

Completion of Business Disputes through Online Dispute Resolution (ODR) and its Implementation in Indonesia

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This paper seeks to discuss several matters relating to the resolution of business disputes through ODR, Online Arbitration Agreements, Online Arbitration Process, Online Arbitration Awards, and ODR Enforcement in Indonesia. Descriptions in this paper are expected to provide clearer discourse about ODR and the extent of existing legislation governing the settlement of civil disputes (carried out via the internet). They are also expected to provide clearer discourse about the possibility of alternative civil dispute resolution through ODR that can be applied in Indonesia. With this ODR, in the future, it will open new alternatives for the people of Indonesia, especially justice seekers, in resolving their disputes in the future.

Key words: Business disputes through online dispute resolution.

Introduction

In the business world today, this model of dispute resolution is not preferred. Even if the settlement is done through a judicial institution, it will merely be a last resort (ultimatum remedium) after other efforts have not produced results. Therefore, it is necessary to find a system that is right, effective and efficient. The system must have the ability to resolve disputes simply, quickly and cheaply (Mertokusumo, 2002). Consequently, the modern business world turns to Alternative Dispute Resolution (ADR). In the developing world of trade, the two main models are the traditional trade model and conventional business model. The two models each have different methods, problems, juridical consequences and dispute resolution processes. The use of internet technology as an innovative trading system allows information to occur quickly throughout the world in cyberspace giving birth to what is called the third wave of society (Sanusi, 2001).



In Indonesia, online trading sites have sprung up that provide product sales services through the internet, but people have not used this method much. They still like conventional transactions by visiting and meeting face to face with sellers. Indonesian people who use modern transaction systems via the internet are mostly dealing with sellers who are abroad. This is because the products they want to buy are sought in Indonesia. Transactions like this, along with the development of technology and social society, will continue to increase. It is feared that this will cause disputes that have core issues, as described above. Based on this, an interesting idea arises, namely, how to resolve disputes that occur on the Internet through a dispute resolution mechanism that is also based on innovation. Dispute resolution as an object of renewal. APS itself in Indonesia is known as customary law construction, along with the complexity of cases in Indonesia that increasingly offer many choices. These include Negotiations, Mediation, Neutral Fact Finding, Mini-Trial, Ombudsman, and Jury Trial Summary.

Furthermore, the idea was developed into an online arbitration mechanism that functions to resolve disputes due to electronic acts in particular and other disputes in general. The object, especially in disputes based on the law, can indeed be resolved through an alternative dispute resolution process. Online arbitration is one way to resolve civil disputes arising from online transactions and domain disputes where the parties submit their cases to a neutral third party who has the power to make decisions.

The use of information technology in civil dispute resolution systems, especially online dispute resolution, is very helpful for parties across the country so as to shorten distances, reduce costs, simplify processes and speed up resolution. In addition to providing benefits, the use of information technology in dispute resolution can lead to legal problems. The fundamental problem regarding ODR systems is the issue of agreements that can change from one legal system to another due to the different positive laws of each party. One of the conditions for the formation of an arbitration agreement is the existence of a choice of forum that will be the settlement of disputes that may occur. Forum selection generally considers several things, including the place where the agreement was signed/agreed to, the place of agreement implementation and the domicile of the party who submitted the dispute. The problem here is that transactions are carried out in cyberspace. Hence, election forums, if not done carefully, can cause problems later on.

Normatively, the regulations regarding Arbitration and Alternative Dispute Resolution in Indonesia can be found in Law No. 30 of 1999. Nevertheless, the legitimacy of the existence of online arbitration and the rules of conduct governing how online arbitration is carried out are not clearly regulated in these regulations. If the arrangement for the implementation of online arbitration is left to the parties themselves, it is feared that there will be no standard



standards regarding the implementation of effective and efficient online arbitration. In addition, there are also many obstacles, especially regarding the facilities and infrastructure of the implementation of online arbitration.

ODR as a Resolution of Disputes

The existence of ODR has offered a new concept regarding the resolution of disputes on the internet and also provides several possibilities. Daewon Choi, in his article entitled Online Dispute Resolution: Issues and Future Directions, expresses his opinion as follows: "Some of these possibilities include not only detemporalisation and depersonalisation, but also dematerialisation and deterritorialisation of conflicts" (Riswandi, 2006).

Alternative dispute resolution online (Online Dispute Resolution/ODR), in this case online arbitration, is an alternative business dispute resolution strategy outside the court. It uses the internet as a medium to resolve disputes that occur between parties. Basically, alternative systems for conventional dispute resolution are not different from online systems. The steps or stages of the online dispute resolution process are more or less the same as the steps or stages of the conventional arbitration process. The only difference is the place and medium of dispute resolution used. Online arbitration is carried out on the internet or in cyberspace and the process of settling disputes is generally not done face to face. This is different from general arbitration, where dispute resolution is carried out in the real world. Generally, the dispute resolution system brings parties together directly. However, through online arbitration, the parties in a dispute will usually never meet face to face. In certain cases, online arbitration service providers may bring the two parties together directly for the sake of a smooth dispute resolution process.

Arbitration and Alternative Dispute Resolution do have a very important role in resolving business disputes. However, since the internet was introduced to the general public in the late 1980s, the world of commerce has started to penetrate cyberspace. It is estimated that up to this year, internet users have reached 1 billion people. This population increased from only 50 million users in 1996, and in 2000, there were around 288 million users worldwide.

Organisations, educational institutions, governments and individuals use the internet to sell products and share information. Symptoms like this are good for businesspeople in running their businesses online in cyberspace. Many business transactions that occur every day online (e-commerce), for example, eBay online auction sites, have several million materials to be sold and more than one million transactions taking place every week. In transactions that have large amounts, such as eBay, it is very possible that errors occur in terms of payment, delivery of goods and damage arising in shipping.



In settling trade disputes between eBay and its trading partners abroad, a fast and inexpensive dispute resolution system is needed. In this case, the conventional alternative system of dispute resolution and arbitration can no longer resolve disputes effectively and efficiently, because it is different from transactions and trade agreements in general. Online transactions result in parties not meeting face to face. Cultural and linguistic differences are also barriers. The loss of national borders and the speed and magnitude of the number of transactions that occur in cyberspace demands a better and more effective system of trade dispute resolution than arbitration and other alternative dispute resolutions that have been known so far.

Online arbitration itself is in line with conventional arbitration in terms of case registration, arbitrator selection, decision making, document submission, arbitrator deliberation, and notification of an award made online. In addition, the stressing discussion in online arbitration is focused on regulating the matter of the validity of arbitration agreements made online, online arbitration procedures, and the issue of online arbitration awards. In addition, the discussion will involve regulation of the Internet as a form of online media in the arbitration process. The significance of the discussion about Internet regulation is regards the reality of the Internet, which is global and crosses national borders. For this reason, it is necessary to explain who is entitled to regulate the Internet. This is related to the fact that many disputes that occur and are resolved through online arbitration are disputes that occur due to online activities on the Internet. This includes e-commerce disputes.

Online arbitration mechanisms free the determination and use of legal options. Most arbitration agreements are made in a standard clause, known as a Standard Contract, so that the appointment of the relative competence and legal choices of an arbitration agreement are only determined by one of the parties. For this reason, it is necessary to know the provisions that can be seen from the customs that take place in international relations. The application of online arbitration does offer a lot of effectiveness and efficiency compared to conventional arbitration. This is especially true regarding costs that are sometimes even more expensive than the litigation process, which can be minimised. There are also weaknesses that accompany it. In online arbitration, complete procedural support and Internet access are required so that the online arbitration processes can run smoothly. The fulfillment of this requires planned preparation. For example, a website may be integrated with a database application to accommodate incoming requests, a list of arbitrators, and the rules needed regarding an application to arbitrate. In addition, to ensure the confidentiality and authenticity of data and documents used during the online arbitration process, adequate security applications equipped with good encryption technology are required. And of course, it is also necessary to provide chat rooms and bulletin boards based on real-time audio-visual streaming and Content Management Systems specifically for arbiters.



The use of information technology in civil dispute resolution systems, especially online dispute resolution, is very helpful for parties across the country. It shortens distances, reduces costs, simplifies processes and speeds up resolution. Despite providing benefits, the use of information technology in dispute resolution can lead to legal problems. The fundamental problem regarding ODR systems is the issue of agreements that can change from one legal system to another due to the positive law of each different party. One of the conditions in the formation of an arbitration agreement is the existence of a choice of forum that will involve the settlement of disputes that may occur. The forum selection generally considers several things, including the place where the agreement was signed/agreed to, the place of agreement implementation and the domicile of the party who submitted the dispute. The problem here is that transactions are carried out in cyberspace, so election forums, if not done carefully, can cause problems later on.

In the online process, it is not possible to determine a physical location where procedural rules from ODR service providers can be implemented. This is so because the internet creates a technology base for multimedia and computerised conversions so that surrounding boundaries disappear. The internet has an overall function as a virtual reality or cyberspace that can effectively facilitate communication and relieve similar activities from territorial boundaries. All activities in cyberspace take place everywhere, not only in certain places. The process involving the internet's functional characteristics intersects with the application of conventional international legal principles relating to the problem of the place of an activity. Thus, the internet/cyberspace is a functional system creating a world without borders. The principles of international law apply to it. These are developed and intended for the development of a world based on territorial or national boundaries. In addition to legal issues, such as the validity of online arbitration agreements, the choice of forums, jurisdictions, the laws used in cyberspace and law enforcement, there are other problems. These include technical and social problems and their use.

The practical problems of the online arbitration system involve technical and social problems. Technology related to security and confidentiality (an advantage of Alternative Dispute Resolution) has become a very important issue in the online world. Rapid technological developments can protect documents and maintain confidentiality and authenticity. The absence of the face-to-face meetings of parties constitutes a fundamental criticism of online arbitration. Arbitrators have difficulty seeing actual disputes and providing good solutions by reading written text rather than having face to face interactions with parties. Language differences become a problem both in conventional and online arbitration. Expressions that are not translated correctly between parties in different countries lead to different interpretations. Arbitrators must pay attention to this language problem. If they do not use the language used by the parties involved, they can use a professional translator, which is more complicated. An online arbitration cannot be carried out if too many parties are involved, because it will make



it difficult to monitor. The large number of participants will increase the assignments, which can become almost impossible for neutral third parties to handle. It is then difficult to stay focused during the discussion process because the parties can send messages continuously through various e-mail characters. It is best for online arbitration when the parties involved are as few as possible (for example, the only parties being the seller and the buyer).

However, there are many obstacles that hinder the application of this new breakthrough in our country, which is clearly one thing we need to note. Constitutionally, the legitimacy of online arbitration has been indicated. Special regulations must be made at the same time as the socialisation of procedures regarding online arbitration implementation. This also concerns the government's recommendations to related parties.

Online Arbitration Agreements

Online arbitration agreements use various international legal instruments as their legal basis. At the international level, the New York Convention on June 10, 1958 and the 1985 LAW Model UNCITRAL can be enacted. This convention can be ratified by all countries in the world. European countries use the Geneva European Convention on International Commercial Arbitration from 21 April 1961. Countries on the American continent use The Inter-American Convention on International Commercial of 1975, often called the Panama convention, coupled with The Inter-American Convention on Extraterritorial Validity of Foreign Judgment and Arbitral Award of 1979, often called the Montevideo convention (Manevy, 2006).

In terms of conditions referring to the form of the agreement, based on Article 2 paragraph (1) of the 1958 New York Convention, it is stated that "Each contracting state shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

It is explained in the article above that the terms of an agreement must be written (an agreement in writing), which is then completed by paragraph, 2 which reads, "The term 'agreement in writing' shall include an arbitrary clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams."

The written form requirements, as stated in Article 2, paragraph (1) of the New York Convention, are adopted by Article I of the Panama Convention with additional agreements in other forms of telecommunications.



In online trading practices, agreements occur through the process of exchanging letters in electronic form (e-mail). However, some jurists doubt whether an agreement using electronic mail exchange (e-mail) can be considered a written agreement (an agreement in writing). Others state that e-mail is no different from the form of a letter in general, so it does not matter if e-mail is the basis of an agreement. According to Jerome Huet and Stephania Vahuachino, the internet can be analogised as a fax medium, which involves the development of telegrams. The consequence is that an electronic arbitration agreement is as valid as regulated by the Panama Convention (Manevy, 2006).

Online Arbitration Process

The scope of online arbitration processes here includes the workings, places or positions of arbitrations and arbitration rules adapted to e-commerce.

a. How arbitration works online

In the world of trade between countries, the use of the internet to provide and distribute information and goods must be approved by parties. This agreement aims to protect the confidentiality and authenticity of data, while the mark of an agreement is usually a signature. In the e-commerce world, electronic signatures are used instead of manual signatures. In addition to its function as a signature (as in ordinary trade agreements), it can also protect data. This is because this signature is difficult to fake. A digital signature guarantees the security of a contract.

b. Place of arbitration

The term place or position of arbitration refers to the place chosen by the parties or arbitrators as the legal domicile of arbitration. The task of this arbitration is as a medium of conflict to determine the legal procedures that will be established for dispute resolution. An arbitration position gives the court access to intervene, in addition to the proceedings through the ongoing arbitration court. This access sometimes refers to the application of a fixed procedure that applies in the area where an arbitration is located. It also impacts the jurisdiction of the court in determining decisions unilaterally. In its implementation under various conditions, it sometimes affects the application and enforcement of an arbitration decision. This arbitration position has an important role in determining the legal material to be used in arbitration. In determining the arbitration process used, if the parties do not choose the law used, generally, the law where the arbitration is located will be chosen.

c. Arbitration rules are adapted to e-commerce

Many arbitration rules and procedural laws in a country must be modified to accommodate online arbitration and regulatory requirements. For example, Article 20 paragraph (3) of the London Court of International Arbitration (LCIA) rules of 1998 contains provisions of



testimony or written evidence without explaining whether this will also include evidence in an electronic format. Article 17, paragraph (3) of the e-Commerce Directive provides a legal basis for removing barriers to formality, such as the LCIA Rules for the use of ODR (Online Dispute Resolution) by European Union countries (<http://www.lcia-arbitration.com/lcia>).

Stipulation of rules regarding the procedure for online proceedings must be in accordance with the requirements of the mandatory legal rules that can be used in the place or position of arbitration, even though the place or position of the arbitration may be unreal. In addition, the procedures for online processes must not conflict with public interest (public policy).

Online Arbitration Decisions

a. Forms of arbitration awards

Article IV of the 1958 New York Convention and Article 31 of the UNCITRAL LAW Model on Commercial Arbitration require that an arbitral award must be in written form signed by the arbitrator and the parties. This means that online arbitration awards must be applicable in any country, but the legal persons of a third world country must be examined to ascertain whether the laws in that country can execute the decision online. If one of the laws exist in such a country, this law is chosen as the procedural law that applies to disputes. Based on Article 101, paragraph (1), letter (a) of the Electronic Signatures in the Global and National Commerce Act (ESGNCA), the United States has ended the debate among experts regarding electronic arbitration agreements. These require written forms, such as the objectives of the Uniform Commercial Code. This federal law also addresses the problems contained in the Federation Arbitration Act of 1925 concerning arbitration. The ESGNCA provides a general role regarding signatures, contracts and other copies relating to transactions that affect trade transactions between countries that are made electronically, are legal, have legal consequences and are binding.

In accordance with paragraph (2) of the ESGNCA, a contract relating to transactions that have electronic signatures or copies made in electronic forms must have legal consequences. In Article 101, letter (c) of the ESGNCA, in the case of transactions where the consumer wants to be recorded in writing, the consumer's approval is required to make an electronic copy (Manevy, 2006). Under Article 52 paragraph (1) of the British Arbitration Act of 1996, the parties are free to agree on the form of the award. However, if there is no agreement that states the decision must be made in written form signed by all arbitrators or depending on the contents of the decision of the arbitral tribunal. The same is true in French law, based on Article 1472 of the Nouveau Code de Civil Procedure. It is applicable to local and international arbitration, adding that a decision must be dated and contain the names of the arbitrators and other additional provisions, such as the place where the award was submitted.



The national and international provisions above can cause problems with online arbitration decisions because in electronic matters copying things becomes easier. It is not easy to identify the authenticity of a document, so it can be doubted whether an arbitration award is made on the internet and written in electronic form with an electronic signature (digital signature). There is uncertainty whether arbitrators will be able to prove the authenticity of a decision, as required by Article IV of the New York Convention, which aims to be recognised in the execution process. This problem can be solved by sending a printed version of the arbitral award to the arbitrator or by using a third party who can ensure that digital signatures do originate from arbitrators.

b. Impact of arbitration awards

1. Enforcement of online decisions

Enforcement of online decisions is a major issue that is very important because it is different from the nature of the win-win solution in negotiations and mediation. Only one party wins the arbitration process, so sometimes the losing party is often reluctant to execute the decision voluntarily.

2. Archive notes

Other legal issues include what must be done regarding digital archives of online arbitration. A decision needs to be submitted to a court and it is expected that online service providers keep a copy of the decision, signed manually by the arbitrator. However, this does not mean that the parties cannot be notified of the decision via electronic media.

3. Lack of publicity

There is a dilemma in determining whether the way to work online must be kept confidential, as in ordinary arbitrage, or if it must be published with the aim of developing an online arbitration legal system. Answering the dilemma makes it possible for providers to publish a decision in such a way that the published decision can be accessed by the world internet community in a form that has been previously changed.

Application of ODR in Indonesia

The existence of ODR in some countries, including Indonesia, is still relatively new, so legally the use of online dispute resolution mechanisms (ODR) has not been regulated and is clearly formulated in legislation. The following matters are not yet regulated in the Indonesian legal system:

a. Online arbitration agreements



Basically, online arbitration is an alternative dispute resolution in e-commerce, especially related to contract or agreement issues. Arbitration agreement clauses stated in an online agreement and e-mail exchange are not clearly regulated in Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, specifically in the provisions of Article 1, paragraph (1,2,3), Article 4, paragraph (1,2) and Article 9.

b. Indonesian legal recognition

Indonesian legal recognition of decisions issued by ODR, as well as concerning the implementation of ODR decisions themselves are not yet considered thoroughly. In conventional legal arrangements, each implementation of domestic and foreign arbitration decisions always requires registration at the District Court, especially for foreign registration being carried out at the Central Jakarta District Court. In this context a question arises: Can ODR decisions also be registered at the District Court? Indonesian law, especially Law No. 30 of 1999, has not provided strict regulation. Hence, from this point of view, ODR seems to be something that needs to be anticipated in Indonesian civil procedural law, which regulates the issue of dispute resolution. In reality, in Indonesia itself, there are no sites that try to develop this ODR. However, it must be remembered that the existence of sites from other countries that provide ODR services (such as www.adronline.com.au) are also involved. They have entered into the jurisdiction of Indonesia.

Conclusion

Internet technology has significantly changed human interactions in the area of trade relations. Likewise, in Indonesia, online trading sites have sprung up that provide services to sell products via the internet. The number of users of these internet facilities has opened up opportunities for disputes between internet service users, where disputes occur in online electronic communication traffic. The existence of such phenomenon raises new ideas about how to resolve disputes, namely through the internet media (Online Dispute Resolution). Furthermore, these ideas have been developed into online arbitration mechanisms that function to resolve disputes due to electronic acts in particular and other disputes in general. Legally, ODR (especially online arbitration) is not clearly regulated in Law No. 30 of 1999. This does not mean it cannot be applied in Indonesia. However, arbitrators and judges can use a method of legal discovery to overcome this. Several methods of legal discovery that can be used include interpretation and analogy methods to explain some of the provisions of the Articles contained in Law N0. 30 of 1999. With the existence of this ODR, going forward will open new alternatives for the people of Indonesia, especially justice seekers resolving disputes in the future.



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