
A Preliminary Analysis On The Non-Legal Requirements For The Successful Establishment Of E-Arbitration In Malaysia

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Abstract

Electronic arbitration (hereinafter referred to as e-arbitration) has gained much prominence in the developed countries, such as China and England, because of its special features and characteristics. Since the future of e-arbitration is still hazy in Malaysia, by using doctrinal research methodology, this article aims to provide a preliminary analysis on the non-legal requirements for the successful establishment of e-arbitration in Malaysia. The collected data then is analytically and critically examined using content analysis method. The article finds that the successful and effective establishment of e-arbitration in Malaysia requires the fulfilment of several non-legal requirements. Some of the non-legal requirements are in place with a need for improvements. In contrast, other non-legal requirements need to be appropriately addressed. For this reason, this article provides a range of recommendations that would provide the relevant authorities in Malaysia with valuable insight on how to satisfy these non-legal requirements. This would ultimately have a concrete impact on the future establishment of e-arbitration in Malaysia.

Keywords: *Traditional Arbitration, E-Arbitration, Dispute Resolution, Online Dispute Resolution.*

1.0 INTRODUCTION

The COVID-19 pandemic has exerted an unprecedented impact on access to justice in Malaysia [1]. On the other side of the spectrum, information and communications technology (hereinafter referred to as “ICT”) has infiltrated the dispute resolution industry and changed the way how we resolve our disputes. Specifically, e-arbitration is one of the online dispute resolution (hereinafter referred to as “ODR”) mechanisms, and it is completely based on using ICT [2]. For this reason, it is no difference in terms of the procedure of traditional arbitration and e-arbitration, except the manner it is conducted, whereby the former is conducted in the physical environment, and the latter is conducted online by using electronic technologies.

The definition of e-arbitration is somewhat amorphous [3] or unclear due to the impact of electronic technology [4]. From a legal perspective, article 1 of the Guangzhou Arbitration Commission-Network Arbitration Rules 2018 defined e-arbitration as an online dispute resolution method that provides arbitration services by using network technology resources, such as the Internet. From a theoretical perspective, e-arbitration refers to the integration of ICT into the arbitral proceedings to the extent that the latter are made substantially or wholly online [5], [6]. However, others defined e-arbitration as a dispute resolution method in which all its proceedings are conducted electronically [7], [8]. Furthermore, e-arbitration can be employed for resolving disputes arising from the online and offline environment [9], [10].

E-arbitration has gained much prominence in the developed countries, such as China and England, because of its special features and characteristics. For example, e-arbitration is a cost-effective and time-effective resolution mechanism [11]. For this reason, e-arbitration is seen as a mechanism that can replace traditional arbitration mechanism [12].

Regardless of the above, the establishment of e-arbitration requires the fulfilment of several legal and non-legal requirements. However, the future of e-arbitration is still hazy in Malaysia because it has not been regulated and established. Hence, this article is devoted to provide a preliminary analysis on the non-legal requirements for the successful establishment of e-arbitration in Malaysia.

2.0 METHODOLOGY

This article is based on the doctrinal research. The data is collected through the library-based approach. Specifically, the data is collected from books, legal documents and articles from journals and online resources. The data is then analysed by using content analysis. The critical and analytical approaches are also adopted in this article in interpreting.

3.0 FINDINGS/RESULTS

The following addresses the non-legal requirements for the successful establishment of e-arbitration in Malaysia.

3.1 The Need for Sufficient Knowledge and Training

Generally, ODR practitioners should learn new skills and knowledge before they can handle the online resolution procedures [13]. In the context of this article, e-arbitration requires a technically trained administration [14]. Likewise, e-arbitration will attract individuals who are experienced in the online environment [15] and have technical knowledge [12]. For this reason, the arbitrator qualified for the traditional arbitration is probably unqualified for e-arbitration [8].

In the same vein, it is argued that establishing e-arbitration on a full-scale in Malaysia might require experienced arbitrators with technical training and knowledge because most of the arbitrators might not be digital native. The same thing could be applied to the old generation lawyers. For instance, lawyers and arbitrators should be trained on how to use the technologies required in e-arbitration.

Based on the previous facts and arguments, it is apparent that establishing e-arbitration in Malaysia requires the participants, such as arbitrators and lawyers, to gain new skills and experiences. This happens by following three steps; firstly, the relevant Malaysian authorities should organise frequent conferences, seminars, and workshops in the area of e-arbitration. Secondly, they should train the current arbitrators and lawyers on using the technologies required in e-arbitration. Thirdly, Malaysian universities should provide legal education on e-arbitration to law students. This can be achieved when they incorporate e-arbitration subject into the law school curriculum and create an electronic simulation platform that teaches the law students (the future arbitrators and lawyers) how to handle the arbitral proceedings in the online environment.

3.2 The Need for Changing the Mindset to Accept the Use of E-Arbitration

Historically, lawyers are slow in adopting and accepting the technology in their practice [16], [17]. Similarly, it is mentioned that online technology might be resisted by ADR practitioners, who dislike the online culture and communication style [18]. In the context of this article, although COVID 19 pandemic has brought distressed dismay to various sectors in general, such as tourism, hospitality, and travel and the justice system in specific, this pandemic has demonstrated that nothing is insurmountable. Specifically, with characteristic stoicism and systematic legal policy, the Malaysian lawmakers have properly responded to the threat affecting the justice system by taking several measures, because it is inconceivable that access to justice is paralysed. For instance, most of the trials and hearings during the COVID 19 pandemic are conducted online by using electronic technologies, such as video-conferences [19]. So, what can be gleaned from the previous arguments is that the Malaysian lawyers, judges, and arbitrators have shifted from the offline mode (the traditional court and arbitral procedures) to an online mode. However, it is logical to mention that some lawyers and arbitrators might remain sceptical and hesitated to adopt new approaches, such as online hearings. One of their doubts might be whether the outcomes produced using the ICT mirror the meaning and essence of “justice” in its offline (traditional) form. For example, whether the online hearing is sufficient to ensure due process, such as the right of equal treatment. In this regard, they may not have enough courage and mindset to accept the use of e-arbitration in the future. Hence, the effective and sustainable establishment of e-arbitration in Malaysia could not be achieved unless some efforts are given to fulfil this non-legal requirement. For example, the sceptical and hesitated participants (arbitrators and lawyers) in e-arbitration in Malaysia should fight the mindset of “techno-phobic.” This can be accomplished when they consider the advantages of e-arbitration as needs and opportunities instead of threats.

3.3 The Need for Infrastructure

E-arbitration requires a proper technical infrastructure for the conduct of e-arbitral proceedings [14]. The following discusses some of the technologies used in the Malaysian e-court and Asian International Arbitration Centre (hereinafter referred to as “AIAC”). This is important to show that Malaysia has a developed infrastructure, and it is almost ready to establish e-arbitration from a technical point of view. Indeed, the idea of having the e-court was materialised in 2002 [20], but the project of e-court was successfully established in 2009 [21]. There is no doubt that Malaysia’s e-court has played a vital role in decreasing backlog cases [22]. Several technologies used in the Malaysian e-court, including but not limited to, the E-File System, Case Management System (hereinafter referred to as “CMS”), Audio and Video Conferencing System (hereinafter referred to as “AVS”), and Case Recording and Transcribing (hereinafter referred to as “CRT”).

Regarding the E-Filing System, it is an initiative of the Malaysian Judiciary. It is designed to serve as a one-stop portal for the legal community to access all its needs, such as registering a case and filing the documents [21]. The e-filing system is also available for twenty-four (24) hours and seven days (7) a week [21]. So, the lawyers

can file their cases smoothly and effectively. In relation to the CMS, it is developed to enhance service effectiveness in handling cases in the Malaysian Courts. Moreover, it can be accessed by the court judges, officers, and staff. The CMS provides several features, such as scheduling trials, managing reports, file tracking, retrieving statistics, and monitoring cases [23].

Concerning the AVS, the audio conferencing system is employed for court hearings among the lawyers, judges, and others involved in the hearing sessions and stay at different locations [24]. An audio conferencing can be simultaneously made through mobile phones or fixed telephone lines [25]. Moreover, audio conferencing is employed for a simple procedure, such as fixing the date of hearing [26]. In contrast, the video conferencing system is usually used for a full hearing session managed and presided by the judge in an open court [26].

With regard to CRT, it is used to record the process of hearing before judges in an open court. All the court proceedings are stored in an audio-video format for further reference [21]. This enables the experts to examine and review the facial expressions of the witnesses during their testimonies [21]. Further, all the relevant parties, such as prosecutors and lawyers, can request a copy of that recordings in a compact disc form without the need for paying fees [27].

In the context of AIAC, there is a lack of information on the AIAC's website regarding the technologies used in traditional arbitration. However, the AIAC has already used interpretation facilities, transcription services, a video conferencing system [28], and a case management system. Based on the previous facts, it is argued that Malaysia, including AIAC, have already experienced the benefits of using several technologies in the context of dispute resolution, such as litigation and traditional arbitration. However, there is a need for improvements in order to offer full-scale e-arbitration services. This can be fulfilled when AIAC upgrades its current technologies and discover new technologies, such as "Artificial Intelligence", "Blockchain", "Augmented Reality", "Virtual Reality", and "360-Degree Camera".

3.4 The Need for Providing Several Languages in the E-Arbitration Platform

This part deals with the language used in Malaysia's potential e-arbitration platform, but not during the e-arbitral procedures. Indeed, the e-arbitration platform should take into account that the potential participants in e-arbitration may be from different countries and used different languages [29]. Some e-arbitration platforms, such as eJust [30] and FastArbitre [31], come only in two (2) languages (English and French). In the context of this article, the reputation of the traditional arbitration industry in Malaysia is excellent, and the potential disputants could be from everywhere and have different cultural and linguistic backgrounds. Therefore, the possibility of using the potential e-arbitration platform in Malaysia by international parties is very high. As a result, the potential e-arbitration platform in Malaysia should provide its services in several languages, such as Malay, Arabic, English, and Mandarin. This would help in attracting more international participants to use e-arbitration in Malaysia.

3.5 The Need for Ensuring Security and Confidentiality in E-Arbitration

Security reflects the reliability and safety of the users' identities and the protection of their confidential information [32] and data. From a theoretical perspective, the place where e-arbitration operates must be secure [5], [15], [33] because the lack of security makes people feel reluctant for using e-arbitration and weakens the confidentiality [34], [35]. Hence, the successful establishment of e-arbitration in Malaysia would not be achieved, unless the potential participants of the e-arbitration assure that their data and information provided during the e-arbitral proceedings will remain secure from external and internal risks, such as cyber-attack or unauthorised access.

Concerning the lack of confidentiality in e-arbitration, it is essential to note that the parties prefer to use traditional arbitration because it is a confidential mechanism [36], [37]. However, e-arbitration is less confidential than traditional arbitration [38] due to the fact that all the e-arbitral proceedings occur in the online environment, and they are vulnerable to the risk of interceptions. Hence, confidentiality in e-arbitration should be ensured and guaranteed [5], [33].

Based on the above, several non-legal measures can be adopted to ensure security and confidentiality in e-arbitration. Specifically, the potential participants and e-arbitration service providers should use digital signatures, firewalls, antivirus programs [39], and cryptographic e-mails [34]. They should also use sophisticated tools to secure the communications and data transmissions in the potential e-arbitration platforms. For instance, they could

use blockchain technology [40] because it could play a vital role in enhancing security, confidentiality, and data protection in e-arbitration.

3.6 The Need for Establishing a Local Centralised E-Platform

Despite the deep-rooted benefits, e-arbitration has faced slow growth because of the offline judicial enforcement that affects the purpose of online resolution [44]. Based on this, even if Malaysia, including AIAC, would regulate e-arbitration in the future, this would not be enough to provide a quick remedy to the winning party who still needs to go through a long process to enforce his/her e-arbitral award.

Specifically, the e-filing system is only accessible to the law firms, lawyers, and agencies [45], but not to public litigants without lawyers to represent them [46]. In the light of this, the unrepresented winning party, who wants to enforce his/her e-arbitral award, still needs to attend in-person before the Malaysian High Court and files the required documents, such as e-arbitral agreement and e-arbitral award, by using the e-filing service bureau [47] at the court. This would, of course, increase the cost and burden on the winning parties.

Finally, it is argued that regardless of the facts that Malaysia has established the e-court, and the Rules of Court 2012 have been amended since 2020 to provide legal recognition of remote communication technology [48], there is a need for establishing a local centralised e-platform that links the potential e-arbitration platform with the Malaysian High Court. For the reason that the procedures for enforcing the traditional arbitral award could be impractical and ineffective if they applied to the e-arbitral award. By doing so, the process of enforcing the e-arbitral award would be more arranged, attractive, and secure.

3.7 The Need for Access to Internet

Access to Internet is a primary need for the success of e-arbitration [15], [33]. However, the Internet is not accessible to everyone [49]. In the context of this article, it seems that access to Internet in Malaysia might not constitute a big problem. According to the report published by the Malaysian Communications and Multimedia Commission (hereinafter referred to as “MCMC”), there are twenty-eight point seven (28.7) million Internet users in 2018 [50]. Furthermore, in 2019, another report revealed that Malaysia was ranked thirty (30) in the world, with an average speed of twenty-two point fifty-seven (22.57) MegaBits per second [51].

Moreover, the development of the Internet network in Malaysia does not stop at that stage because Tun Dr. Mahathir bin Mohamad (the former Prime Minister of Malaysia) hinted that Malaysia could benefit from 5G technology within the next three years [52]. In contrast, the percentage of internet users in Malaysia was seventy (70) per cent and thirty (30) per cent in urban and rural areas, respectively [50]. Hence, there is still a digital divide between urban and rural areas. This might be a result of a poor Internet connection and accessibility in rural areas.

Based on the arguments and facts mentioned earlier, it is clear that in Malaysia, the need for access to Internet is somehow fulfilled, but there is a need for improvements. To do so, the Malaysian government should pay more attention to expand and develop the Internet network infrastructure in rural areas. This would minimise the digital divide between urban and rural areas in Malaysia and enhance the Internet accessibility and connection.

3.8 The Need for Access to Technology

Although the difficulty facing e-arbitration appears in the realm of law than technology [53], using e-arbitration raises significant concerns about the imbalance in the technological resources [54] among the participants. For instance, the e-hearings involved significant technical resources that are only available at a high cost [55]. Likewise, the success of e-arbitration relies on the availability of the required technologies [15]. Thus, the participants in e-arbitration should have the ability to access to technologies required in e-arbitration [56] or specify the preferred method for communications [57].

In the context of this article, Malaysia has already used the electronic technologies in dispute resolution, such as litigation and traditional arbitration, as mentioned earlier under sub-head 3.3. Besides, access to technology in Malaysia is declining because it is revealed that the percentage of individuals using the computer reached seventy point five (70.5) per cent in 2018 [58]. Regardless of the foregoing, there is a need to enhance access to technology in Malaysia. To do so, the Malaysian government, including AIAC, should provide the technological facilities at the lowest possible price or free of charge to those who are willing to use e-arbitration. This would enable the potential participants with low technological accessibility to use e-arbitration.

3.9 The Need for the Support of Traditional Arbitration Center

E-arbitration is institutional in nature [5], and the number of institutions offering e-arbitration services is increasing [59]. Therefore, the successful establishment of e-arbitration requires establishing an e-arbitration centre [60] or offering e-arbitration services by traditional arbitration centres [5]. In the context of this article, it is believed that traditional arbitration centres in Malaysia, such as AIAC, has a unique and unprecedented opportunity to be the primary authority in establishing e-arbitration because it has a unique reputation and developed infrastructure. Hence, the involvement of AIAC in establishing and developing e-arbitration in Malaysia would enhance its position as a well-known arbitration centre.

3.10 The Need for Spreading Awareness on E-Arbitration

In general, there is a lack of awareness in e-arbitration [61]. This might prevent the potential participants from using e-arbitration. By the application of analogy, the successful establishment of e-arbitration in Malaysia would face the problem of lack of awareness. This is because one survey revealed that there is less familiarity among the participants regarding the independent institutions offering Alternative Dispute Resolution (ADR) mechanisms [62], such as traditional arbitration. Hence, it is argued that the Malaysian authorities, including AIAC, should promote e-arbitration to the public by highlighting its advantages and features. By doing so, e-arbitration would gain more credibility, and the potential stakeholders will be more aware and informed about its existence.

4.0 CONCLUSION

E-arbitration is a combination of legal and non-legal requirements. This article sought to provide a preliminary analysis on the non-legal requirements for the successful establishment of e-arbitration in Malaysia. It finds that several non-legal requirements should be fulfilled in order to ensure the successful and effective establishment of e-arbitration in Malaysia. These non-legal requirements include the need for sufficient knowledge and training, the need for changing the mindset to accept the use of e-arbitration, the need for infrastructure, the need for providing several languages in the e-arbitration platform, the need for ensuring security and confidentiality in the e-arbitration, the need for a local centralised e-platform, the need for access to Internet and technology, the need for the support of traditional arbitration centre, and finally the need for spreading awareness on e-arbitration.

Moreover, the article also discovers that some of the non-legal requirements are in place with a need for improvements. In contrast, other non-legal requirements need to be appropriately addressed. For this reason, the authors, throughout this humble article, provide several recommendations that could make a difference once they have been adopted and considered by the relevant authorities in Malaysia. Lastly, it is suggested that the Malaysian authority, including AIAC, should establish e-arbitration. This would firstly help in enhancing the current dispute resolution framework. Secondly, it would promote greater access to justice in Malaysia.

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