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The Future of Arbitration for Personal Data Disputes in Indonesia: Weighing the Benefits and Challenges

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Abstract

Law No. 27 of 2022 on Personal Data Protection ("PDP Law") states that any personal data protection dispute can be settled through court, arbitration or any other form of alternative dispute resolution. Due to the recent issuance of the PDP Law, dispute resolution in the field of personal data is still a new area in Indonesia, especially arbitration. This paper seeks to discover the possibility of implementing arbitration for personal data breach disputes in Indonesia, by examining the benefits and challenges in place. Conducted using a normative legal research method, this research shows that arbitration offers many benefits which suit the specific features of data disputes, however, may face many challenges in the implementation. Flexibility, time and cost efficiency, confidentiality, expertise, and also the ability to cater cross border cases, are its benefits. However, there are some challenges in the implementation, for instance, the mass number of claimants, absence of implementing regulations and precedents, cost and procedural barriers for individual data subjects. To resolve these practical issues, the government can establish a specific sectoral arbitration board, which specifically resolves personal data-related disputes and has procedures tailored to meet the specific needs of data disputes. Hence, a more streamlined, less costly and accessible dispute resolution can be established.

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Introduction

Living in the digital world where transfer of information is as easy as one click of a button, the protection of personal data has now become more important than ever. Personal data, which refers to any information that is related to an identified or identifiable living individual, have been regulated so heavily by many countries due to its highly confidential nature and high risk it poses if treated poorly. The occurrence of cyber-attacks has also drastically risen as many are driven by the financial gains one can obtain from utilizing personal data. If effectively collected, analyzed, and utilized, personal data can bring many benefits to a corporation, such as by enhancing decision making, optimizing operations, propelling business growth, understanding customer behavior, personalizing marketing campaigns, and even developing innovative products

and services.¹ Personal data, more specifically digital personal data, are even described by the World Economic Forum as the “resource of the future” and “new asset class”.² While the benefits on the use of personal data are clear and evident, the use of personal data also conceives associated implications, particularly regarding security and data subject privacy.³

In Indonesia specifically, many data breach cases have happened in the past few years. Personal data leaks happened at major e-commerce companies such as Lazada and Tokopedia, as well as Indonesian government bodies such as the Healthcare and Social Security Agency and the General Elections Commission.⁴ In the Tokopedia data leak in 2020, 91 million customers’ personal data and 7 million merchants’ information was leaked⁵ and some even claimed that the data had been sold for US\$5,000.⁶

However, personal data disputes are not only in the form of personal data breach as commonly known. There are also many other forms of personal data disputes, such as insufficient fulfillment of data subject rights, insufficient legal basis for data processing as well as liability sharing between personal data controllers and processors.⁷

As the volume of data is growing exponentially and data disputes are happening more frequently than ever before,⁸ a comprehensive framework on personal data protection is necessary. On October 17th, 2022, the Indonesian Parliament finally passed

¹ Long Cheng and others, ‘Enterprise Data Breach: Causes, Challenges, Preventions and Future Directions’ (2017) 7 (5) WIREs Data Mining and Knowledge Discovery <<https://wires.onlinelibrary.wiley.com/doi/10.1002/widm.1211>> accessed on 20 June 2024.

² Kean Birch and others, ‘Data as asset? The measurement, governance, and valuation of digital personal data by Big Tech’ (2021) 1 (15) Big Data and Society, <<https://journals.sagepub.com/doi/pdf/10.1177/20539517211017308>> accessed 7 June 2024.

³ Gabriel Arquelau Pimenta Rodrigues and others, ‘Understanding Data Breach from a Global Perspective: Visualization and Data Protection Law Review’ (2023) 9 (27) Data <<https://www.mdpi.com/2306-5729/9/2/27>> accessed on 15 June 2024.

⁴ Jauhar Rizqullah Sumirat, ‘Data Breach in Indonesia: A Contemporary View’ (2023) 3 (5) Innovative: Journal of Social Science Research <<https://j-innovative.org/index.php/Innovative/article/view/6744/5022>> accessed 6 June 2024.

⁵ CNBC Indonesia Editorial, ‘Cerita Lengkap Bocornya 91 Juta Data Akun Tokopedia’, (CNBC Indonesia, 4 May 2023) <<https://www.cnbcindonesia.com/tech/20200504063854-37-155936/cerita-lengkap-bocornya-91-juta-data-akun-tokopedia>> accessed on 18 June 2024.

⁶ CNBC Indonesia Editorial (n 5).

⁷ Julien Chaisse and Ishika Garg, ‘Redefining Resolution in Data Disputes: Why Arbitration Holds the Key’ (2023) Kluwer Arbitration Blog <<https://arbitrationblog.kluwerarbitration.com/2023/12/11/redefining-resolution-in-data-disputes-why-arbitration-holds-the-key/>> accessed 20 June 2024.

⁸ Birch (n 2).

Law Number 27 of 2022 on Personal Data Protection (“PDP Law”) which has long been absent. Matters included in the PDP Law range from the scope of PDP Law, types of personal data, processing of personal data, to dispute resolution and procedural law for personal data disputes.

Under Article 64 (1) of PDP Law, personal data disputes can be settled either through court, arbitration or any other form of alternative dispute resolution, which includes negotiation, mediation or conciliation. Among all options, litigation through court may be known as the traditional way of dispute settlement, either through criminal or civil trial. Arbitration, on the other hand, though has been a popular choice of dispute settlement for trade-related disputes and is a relatively new area for personal data breach disputes. Compared to traditional courts, arbitration can offer many benefits; confidentiality and time efficiency, for example. However, the utilization of arbitration specifically for personal data breach disputes can come with some complexities in the implementation. For example, questions arise regarding whether or not arbitration can resolve personal data disputes that involve massive numbers of data subjects acting as applicants.

Recognizing the fact that the PDP law provides arbitration as an option for dispute resolution, this paper will revolve around one main research question: how possible is it that arbitration be implemented for personal data disputes in Indonesia? This question will be answered by examining the benefits and challenges in place. This paper will start by discussing personal data disputes in general, followed by dispute settlement options for personal data, and the benefits and challenges in the use of arbitration for personal data disputes.

Research Method

This paper will be conducted using a normative legal research method, by assessing the legal norms under the PDP Law as well as Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution (“Arbitration and ADR Law”) to comprehend the possibility of implementing arbitration of personal data protection disputes. As for the sources, primary sources are referred to in this research such as the PDP Law and Arbitration and ADR Law. In addition, secondary sources such as law journals and articles are also referenced in this research.

Personal Data Disputes

General concept

Personal data are data regarding individuals who are identified or can be identified separately or in combination with other information, either directly or indirectly through an electronic or non-electronic system ("Personal Data").⁹ Personal data can be categorized into two types: Specific Personal Data and General Personal Data. Specific personal data includes health data and information, biometric data, genetic data, crime records, child data, personal financial data and/or any other data in accordance with the provisions of laws and regulations.¹⁰ General personal data, on the other hand, includes a person's full name, gender, citizenship, religion, marital status, and/or combined personal data to identify a person.¹¹

Personal data can be obtained by any person, public agency or international organization. Due to the sensitive nature of personal data, collection and processing of personal data must be carefully done and subject to the terms and conditions under PDP Law. For example, personal data collection must be limited and specific, legally valid and transparent, and personal data processing must be carried out in an accurate, complete, non-misleading, up-to-date and accountable manner.¹²

In personal data protection, there are at least three main actors. *First*, the personal data subject which refers to the individual to which the personal data are associated ("Data Subject").¹³ *Second*, the personal data controller, which refers to every person, public agency, and international organization that acts individually or jointly in determining purposes and exercising control over the processing of personal data ("Controller"). *Third*, the personal data processor, which refers to every person, public agency, and international organization that acts individually or jointly in personal data processing on behalf of a Controller ("Processor").

The controller and processor as the data processing parties are imposed many

⁹ Law Number 27 of 2022 on Personal Data Protection, Article 1(1).

¹⁰ *ibid*, Article 4(2).

¹¹ *ibid*, Article 4(3).

¹² *ibid*, Article 16

¹³ *ibid*, Article 1(1).

obligations under the PDP Law. On the other hand, data subjects are given a list of rights which must be fulfilled and guaranteed by the controller and processor. As a consequence of these rights and obligations, many disputes may arise, either between the data subjects and controller or processor, or even between the controller and processor themselves in regard to liability sharing in case of dispute.¹⁴ The disputed matter itself can range in different forms. Starting from personal data breach, non-compliance with personal data processing principles until the failure to fulfill the data subject's rights.¹⁵

Among all types of personal data disputes, data breach may be the most commonly known. A personal data breach can be broadly defined as a security incident that has affected the confidentiality, integrity or availability of personal data.¹⁶ In other words, personal data breach occurs whenever any personal data are accidentally lost, destroyed, corrupted or disclosed; if someone accessed the data or passes them on without proper authorization; or if the data are made unavailable and this unavailability has significant negative effect on individuals.¹⁷ Personal data breach may be malicious, unintentional or accidental.¹⁸ The greatest impact a personal data breach can have on individuals is identity theft.¹⁹ Victims of identity theft experience a loss of control over their personal information, a loss of confidentiality, identity fraud, financial loss, unauthorized reversal of pseudonymization, damage to their reputation and significant economic or social disadvantages.²⁰

In the event of data breach, damage is not only suffered by data subjects, but also to corporations and organizations from which the data are leaked. The loss of sensitive information can lead to significant reputational damage and financial losses, and can even be detrimental to the long-term stability of an organization.²¹

¹⁴ Chiasse (n 7).

¹⁵ Shard Secure, 'What Are the Most Common GDPR Violations? A Guide' (17 August 2023) <<https://shardsecure.com/blog/most-common-gdpr-violations>> accessed on 22 June 2024.

¹⁶ Information Commissioner's Office, 'Personal Data Breaches: A Guide' <<https://ico.org.uk/for-organisations/report-a-breach/personal-data-breach/personal-data-breaches-a-guide/#whatisa>> accessed 27 June 2024.

¹⁷ *ibid.*

¹⁸ Rebecca Ong, 'Mandatory Data Breach Notification: Its Role in Protecting Personal Data' (2023) 10:1 *Journal of International and Comparative Law* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4480675> accessed 10 June 2024.

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ Cheng (n 1).

Nature of personal data disputes

Personal data disputes have some specific characteristics compared to other civil disputes. First, personal data disputes can have cross-border aspects. Nowadays, personal data processing can be conducted through electronic or non-electronic means. In the context of electronic personal data processing, there is no territorial border between controllers, processors and data subjects, and therefore disputes can arise between parties from different countries.

Second, personal data processing is not always done on a contractual basis. According to Article 20 of PDP Law, a controller must have a basis for personal data processing. There are six bases for personal data processing: (1) an explicit valid consent, (2) fulfillment of agreement obligations, (3) fulfillment of the legal obligations according to the laws and regulations, (4) protection of vital interests of the personal data subject, (5) carrying duties for public interest, public services or exercising controller's authority based on laws and regulations, (6) other legitimate interests.

Personal data processing based on consent and fulfillment of agreement obligations, is conducted based on a contractual basis. Meaning that there is a written document underlying the controller-data subject relationship. However, the remaining bases of personal data processing, such as fulfillment of legal obligations and vital interest of data subjects, are not based on an agreement. In relation to arbitration, the main prerequisite of arbitration is the existence of a written arbitration agreement. The absence of an arbitration agreement (or arbitration clause) in some personal data disputes then means that a separate arbitration agreement must be made by the parties after the dispute arises (also commonly known as *acta compromise*).

Third, in personal data disputes there can be a massive number of claimants or impacted data subjects. Controllers and processors can process large-scale personal data, where they can collect a massive amount of individual personal data from a large number of people for various purposes. Banks, for example, collect massive personal data from all of its customers. Consequently, in the event of a personal data breach, the massive number of data subjects can be impacted all at once. The numerous impacted parties in personal data processing then adds complexity in the dispute settlement process.

Dispute Settlement Options for Personal Data Disputes

PDP Law provides several options for dispute resolution of personal data protection disputes. According to Article 64 (1) of PDP Law, personal data protection disputes can be settled through arbitration, court or any other alternative dispute resolution agencies in accordance with the provisions of laws and regulations. From all the options provided under PDP Law, each option comes with its own benefits and drawbacks as discussed below.

Litigation through Court

If compared to arbitration or alternative dispute resolution, personal data dispute settlement through court has many benefits. *First*, dispute resolution through court can accommodate both civil and criminal litigation. Through civil litigation, personal data subjects whose rights have been breached receive compensations, while in criminal litigation, the violating party can be imprisoned for up to six years and imposed fines up to Rp6,000,000,000.00 (six billion rupiah).²² This amount can be multiplied up to maximum 10 if the crime is committed by corporations.²³ Actions which are sanctioned with criminal sanctions are unlawful collection,²⁴ unlawful disclosure and utilization of personal data²⁵ and creation of false personal data.²⁶ In contrast, other out-of-court dispute resolution forums can only accommodate the civil litigation area to provide compensation, as criminal litigation is the exclusive authority of the state.

Second, the court accommodates the parties' right to appeal, a feature which is absent in arbitration. Dispute resolution through court, either civil or criminal litigation, provides the opportunity for the parties to file for an appeal if the decision is not in favor of them. The primary function of the right to appeal is to protect against miscarriages of justice,²⁷ or in other words to "correct" any error from the previous decision and ensure

²² *ibid*, Article 67-68

²³ *ibid*, Article 70(3).

²⁴ *ibid*, Article 67(1).

²⁵ *ibid*, Article 67(2) and (3).

²⁶ *ibid*, Article 68.

²⁷ Peter D Marshall, 'A Comparative Analysis to the Right to Appeal' (2011) 22 *Duke Journal of Comparative and International Law* <<https://scholarship.law.duke.edu/djcil/vol22/iss1/1/>> accessed on 10 June 2024.

fairness for all. However, this surely impacts the time-frame of a dispute settlement, causing cases to be resolved even longer and without a certain time period.

Third, court proceedings are generally open to the public. Only certain cases are closed from the public, such as for criminal offenses committed by minors. Specifically for personal data disputes, it is generally open to the public. The publicity may in some cases be necessary, as data disputes have spectrums of public interest.²⁸ For example, in data breaches it may be necessary to expose the crimes committed by a party as it has caused massive harm to the public. However, PDP Law states that if necessary to protect personal data, court proceedings for personal data disputes may be conducted in a closed court.²⁹

Fourth, litigation through court can accommodate class action suits. Class action is a procedure for filing a lawsuit, where one or more people representing a group file a lawsuit for themselves and at the same time representing a large group of people, who have the same facts or legal basis between the group representatives and members of the group.³⁰ Specifically in personal data disputes, a large number of users can be impacted. In 2022, a hacker with an alias name 'Bjorka' claimed to have stolen 105 billion personal data of Indonesian voters from the General Election Commission.³¹ In such cases, individual litigation does not seem to constitute an efficient use of resources.³² The monetary value of individual claims may often be too small or, because of particular circumstances, some victims would not or could not in an appropriate manner set the judicial process into motion.³³ Moreover, class action with all its public exposure, may also deter similar illegal conduct in the future by other potential defendants who may escape all sanctions because victims are geographically scattered as in personal data disputes.³⁴

²⁸ Chaisse (n 7).

²⁹ Law Number 27 of 2022 on Personal Data Protection, Article 64(4).

³⁰ The Supreme Court of the Republic of Indonesia Regulation Number 1 of 2002 on Class Action Procedure, Article 1 letter a.

³¹ Intan Rakhmayanti Dewi, 'Hacker Bjorka is Back, Data Apa Saja yang Pernah Dibocorkan?', (CNBC Indonesia, 11 November 2022) <<https://www.cnbcindonesia.com/tech/20221111075351-37-386931/hacker-bjorka-is-back-data-apa-saja-yang-pernah-dibocorkan>> accessed on 12 June 2024.

³² Nicole L'Heureux, 'Effective consumer access to justice: Class actions', (1992) 15 Journal of Consumer Policy <<https://doi.org/10.1007/BF01014122>> accessed on 12 June 2024.

³³ *ibid.*

³⁴ *ibid.*

In spite of the benefits above, dispute resolution through court specifically for personal data disputes also has some drawbacks. This will be further elaborated in Point 4.3 of this paper which discusses the challenges of arbitration compared to the court.

Alternative Dispute Resolution

Besides dispute resolution through court, PDP Law also provides the option of undergoing alternative dispute resolution. Alternative dispute resolution refers to institutions for the settlement of dispute or contention, through a rule which is agreed by both parties, that is settled outside of court through methods such as consultation, negotiation,³⁵ mediation,³⁶ conciliation³⁷ or expert's assessment ("ADR").³⁸

ADR has many benefits compared to litigation. For example, mediation provides more privacy, flexibility, speed, and also promotes negotiation.³⁹ In ADR, the parties will sit together, communicate and voluntarily reach a settlement and rebuild the trust between each other.⁴⁰ The problem-solving process between the parties is conducted in an informal manner, non-binding approach, and the successful outcome of which is an agreement to "settle".⁴¹ In contrast, litigation is a much more formal, rigid and divisive process which may not be very friendly for the disputing parties.⁴²

³⁵ Negotiation is a process of joint decision making in which the disputants discuss their contradictory interests and the final goal is to reach a mutual agreement which can most likely satisfy both parties' interests. See Suherman, 'Arbitration and Other Alternative Dispute Resolution for Commercial Dispute (Reviewed from the Strengths of ADR and Decision of Arbitration)', (2019) 6(1) *Brawijaya Law Journal of Legal Studies* <<https://lawjournal.ub.ac.id/index.php/law/article/view/182/pdf>> accessed 14 June 2024.

³⁶ Mediation is assistance to two or more interacting parties by third parties who usually have no authority to impose an outcome. See James A. Wall and others, "Mediation: A Current Review and Theory Development." (2001) 45(3) *The Journal of Conflict Resolution* <<http://www.jstor.org/stable/3176150>> accessed on 29 June 2024.

³⁷ Conciliation is a process which the parties to a dispute are helped by a neutral and independent third party, who may be either and official provided by the state or a private person, to reach a mutually acceptable settlement. See Murray, Rau and Sherman, *Processes of Dispute Resolution* (Foundation Press, 1989) 69 and Suherman (n 35).

³⁸ Law Number 30 of 1999 of Arbitration and Alternative Dispute Settlements, Article 1 number 10.

³⁹ 'Alternative Dispute Resolution' (1995) 12 (2) *Compleat Lawyer*, <<http://www.jstor.org/stable/23778837>> accessed 14 June 2024.

⁴⁰ Jethro K Lieberman and James F. Henry. 'Lessons from the Alternative Dispute Resolution Movement' (1986) 53 (2) *The University of Chicago Law Review* <<https://doi.org/10.2307/1599646>> accessed 14 June 2024.

⁴¹ Nicholas Gould, 'Adjudication and ADR: An Overview' <<https://www.fenwickelliott.com/research-insight/articles-papers/adjudication-and-adr-overview>> accessed 14 June 2024.

⁴² Lieberman (n 40).

In Indonesia, the draft of government regulation on the implementing regulation of PDP Law⁴³ (“Draft of PDP Implementing Regulation”) which has been released by the Ministry of Communication and Information of the Republic of Indonesia, also states that mediation will be the first and prioritized dispute resolution forum for personal data disputes and will be facilitated by the PDP Agency.⁴⁴ This emphasizes the use of out-of-court dispute settlement for personal data disputes.

Arbitration for Personal Data Disputes

Arbitration refers to a method for civil dispute settlement outside of the general judiciary, which is based on an arbitration agreement made in writing by both disputing parties.⁴⁵ Disputes which may be settled through arbitration are only disputes in the trade sector and concerning rights, which are fully controlled by the disputing parties according to the laws and regulations.⁴⁶ Once the disputing parties have been bound by an arbitration agreement, the District Court shall have no competence to adjudicate such dispute.⁴⁷

Arbitration derives many characteristics of the court system, where a neutral third party can impose a binding decision,⁴⁸ but at the same time it also inherits the ADR’s flexibility traits such as by allowing the parties to choose the arbitrator and keep the entire process private. Accordingly, arbitration can be an option for parties willing to avoid the traditional litigation process yet still seeking for a final and binding decision from a third party.

However, the use of arbitration as a dispute resolution option comes with a condition. Under Article 2 of Arbitration and ADR Law, arbitration can only be conducted if an explicit arbitration clause or agreement exists between the disputing parties. The arbitration clause or agreement must clearly state that all disputes or contentions which

⁴³ Draft of Government Regulation on the Implementing Regulation of Law Number 27 of 2022 on Personal Data Protection as released by the Ministry of Communication and Information (PDP Implementing Regulation Draft), <<https://pdp.id/rpp-ppdp/1>> accessed on 16 June 2024.

⁴⁴ *ibid.*

⁴⁵ Law Number 30 of 1999 on Arbitration and Alternative Dispute Settlements, Article 1 number 1.

⁴⁶ Law Number 30 of 1999 on Arbitration and Alternative Dispute Settlements, Article 5(1).

⁴⁷ Law Number 30 of 1999 on Arbitration and Alternative Dispute Settlements, Article 3.

⁴⁸ Suherman (n 35).

occur or may occur from the parties' legal relationship will be settled through arbitration.⁴⁹ Specifically for personal data disputes, arbitration can be conducted if an arbitration agreement or clause exists between the data controller and data subject.⁵⁰ In practice, this could be inserted in the data controller's terms and conditions or agreement with the data subject. If an arbitration clause is absent in the initial agreement, the disputing parties may also create a separate arbitration agreement after the dispute arises.⁵¹

1. Prerequisite for Arbitration

The main prerequisite for arbitration is the existence of an arbitration agreement. According to Article 2 of the Arbitration and ADR Law, a dispute can be resolved through arbitration only if the parties have agreed on an arbitration agreement beforehand. The arbitration agreement between the parties must be in the form of a document (written) and signed by the parties. The arbitration agreement itself can be made by the parties before the dispute arises (*pactum de compromittendo*) or after the dispute arises (*acta compromise*).

In the context of personal data disputes, only disputes which have arbitration agreements can be resolved through arbitration. As discussed in Point 3 on the Nature of Personal Data Disputes above, not all personal data processing is based on an agreement or conducted on a contractual basis. For example, a party can process another person's personal data if it is necessary for protecting the person's vital interests such as in the event of a medical emergency. In such cases, there is no underlying written agreement between the parties and therefore in terms of dispute resolution through arbitration, a separate arbitration agreement must be made by the parties afterwards.

2. Benefits of Arbitration for Personal Data Disputes

Arbitration has been well-known as a favored dispute settlement choice for trade-related disputes. Interestingly, arbitration's traits really suit the characteristics of

⁴⁹ Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution, Article 2.

⁵⁰ Jacques de Werra, 'Using Arbitration and ADR for Disputes about Personal and Non-Personal Data: What Lessons from Recent Developments in Europe?', (2020) 30 (2) *The American Review of International Arbitration* <<https://aria.law.columbia.edu/issues/30-2/using-arbitration-and-adr-for-disputes-about-personal-and-non-personal-data-what-lessons-from-recent-developments-in-europe-vol-30-no-2/>> accessed on 21 June 2024.

⁵¹ Law Number 30 of 1999 on Arbitration and Alternative Dispute Settlements, Article 9(1).

personal data disputes and offers many benefits compared to other dispute resolution options. The benefits include flexibility, speed, confidentiality, expertise and ability to cater cross-border disputes.

Flexibility

The flexibility and less formal procedures are one of the key advantages of arbitration, at least compared to litigation. In arbitration, the parties have the authority to choose the arbitrator or arbitral tribunal themselves, based on the arbitrator's expertise in the matter in dispute. Procedures can also be tailored by the parties to better suit their needs.⁵² The parties can choose where the arbitration is held, the language to be used, the law to be applied, and also agree on how the arbitration will be conducted.⁵³ Accordingly, any hindrances which are caused by procedural and administrative matters in court may be avoided in arbitration.⁵⁴

Time and cost efficiency

Speed to resolution is one of the prime reasons small businesses build arbitration into their contracts.⁵⁵ Once a dispute is filed with an arbitration body, the parties mutually decide on an arbitrator and the hearing can begin.⁵⁶ In Indonesia, examination of a dispute in arbitration must be concluded within 180 days since the day when the arbitrator or arbitral tribunal has been established.⁵⁷ Compared to the litigation at court, the process can take much longer as the option of submitting an appeal is always available.

In addition to speed in general, arbitration can also provide faster and immediate response to a dispute compared to court due to the less formalities. Decisions can also be made sooner as the law allows an arbitrator or arbitral tribunal to render a provisional

⁵² Suherman (n 36).

⁵³ Benjamin Hayward, 'Too Much of a Good Thing? The Case for Less Flexibility in International Commercial Arbitration' Monash University (19 December 2017) <<https://impact.monash.edu/legal/too-much-of-a-good-thing-the-case-for-less-flexibility-in-international-commercial-arbitration/>> accessed 21 June 2024.

⁵⁴ Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution, Elucidation of Law Number 30 of 1999, General Part.

⁵⁵ Thomson Reuters, Arbitration vs. Litigation: The Differences (4 October 2022) <<https://legal.thomsonreuters.com/blog/arbitration-vs-litigation-the-differences/>> accessed 21 June 2024.

⁵⁶ *ibid.*

⁵⁷ Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution, Article 48 (1).

award or other interlocutory award.⁵⁸ The absence of administrative burden which happens in court also speeds up the whole process. In personal data disputes, all activities are conducted online and can happen very fast. Therefore, an immediate response may be necessary to prevent greater harm and damages to the impacted parties.

In relation to the speedy process in arbitration, some even argue that this directly impacts the overall cost borne by the parties. The UK Court of Appeal affirmed that arbitration is the most cost-effective and efficient supranational dispute resolution procedure.⁵⁹ In litigation, the parties are given the opportunity to submit an appeal, which causes the entire process to be longer and without a certain time frame. The longer the process, then the higher the cost is for the parties.⁶⁰ However, issues related to higher cost may be controversial as some even argue that specifically for data disputes, the cost may even be higher (*see discussion in Point 4.3 below*).

Confidentiality

In contrast to civil litigation at courts which must be open to the public, arbitration proceedings are entirely confidential. The hearings in arbitration must be conducted in private and decisions are not published.⁶¹ Any papers, reports, notes and witness statements during the process are also protected by confidentiality,⁶² unless the laws and regulations explicitly state that such confidentiality is not necessary or disclosure has been approved by the disputing parties.⁶³

In personal data disputes, companies may prefer arbitration due to the minimum to even zero public exposure. Publicity may cause reputational risk and further damage to an organization. Particularly for organizations whose activities rely heavily on customer's trust, such as in the banking and health sector, less exposure may be necessary. From the data subject's point of view, the confidential nature of arbitration can also safeguard

⁵⁸ Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution, Article 32 (1)

⁵⁹ Chaisse (n 7).

⁶⁰ Costs may include cost for legal counsels which may be higher as the process becomes lengthier.

⁶¹ Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution, Article 27

⁶² Neela V Naik, 'Confidentiality in International Commercial Arbitration: A Reality or Presumption' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4720700> (2023) accessed 21 June 2024.

⁶³ Indonesia National Arbitration Board Regulation, Article 14 (2) <<https://baniarbitration.org/arbitration-rules>> accessed 20 June 2024.

proprietary data and individuals' privacy, a level of protection not always available in court proceedings.

Expertise

In arbitration, disputing parties are able to select or choose their own arbitrator or arbitral tribunal⁶⁴ which has professional qualification or expertise in the relevant field. Specifically in the field of personal data, personal data disputes are quite complex, particularly in terms of substantive legal issues.⁶⁵ Various regulatory instruments in the field personal data create rights and obligations for many parties⁶⁶ requiring extensive knowledge in the field of personal data. To some extent, knowledge beyond legal matters or a multidiscipline approach may also be necessary. Personal data disputes encompass many non-legal aspects, from technical cybersecurity to data management, therefore requiring not only legal but also information technology context by the arbiter.

Catering for cross-border disputes

Personal data disputes can have trans-national aspects.⁶⁷ Especially in terms of digital personal data, their digital nature allows them to be easily transmitted online and transferred beyond countries. Accordingly, personal disputes may arise across jurisdictions and it is important to establish an appropriate dispute resolution mechanism for solving such cross-border disputes.⁶⁸ In this context, arbitration, more specifically international arbitration, can be a great solution.⁶⁹ In fact, arbitration has consistently been the preferred means for resolving cross-border commercial disputes as carried out at the School of International Arbitration.⁷⁰ According to Werra, it may even be risky and counter-productive if the claimant had to use separate dispute resolution mechanisms that would be cost-ineffective and could even lead to potentially conflicting

⁶⁴ Emilia Onycma, 'Selection of Arbitrators in International Commercial Arbitration' <https://eprints.soas.ac.uk/4424/1/Selection_of_arbitrators.pdf> accessed 28 June 2024.

⁶⁵ Werra (n 50).

⁶⁶ Werra (n 50).

⁶⁷ Adele Azzi, 'The Challenges Faced by the Extraterritorial Scope of the General Data Protection Regulation' <<https://www.jipitec.eu/archive/issues/jipitec-9-2-2018/4723>>

⁶⁸ Werra (n 50).

⁶⁹ *ibid.*

⁷⁰ Heyward (n 53).

decisions.⁷¹ The use of international arbitration also ensures neutrality in disputes beyond jurisdictions, as the parties are free to choose the place of arbitration, governing law, and language, without having to be forced to be bound by one specific country, law or language.

3. Challenges in Utilizing Arbitration for Personal Data Breach Disputes

In spite of the benefits, the utilization of arbitration still entails many challenges in the implementation. For example, the mass number of claimants, absence of implementing regulations and precedents, cost and procedural barriers and preference to use litigation.

High number of claimants

A possible issue of utilizing arbitration for personal data disputes is the fact that personal data disputes can impact a high number of data subjects. This may be an issue as there is no clear procedure of mass complaints unlike class action which exists in court. Even though the Indonesian National Arbitration Body Regulation (*Badan Arbitrase Nasional Indonesia*/"BANI") does allow multiple applicants or respondents, it is unclear about the number of maximum parties which could participate as an applicant or respondent under the rules. The BANI rules⁷² only states that if there are more than two parties to the dispute, then all parties acting as the applicant (the applicants) must be considered as a single party in the hearings, and all the sued parties must be considered as one single respondent in the same matter.⁷³ Due to the lack of clarity of mass claim procedure under arbitration, litigation can be a more feasible option for mass claims.

Cost and procedural barriers

While arbitration generally can be more cost-effective compared to litigation, some argue that the case can be different in the context of data privacy disputes. According to Chaisse, in data privacy disputes which are often high-volume and low-value, the costs associated with arbitration can become a significant barrier.⁷⁴ This is especially relevant as these disputes frequently involve complex technicalities and legal nuances, potentially

⁷¹ Werra (n 50).

⁷² Indonesia National Arbitration Board Regulation (n 64), Article 11 (4).

⁷³ *ibid.*

⁷⁴ Chaisse (n 7).

escalating arbitration expenses.⁷⁵ Especially as individuals or smaller entities will be facing off larger corporations, such financial constraints can discourage individuals from pursuing their privacy rights, emphasizing the need for a more accessible and cost-efficient ADR mechanism.⁷⁶ In addition to cost barriers, there can also be procedural barriers in arbitration. Even though generally arbitration is much more flexible compared to litigation, the entire process can still be a barrier for data subjects as individuals, as they still have to undergo the entire procedure against larger corporations.

In light of this, Chaisse emphasizes that the adoption of a model akin to the expert determination used in domain name disputes could offer a more suitable solution. This has been implemented by The Internet Corporation for Assigned Names and Numbers' (ICANN), by creating the Uniform Domain-Name Dispute-Resolution Policy ("UDRP"). UDRP provides a mechanism for rapid, cheap and reasonable resolution of domain name conflicts, avoiding the traditional court system for disputes by allowing cases to be brought to one of a set of bodies that arbitrate domain name disputes.⁷⁷ This approach could provide a more streamlined, less costly avenue for resolving data privacy disputes, thereby enhancing transparency, accessibility, and cost-effectiveness in the realm of data privacy arbitration, and ensuring that individuals and smaller entities are not deterred from seeking justice due to prohibitive costs.⁷⁸

Absence of implementing regulations and precedents

The Indonesian PDP Law was enacted in 2022 and will become effective as of October 2024. No implementing regulation has been issued yet up to date. Due to the recent issuance of the law, the field itself is very novel, at least in the Indonesian society. In spite of the fact that many data breach cases have happened, no dispute resolution or litigation cases have happened to date. More specifically for arbitration, either from Indonesia or other countries, it is also challenging to find any further information about the existence of such personal data disputes in arbitration due to the confidential

⁷⁵ *ibid.*

⁷⁶ *ibid.*

⁷⁷ Uniform Domain-Name Dispute-Resolution Policy <<https://www.icann.org/resources/pages/help/dndr/udrp-en>> accessed on 29 June 2024.

⁷⁸ *ibid.*

nature of arbitration. Hence, at this point, there is little that we can learn regarding the practicality of arbitration for personal data disputes.

Preference of choosing litigation in digital platform standard terms and conditions

One primary requirement for the use of arbitration is the existence of an arbitration clause or arbitration agreement. Without an arbitration clause or arbitration agreement, a dispute cannot be resolved through arbitration. Many personal data disputes arise between data subjects and digital platforms. In Indonesia specifically, many Indonesian major digital platforms still use litigation for dispute settlement.⁷⁹ However, some⁸⁰ choose arbitration as its dispute settlement forum.

An important matter to note regarding this is that digital platform terms and conditions are standard clauses which are unilaterally made by the platform itself. The consumers or data subjects have no right to change or negotiate these standard clauses. Accordingly, once a digital platform states in its terms and conditions that all disputes arising from its services will be resolved through court, it abolishes the possibility of using arbitration in any personal data dispute that may arise between the parties. In theory, such practice may not be ideal as it eliminates the consumer's rights, as a party to the agreement, to choose the dispute settlement mechanism. The ideal condition is that both enter into the agreement on a consensual basis and equally have the freedom to determine the terms and conditions in the agreement. In standard clauses however, consumers are left with no choice rather than "take it or leave it." This condition proves that the *das sein* or actual condition, deviates from the *das sollen* or the ideal legal norm.

Nonetheless, in such conditions, the Arbitration and ADR Law still provides an opportunity for disputing parties to choose arbitration after the dispute has arisen by creating a separate arbitration agreement signed by both parties.⁸¹ However possible, the creation of an arbitration agreement may add more technical complexities. Especially

⁷⁹ For example, Shopee <<https://help.shopee.co.id/portal/4/article/71187>>, Tokopedia <<https://www.tokopedia.com/terms?lang=id>>, Gojek <<https://www.gojek.com/id-id/terms-and-condition/gojek>> chooses dispute resolution through court. However, Grab Indonesia uses arbitration as its dispute settlement choice <<https://www.grab.com/id/en/terms-policies/transport-delivery-logistics/>>.

⁸⁰ Grab Indonesia uses arbitration as its dispute settlement choice <<https://www.grab.com/id/en/terms-policies/transport-delivery-logistics/>>.

⁸¹ Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution, Article 9(1).

in data breach cases, it should be noted that there may be a very large number of data subjects that are impacted and not all parties can be cooperative after a dispute arises. Hence, the creation of an arbitration agreement afterwards may not always be easily done in practice.

The Way Forward: The Establishment of a Specific Personal Data Arbitration Board

Given the benefits and challenges above, quoting Chaisse,⁸² we can comprehend that in personal data disputes “one size does *not* fit all”. Choosing the right dispute resolution depends on the specifics of the case and the parties involved.⁸³ In some cases, data disputes possess layers of public interest, and resolution through court may be a better choice. For example, for mass claims by a large number of data subjects, class action may be more feasible. Another condition is when the opposing party is not cooperative or even unwilling to engage in arbitration, then the court system can provide means to compel the other party to participate and follow through with the legal process.⁸⁴ However, if the conditions for arbitration are fulfilled, for example, an arbitration clause exists and the parties agree, then arbitration can be an option.

To resolve possible challenges faced in personal data arbitration as discussed in part 4.3 above, the establishment of a separate specific personal data arbitration institution can be a solution. In this case, due to the distinct characteristics of personal data disputes (*inter alia*, massive claimants, case technicalities, cost for individual data subjects, etc.), the utilization of conventional arbitration institutions may be unsuitable. Accordingly, the government can establish a sectoral arbitration board focusing on personal data-related disputes to cater the specific needs and characteristics of data disputes.

The establishment of sectoral and industry-specific arbitration boards is nothing new in Indonesia. In the field of sports, for example, there exists the Indonesian Sports Arbitration Board (*Badan Arbitrase Keolahragaan Indonesia*/BAKI) which resolves sports-

⁸² Chaise (n 7).

⁸³ Lexis Nexis, ‘Arbitration vs. Litigation Making the Right Choice (20 September 2023) <<https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/arbitration-vs-litigation>> accessed 28 June 2024.

⁸⁴ *ibid.*

related disputes in Indonesia. Many sectoral arbitration boards also exist in the field of financial services, for example, the Insurance Mediation and Arbitration Board (*Badan Mediasi dan Arbitrase Asuransi/BMAI*), Indonesian Capital Market Arbitration Board (*Badan Arbitrase Pasar Modal Indonesia/BAPMI*), and Indonesian Guarantee Company Arbitration and Mediation Board (*Badan Arbitrase dan Mediasi Perusahaan Penjaminan Indonesia/BAMPPI*). The construction industry also has the Indonesian Construction Arbitration and Alternative Dispute Resolution Board (*Badan Arbitrase dan Alternatif Penyelesaian Sengketa Konstruksi Indonesia/BADAPSKI*), which specifically handles construction-related disputes.

By establishing a specific personal data arbitration board, the procedure and rules can be tailored according to the special characteristics of personal data disputes. This approach could provide a more streamlined, less costly avenue for resolving data privacy disputes, thereby ensuring accessibility and ensuring that individuals and smaller entities are not deterred from seeking justice due to prohibitive costs.⁸⁵

Conclusion

Arbitration has been mentioned as an option for personal data dispute resolution under the PDP Law. However, due to the quite recent issuance of the PDP Law and the absence of precedents, questions then revolve around the practicality of implementing arbitration for personal data disputes. From the discussion above, we can conclude that there may be many challenges in implementing arbitration for personal data disputes. For example, the massive number of claimants, case technicalities, and also cost and procedural barriers for individual data subjects. To resolve these issues, the government can establish a specific sectoral arbitration board, which specifically resolves personal data-related disputes only. By establishing a specific personal data arbitration board, the procedures and rules can be tailored according to the specific characteristics of personal data disputes. Hence, providing a more streamlined, less costly and accessible avenue for resolving personal data disputes.

⁸⁵ *ibid.*

In the end, we realize that personal data disputes are happening more frequently than ever and time is thus ripe to develop dispute resolution mechanisms that can be adapted to address these challenges.⁸⁶ Detailed regulations and guidelines are necessary to answer the questions in regard to the practicality of arbitration for personal data disputes. The PDP Agency and Arbitration Centers in Indonesia have significant roles in making this happen. After all, the option is already available under the law, and the government is responsible for ensuring that the option is not only available, but is also practically doable, feasible and accessible for all.

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⁸⁶ Werra (n 50).

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