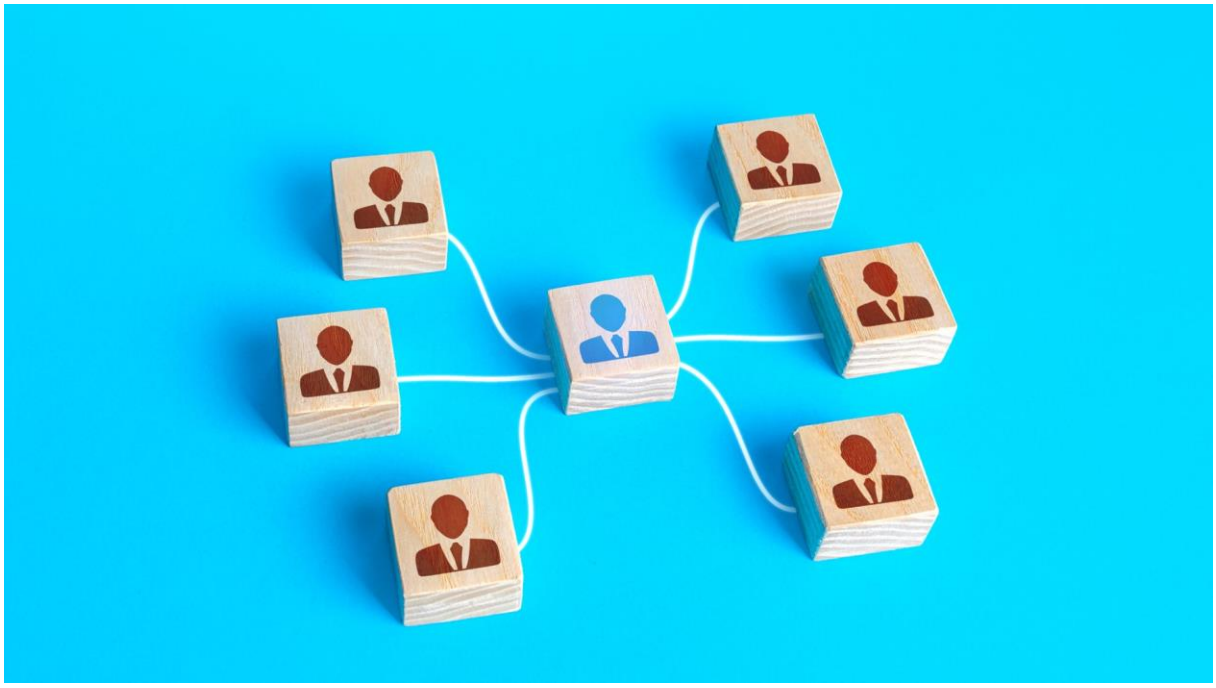
Client Update: Indonesia
30 September 2022

Arb-Med-Arb: An Effort to Enhance Amicable Dispute Resolution



Introduction

In an ideal world, disputes would be able to be resolved amicably. In practice, however, disputes are more often settled by adversarial methods such as litigation and arbitration. To offer another chance at preserving relationships, **Arb-Med-Arb** has emerged as a means of incorporating mediation into the arbitral process, where parties who have commenced arbitration may "pause" proceedings to attempt to settle the dispute by mediation. If unsuccessful, parties would then continue the arbitration.

In Indonesia, Arb-Med-Arb was initially developed from the use of mediation in court litigation as an effort to enhance the amicable dispute resolution process and obtain a win-win solution for all parties involved. Article 45 of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution ("**Indonesian Arbitration Law**") requires that on the first day of a hearing, the arbitral tribunal must attempt initiating an amicable settlement for the disputing parties. This requirement also corelates with the ethical responsibility of Indonesian lawyers based on the Indonesian Advocate Code of Ethics, which requires lawyers to uphold the use of peaceful settlement in resolving a civil dispute before going into an adversarial dispute resolution mechanism.

Although the Indonesian Arbitration Law only imposes an obligation to attempt to settle disputes amicably, parties and arbitrators often opt for mediation compared to other means of amicable dispute resolution mechanism due to the influence of local practice, which we elaborate on below.

Use of Arb–Med–Arb in Indonesia

As mentioned earlier, the Indonesian Arbitration Law does not oblige arbitrators and parties to specifically undergo mediation, as other amicable settlement methods exist. However, in practice, arbitrators often recommend parties to mediate before the arbitral tribunal, where the arbitrators would also act as the mediators. This shows an ongoing trend where mediation amidst the process of arbitration is preferred as part of the amicable settlement effort mandated by the law.

Where Indonesia is designated as the seat of arbitration, the tribunal must initiate efforts for the disputing parties to settle the dispute amicably, regardless of whether the arbitration is *ad hoc* or administered by an arbitral institution.

Influence of Local Court Practices

The use of mediation in the Indonesian arbitral process is unmistakably influenced by local court practices, namely (i) Supreme Court Regulation No. 1 of 2016 on Mediation Procedures in Courts, and (ii) Supreme Court Regulation No. 3 of 2022 on Electronic Mediation in Courts, which were both enacted by the Supreme Court.

Under these regulations, the court mediation process is mandatory and commences after the first day of the hearing. Parties are given 30 days (extendable by up to another 30 days) to settle their dispute through mediation before a court-appointed mediator. If mediation fails, the court-appointed mediator will report such failure to the judges of the case, where it will be used as a basis to continue court proceedings.

Benefits and Drawbacks of Arb-Med-Arb

Benefits

As a recognised practice in Indonesia, Arb-Med-Arb benefits both the disputing parties and the arbitrators. The benefits are, among others:

1. Arb-Med-Arb allows disputing parties to enjoy the confidentiality that arbitration provides while also giving the flexibility of mediation so that parties can preserve their contractual or commercial relationship.

2. Arb-Med-Arb prevents the escalation of a new dispute due to its amicable nature.

3. Arb-Med-Arb avoids interlocutory or jurisdictional issues at an early stage because in mediation, the discussion will centre on the parties' respective commercial interests.

4. A successful settlement will reduce the time spent by the respective lawyers and arbitrators. This will affect the overall costs incurred for the dispute resolution process.

5. If mediation results in a settlement, it will be recorded as a consent award. This will enable the parties to easily enforce the settlement using the New York Convention 1958 or by means of the Indonesian Arbitration Law.

Drawback

Aside from the benefits that it provides, the use of Arb-Med-Arb also has a potential drawback in how it is currently practiced in Indonesia – specifically, how arbitrators often assume a dual role as mediators.

During the mediation phase, the mediators may receive confidential information from one party, particularly during the caucus or any *ex parte* meeting. The other party would not know what information has been given to the mediators, and therefore cannot even challenge such information. If the mediation fails and the mediators resume their role as arbitrators, their decision and reasoning may consequently be influenced by information that should not have been or cannot be considered in rendering an award.

While existing laws and regulations (even local institutional rules) are silent on this issue, soft law may provide guidance on the issue. For instance, the International Bar Association Guidelines on Conflict of Interests in International Arbitration (2014) ("**IBA Guidelines**") allows an arbitrator to assist parties in reaching a settlement of their dispute through conciliation, mediation, or any other means at any stage of the proceedings as long as the parties have expressly agreed that in doing so, the arbitrator will not be disqualified from continuing to act as the arbitrator.

While the above provision is not binding, arbitrators and parties may take the IBA Guidelines into account when undergoing Arb-Med-Arb. In other words, parties should not only consent to the use of the Arb-Med-Arb process, but also to the arbitrators' dual role as mediators.

Concluding Remarks

In conclusion, the use of Arb-Med-Arb is beneficial for parties and is even preferable when disputing parties still have a commercial interest in preserving their contractual relationship. However, we cannot ignore the potential drawback of having arbitrators play the dual role of mediators, which may jeopardise the entire proceedings and even the subsequent enforcement of the award. To address this issue, disputing parties may wish to explicitly agree on the dual roles of arbitrators and mediators, so that arbitrators would not be disqualified from continuing to serve as arbitrators in cases where mediation fails.

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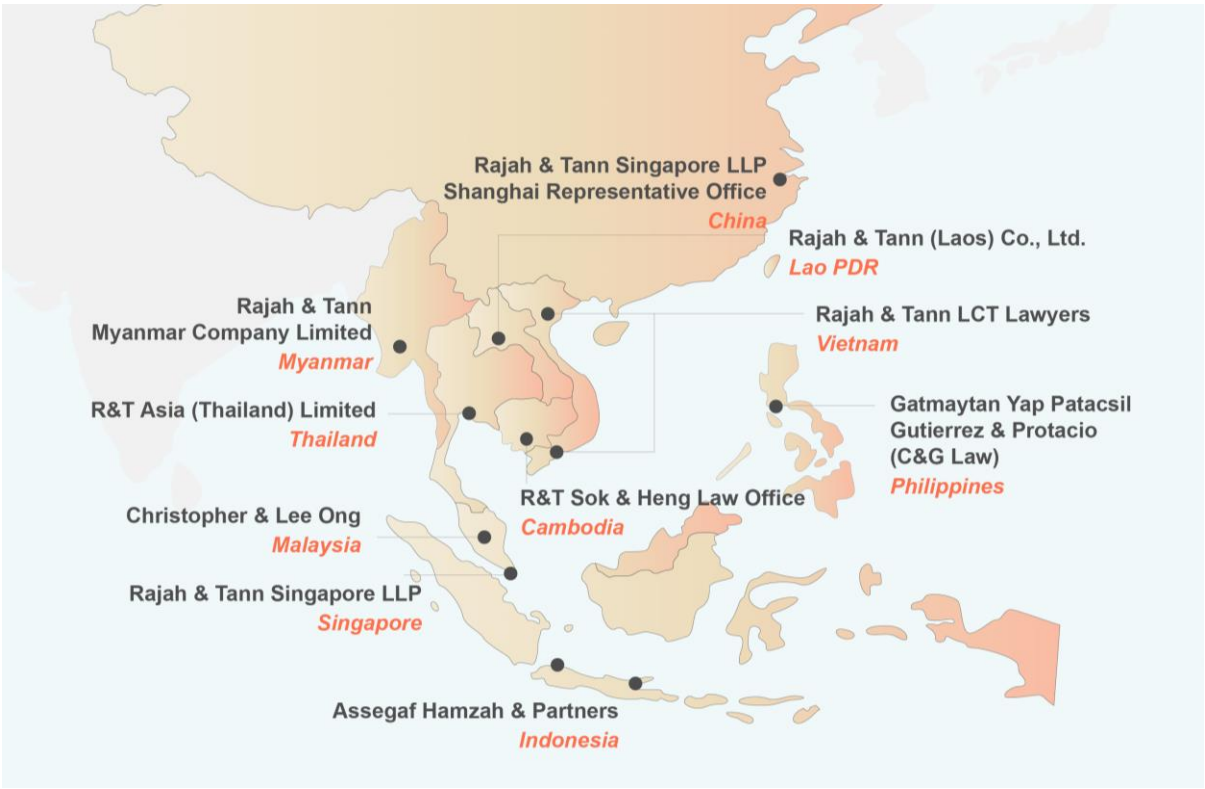

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