

THE POSITION OF ONLINE DISPUTE RESOLUTION IN THE POSITIVE LAW OF INDONESIA

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Abstract

The development of technologies brings immense change to various aspects in the life of modern society. Including the field of law that always follows the development of society, where the dynamics of the development of society help to bring modern legal reform in this case everything always using technologies. The use of technologies also penetrates up to the alternative dispute resolution pattern which begins to develop well. One of the impacts of technologies in the field of law can be seen from the creation of Online Dispute Resolution (ODR) also called as Internet Dispute Resolution (iDR), or also Electronic Dispute Resolution (eDR), Electronic ADR (sADR) till Online ADR (oADR). Basically, ODR has long been adopted by the west countries, like ICANN and European Commission. Indonesia itself is new to know the online dispute resolution or bias is called an online dispute resolution alternative. Why so, it is because there is no legal regulations that truly regulates the Online Dispute Resolution. Indonesia only has a few rules that discuss about ADR only, not with the online ADR. However the electronic or e-commerce transaction sites have long been implemented an online dispute resolution system to address disputes between the buyers/client and the sellers/dealers. Similarly PANDI uses an online dispute resolution system to resolve domain name disputes. When Indonesia has implemented an ODR system in its settlement disputes, so it's certain that every dispute can be settled in concise, light cost and not waste a lot of time. We can imagine when the proof in court can be done at home through e-mail system, the execution of the court using video conference, as well as the court fees are awarded via transfer.

Key words: Online Dispute Resolution, Positive Law, Culture

A. Background

Information Technologies has grown in line with the development of human civilization. The IT development includes the IT infrastructure development, like hardware, software, storage and communication technologies.¹ In one side, the development of IPTEK world that very astonishing indeed has brought big advantages for the development of human civilization. The type of the work that previously required big physical abilities, now already can be replaced by automatic machine tool. Similarly, the invention of new formulations of computer capacity, as if already able to replace the human brain position in various fields of science and human activities. Brief said the current technological advances have really been recognized and felt to provide a lot of conveniences and comfort for human life.² On the other hand, human can't fool themselves in to the fact that technologies bring havoc and misery for modern people. Technological advancement, which was originally intended to simplify human task, when the task become more easy, then came the loneliness and new alienation, namely the dissolution of solidarity, togetherness, and hospitality.

Technological developments also affect the way of dispute resolution in general. Conventional dispute resolution is considered inadequate for the wishes of the international society. Face to face dispute settlement is considered a waste of time and costs a lot. The desire of the society to resolve the disputes practically manifested in an alternative known as Online Dispute Resolution. Until now ODR known in the world of e-commerce transaction to domain name disputes. The creation of ODR which born from the principle of prudence and the principle of trust, builds a sense of courage in international society which is indicated by the utilization of the existing information and technologies. E-commerce itself basically is a trading transaction contract between sellers/dealers and client/buyers with using internet from the ordering goods process, the transaction payment until the goods delivery are communicated through internet.³ E-commerce also can be defined as a business process with using electronic technologies that connecting companies, consumer and society in the form of electronic transaction and goods trading, services, and information electronically.⁴ E-commerce isn't just consists an

¹Laudon, K.C. dan Jane P. Laudon. (2004). *Management Information Systems*. 8th edition. New Jersey: Prentice- Hall, Inc. P. 174. Accessed in articles by Naniek Noviari. (2013). *Pengaruh Teknologi Informasi Terhadap Perkembangan Akuntansi*. Denpasar: Economics Faculty Udayana University. Hlm. 1.

²Sari Widuri. Bahan Ajar Teknologi Komunikasi: *Dampak Teknologi*. Jakarta: Mercuri Buana University. Pp. 2-3.

³Rina Aringintri Moksi. (2006). Thesis: *Perlindungan Konsumen Dalam Transaksi Jual Beli Secara E-Commerce*. Semarang: Diponegoro University. P. 3.

⁴Munir Fuady. (1999). *Hukum kontrak dari sudut pandang hukum bisnis*. Bandung: Citra Aditya Bakti. P. 407. Accessed in paper by Rizky Fadhilah and Partners. (2012). *Mengubah Proses Manajemen*. Malang: Brawijaya University. P. 2.

online-based electronic transaction.. E-commerce also has scope or segmentation that consists of *business to business* means the business communication system between the business actors or in other words transactions via electronic between companies (business actors) that have been done routinely and in capacity or volume of a large product, *business to consumer* which is an electronic business transaction that conducted by the dealer and customer to fulfill a certain need and at particular time, and then *consumer to consumer* means an electronic business transaction that conducted between consumer to fulfill a certain need and at particular time⁵. Based on the scope that mentioned before, e-commerce can be defined as one of the methods to fix the performance and mechanism of goods, services, information, and knowledge exchange with using technology based on network of digital tools.

Besides ODR in e-commerce transaction, ODR also commonly used to resolve brand disputes. The brand is not merchandise brand, but the brand is web address or domain name. The domain name is a unique name which representing an organization where that name will be used by the internet user to connect to the organization.⁶ The domain name that become identity of a server in internet world, must be registered legally according to the rules. The allocation of international domain name is within the authority of Internet Corporation for Assigned Names and Numbers (ICANN), a nonprofit institution that located in California, USA.⁷

At the same time in Indonesia itself, has formed PANDI as a nonprofit organization that specially has given authorities to manage domain name of Indonesia's Internet by The Minister of Communication and Information Republic of Indonesia. Indonesia itself is still not applied much of online dispute resolution or ODR. In the fact, online shop like *Lazada*, *Shopee* or *Tokopedia* till now using online dispute resolution in the dispute of goods returns or cost between consumer and dealers. The same situation with PANDI, PANDI who is given the authorities to manage the domain name of Indonesia's Internet has utilized online dispute resolution to the domain name disputes start from online registration system until online verification. So far, Indonesia still not officially applies the online dispute resolution. Indonesia

⁵Suwardi. (2015). *Hukum Dagang Suatu Pengantar*. Yogyakarta: Deepublish. Pp. 177-179.

⁶Wahyu Hidayat. (2000). *Kamus Teknologi Komputer: Komputer-Internet*. Surabaya: Sarana ilmu. P. 125. Accessed in journal by Jordan Sebastian Meliala and Partners. *Perlindungan Nama Domain Dari Tindakan Pendaftaran Nama Domain Dengan Itikad Buruk Berdasarkan Hukum Positif Indonesia dan Uniform Domain Name Dispute Resolution Policy*. Malang: Brawijaya University. P. 2.

⁷Mada Apriandi dan Meria Utama. (2008). *Perlindungan Hukum Terhadap Hak Atas Merek Berkaitan Dengan Top Level Domain Names Serta Akibat Hukumnya Bagi Hak Atas Kekayaan Intelektual Di Indonesia dan Internasional*. Palembang: Law Faculty Sriwijaya University. P. 5.

also still not officially releases the rule of law that related to ODR. Untill now in Indonesia only regulate the alternative dispute resolution like in the ITE act and Arbitration act and Alternative Dispute Resolution, but in the both of the acts are not explain about ADR which online or also called ODR.

Based on this background, then the writer intrested to write a science article about The Position of Online Dispute Resoulution in The Positive Law of Indonesia

B. Act Number 36 Of 1999 Concerning Telecommunication

The Telecommunication act is not regulate the alternative or ODR. The telecommunication act only explains about the investigation and criminal justice process that conducted based on Criminal Code (KUHP) and Criminal code Procedure (KUHAP). Article 42 section (2) explains that for the need of criminal justice process, the telecommunication service providers allowed to record the information that sent and received by the telecommunication service providers and allowed to give the information required to:

- a. A written request of the Attorney General and or Police Chief of the Indonesian Republic for a specific offense.
- b. An investigator request for a specific offence according to The applicable law.

Article 43 also explains that the hand out of the recording information by the telecommunication service providers to the user of telecommunication service provider for the intrests of the criminal justice process. Article 44 explains that except the Investigator of the State Police Officer of the Republic of Indonesia, also The Certain Civil Servant in the Officers within the department whose scope of duties and responsibilities in telecommunications. The Investigator authorities that have been explained then implemented according to the provisions of the Criminal Code Proedure (KUHAP). Article 45 and article 46 explained about administration sanction related to the offense of provisions which has regulated in this Act. Article 47 untill article 59 regulate the criminal provisions related to the offense of the provisions which has been regulated in Telecommunication act.

C. Act Number 32 of 2002 Concerning Broadcasting

The Broadcasting Act is not regulate altenrative dispute resolution or ODR. Article 53 section (1) Broadcasting Act explains that KPI Center/Central run its function, authorities, duties, and obligations to responsible to The President

and submit the report to The Parliament of Republic of Indonesia (DPR) and section (2) explains that KPI region in implements its function, authorities, duties and obligations responsible to Governor and submit the report to The Regional people's Representative Assembly in province level. Article 55 explains about administration sanction which the procedures arranged by KPI and Government. Article 56 explains that investigation to the crime which has been regulated in the Broadcasting Act conducted according to Criminal code Procedure (KUHAP). Article 57 until Article 59 explains about the criminal provisions to the crime which has been regulated in Broadcasting Act.

D. Act Number 30 of 1999 Concerning Arbitration and Alternative Dispute Resolution

Online Arbitration basically is not forbidden to do in solving the dispute between parties, this thing is in line with the provisions in Article 31 section (1) Arbitration and Alternative Dispute Resolution Act that explains "The parties in a strict and written agreement, free to determine the arbitration procedures that will be use to the investigation dispute as long as not contradictory with the provisions in this Act". The Article can be defined that the procedures process in arbitration is free regulated by the involved parties as long as has been established in an agreement expressly and in writing. Therefore the parties can choose the type of procedure in the arbitration process by theirselves, includes performing the arbitration process via online.

Furthermore, the provisions of Article 31 section (2) Arbitration and Alternative Dispute Resolution Act said that regulates, if the parties aren't choose to use the certain arbitration proceedings and the arbiters or arbitral tribunals that have been formed, then the arbitration proceedings will follow the provisions of Arbitration and Alternative Dispute Resolution act. From the Article can be defined that this thing is prevail if the involved parties is an Indonesian and the arbitration that been used is national arbitration. But if one of the parties is not an Indonesian and the arbitration that been used is foreign arbitration, then Arbitration and Alternative Dispute Resolution Act cannot be fully implemented. In the arbitration proceedings which regulated in Arbitration and Alternative Dispute Resolution Act said, it's not regulate about online arbitration. With this Article 4 section (3) Arbitration and Alternative Dispute Resolution Act that said "In agreed upon dispute resolution through arbitration occurs in the form of letter exchange, then the deleveries of telects, telegram, facsimile, e-mail or any other forms of communication media, obligated be accompanied with a record of reciepts by the parties".

E. Kitab Undang-Undang Hukum Pidana (KUHP)

In the Positive law of Indonesia criminal case cannot be resolved outside the court process, but in certain case the implementation is possible. In the practice

of criminal law enforcement in Indonesia, even if there isn't a formal legal foundation of criminal case that frequently resolved outside the court process through law enforcement apparatus discretion, peace mechanism, traditional institution/organization and etc. The increasingly applied existence of mediating penal as one of the alternative dispute resolution in the criminal law field through restitution in the criminal process showing that the differences between the criminal law and civil law are not too big and those differences become non-functional.⁸

The settlement in criminal case by the police basically is a part of the criminal justice system. The alternative settlements in the criminal justice process basically a part of the criminal justice system which in the end culminating in prevention crime effort, that is in form of repressive efforts.⁹ According to the dogmatic opinion or "positive control", the execution criminal justice system is centered and culminated in the court. The court seen as an institution that concretizes the law in the special occasions which faced in its decisions.

In the Criminal Code (KUHP), the settlements outside the court regulated in Article 82 Criminal Code (KUHP) which called with *Afkoop*, which states, that the authority to prosecute violations that are punishable by criminal fines alone is abolished, if it is voluntarily paid the maximum fine and expenses incurred if the prosecution has begun.

F. The Act Number 11 of 2008 Concerning Information and Electronic Transaction jo. The Act Number 19 of 2016 Concerning The Amendment of The Act Number 11 of 2008 Concerning Information and Electronic Transaction.

Article 41 section (1) ITE Act explains that "societies can have a role to increasing the technologies and information use through the execution of electronic system and electronic transaction" followed by section (2) which states "The role of the society as in section (1) can be implemented through the institutions which formed by the societies" and reinforced by section (3) which reads "The institutions as in section (2) can have consultation function and mediation. Based on Article 41 section (3) which is Indonesia very supporting the establishment of ODR as an Institution that has consultation function and mediation. ITE Act in the Article 40 section (2) mention that The Government of Indonesia protect the public interest from every kind of

⁸Barda Nawawi Arief. (2008). *Mediasi Penal Penyelesaian Perkara Diluar Pengadilan*. Semarang: Pustaka Magister. Pp. 4-5.

⁹Sudarto. (1981). *Kapita selekta ukum Pidana*. Bandung: Alumni. P. 118. Accessed in journal humanities research by Sudaryono and Partners. (2012) *Model Penyelesaian Secara Alternatif Dalam Peradilan Pidana*. Vol. 13 No. 1. Surakarta: Law Faculty Muhammadiyah Surakarta University. P. 65.

interruption as a result of misuses of electronic information and electronic transaction that disrupt public order, according to the provisions of the legislation

Besides Article 41 section (1)(2)(3), can we see in the Article 18 section (4) is a form of Indonesian support to the establishment of ODR which reads “The parties have authorities to set the court forum, arbitration or other institutions that authorized to handle the disputes that may appears from the international electronic transaction which they made” then followed by section (5) which reads if the parties are not choose the forum as in section (4), the establishment of court authority, arbitration or other dispute resolution institution which authorized to handle the dispute that may appear from the transaction, based on international civil law principles. It means in the section (5) it is clear that ODR can run its function as alternative dispute resolution institution which based on the international civil law.

The ODR function to be utilized by the society convinced by the Government of Indonesia through ITE Act Article 38 section (1) which reads “ Everyone can filed law suit to the parties whom performing electronic system and/or using information technology which causing state losses” The society which utilize ODR facility can be protected and then restricted by ITE Act if there are things that are not desirable which causing losses to the involved parties through ODR with Article 35 which mention that “Everyone intentionally and without a right or against the law do manipulation, changing, creation, disappearance ,destruction of information technology and/or electronic document with the aim that electronic information and or the electronic document considered as authentic data”.

It can be defined that the ITE Act article 35 protects the losses parties if there is a party which disputes through ODR, manipulating electronic information and/or electronic document to be considered as authentic and legal evidence. The confidentiality of the dispute and the electronic document which solved through ODR also protected with Article 32 section (2) that is “Everyone intentionally and without a right or against the law with every way allocating or transferring electronic information and/or electronic document to another person’s unauthorized electronic system. The ODR service provider will be protected by ITE Act with the Article 33 if there are parties that try to interrupting or stoping the function of ODR using technology information facility with the Article 33 which mention that “Everyone intentionally and without right or againts the law conducting every action that cause in disruption of electronic system and/or cause the electronic system is not working properly”.

G. The Possibility of the Form of ODR in Indonesia

The author's opinion, in Arbitration and Alternative Dispute Resolution Act, the gap for online arbitration can be seen from the provisions of Article 4 section (3) that is: "In agreed upon the dispute resolution through arbitration occurs in form of letter exchange, then the deliveries of telex, telegram, facsimile, e-mail or any other forms of communication media, obligated be accompanied with a record of receipts by the parties". Judging from the provisions, then the author's opinion is the selection of online arbitration can be occurs as long as there is an agreement between the parties. The editorial section of the Article above there is a word "e-mail" which enables the parties to use internet as a dispute resolution media either with conventional arbitration or any other way. Because e-mail or electronic mail and the recipient only can be conducted through internet media.

It can be admitted or not this ODR in Indonesian Law included in the Arbitration and Alternative Dispute Resolution Act and the implementation in Indonesia, can be observed from the conventional law arrangements which states that any implementation of domestic or foreign arbitral award always require registration in the District Court, and for the foreign arbitral award the registration conducted in Central Jakarta District Court. From this context the question is, is this ODR also can be registered in District Court. In Indonesian law, in this case Arbitration and Alternative Dispute Resolution Act still not give an explicit regulation. So if it observed from the jurist side it is reasonable if ODR is something that questionable in the civil code procedure legal system which regulates the dispute resolution issue. Although in the reality, in Indonesia still there is no a website/site that tries to develop online dispute resolution system, but we have to remember that the existence of another countries sites that providing ODR services (like www.adronline.com) also in the end and even now it is already entered the jurisdiction of Indonesia.¹⁰ This thing enable the users in Indonesia utilize this internet service to resolve their disputes.

The possibilities of ODR model that applied in Indonesia like refund dispute resolution, return of goods in an online shop. Moreover The ODR model which applied in general is online negotiation or mediation which applies the registration also the provision of evidence by e-mail between parties.

¹⁰Bambang Sutyoso. (2008). *Hukum Arbitrase dan Alternatif Penyelesaian Sengketa*. Yogyakarta: Gama Media. P. 222. Accessed in journal of legal renewal by Hutrin Kamil dan M. Ali Mansyur. (2014). *Hukum Online Dispute Resolution (ODR) Di Indonesia Berdasarkan Undang-Undang Nomor 30 Tahun 1999*. Vol. 1 No. 2. P. 118.

H. The Shift of Internet Culture and Searching for Information

The role of technology in influencing changes in human lifestyle is not a questionable issue. Humans will not be able to live without technology. So that the more modern a society become it also bad for them and shift the existing culture. According to Talcott Parson, modern society is illustrated with the following characteristic:¹¹

- a. Effective neutrality is to be neutral, even can lead to the attitude of not paying attention to others or the environment.
- b. Self-orientation, which is more priority self-interest.
- c. Universalism, which is to accept everything objectively
- d. Achievement, the people like to pursue achievement.
- e. Specificity, that is to be honest in expressing everything

In addition, the cultural shift of society can be seen in the rampant use of cell phones so that the habit of solving problems or meeting face to face with relatives began to disappear because it can be solved only through a mobile phone. Even now even teenage children who are still children even have been given cell phone facilities so they can get to know earlier what is facebook, email, twitter, and etc.¹² The use of information and technologies that are more sophisticated make a shift in Indonesia's culture. The cultural shift now happening is the dispute resolution which generally has been settled conventionally but today can be settled by using world internet.

Indonesian constitutional court so far has applied an online dispute settlement system which allows an expert to attend a court without being physically present through a video conference. Besides that, PANDI that concentrate domain name dispute settlement, has benefit those cases of disputes by using a domain name dispute settlement system whereas all the phases of trial do not meet the parties and panel directly. All the phases can be done through email with the amount of time approximately three months to have an efficient settlement both time and expense.

I. Conclusion

The use of ODR in Indonesia has been widely used in the settlement of electronic transaction disputes as well as domain name disputes. However the

¹¹Dwiningrum, S. I. A. (2012). Ilmu sosial & budaya dasar. Yogyakarta: UNY Press. Hlm. 51.

¹²Muhamad Ngafifi. (2014). *Kemajuan Teknologi Dan Pola Hidup Manusia Dalam Perspektif Social Budaya*. Jurnal Pembangunan Pendidikan Vol. 2 No. 1. Wonosobo. P. 41.

implementation of ODR until now only based solely on the principle of prudence and principle of trust. This is due to the absence of specific regulation that regulating ODR, so that's make international society concerned about the impacts of ODR usage. Therefore The Indonesian Government needs to establish a regulatory regulation to ensure public confidence in ODR usage.

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