

ONLINE ARBITRATION AS THE BUSINESS ALTERNATIVE DISPUTE SETTLEMENT IN INDONESIA

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Abstract: This article addresses the Legality of Online Arbitration as the alternative dispute settlement out of the court in Indonesia and the Regulation of Online Arbitration as the alternative dispute settlement out of the court in Indonesia. The legality of online arbitration can be seen from the online arbitration agreement that should meet 4 preconditions of a legitimate agreement based on Burgelijk/Civil Code Wetbook Considering the provision of Article 4 clause (3) of Law Number 30 of 1999, it can be said that the organization of online arbitration is possible when there is an agreement first between the parties to organize online arbitration. Therefore, the organization of online arbitration using information technology in resolving dispute is governed specifically concerning the legitimacy of an agreement in the Law Number 19 of 2016 about Information and Electronic Transaction. The Information and Electronic Transaction Law related to an electronic contract's legality contains the provision of Article 5 clause (3) of Information and Electronic Transaction Law stating that Electronic Information and/or Electronic Document is considered as legitimate when it uses Electronic system corresponding to the provision governed in this law.

Keywords: Online Arbitration, Alternative Dispute settlement, Business

A. INTRODUCTION

As time progresses, economic growth develops. In its development, economic growth, trading and industry system also develop rapidly. The development of trade and industry exerts positive effect on the one hand, because through the development of trade, economic system also develops. On the other hand, in the presence of trading some disputes between businesspersons likely occur. The dispute often occurring is generally related to the procedure of implementing clauses of agreement and or something caused by other factors not governed or not included into the agreement.

Individual businesspersons have different own way of solving dispute and the dispute is expected not to disrupt its business. There are two ways of resolving the business dispute. The first way is to resolve dispute through the court, or called litigation. The second one is to resolve dispute out of the court, or called non-litigation. Non-litigation method of resolving dispute can be divided

into Arbitration, Mediation, Conciliation, and Negotiation.

Both domestic and international trading disputes are originally resolved by general judicial institution (litigation), but for certain considerations, international trading dispute is resolved through non-judicial institution (non-litigation). Trading dispute settlement through general judicial institution is held by district court, while trading dispute settlement through non-litigation is held by arbitration institution (Soemali, 2010).

When businesspersons are faced with a dispute, they will, of course choose the simpler procedure with limited resolution time, to avoid the dispute settlement mechanism in the court taking longer time than that out of the court, and to save cost, and most importantly to resolve the dispute peacefully. The dispute settlement out of the court is guaranteed for its confidentiality, so that it is unnecessary to worry that what occurs during the

resolution process will be known by others or mass media (Nevey Varida Ariani, 2012).

The choice of arbitration as the means of resolving dispute by businesspersons is based on the fact that the Arbitration's verdict is final in nature and has a permanent legal power binding the parties. In implementing the arbitration verdict, there is a difference between national and international arbitration verdict implementations. The verdict of national arbitration should be submitted and registered to the registrar of District Court, while that of international arbitration verdict should be registered in Central Jakarta District Court by enclosing the authentic verdict and officially translated script in Indonesian (Gatot Soemartono, 2006).

The survey conducted by Indonesian Internet Network Organizing Association (APJII) reveals that more than a half of Indonesian people have been connected to internet today. The survey conducted in 2016 found that 132.7 millions Indonesian people have been connected to Internet. Meanwhile, total Indonesian populations are 256.2 millions people (Yoga Hastiadi Widiarto, 2016). From the data above, it can be seen that technology development has an implication to the increased number of internet users, due to the known easiness and advantage the people get from internet use. It also has an implication to the form of arbitration resolution online.

B. METHODOLOGY

This study was a normative law research using statute approach. The source and type of law material used consisted of primary law material including legislations, particularly related to Online Arbitration, such as Law Number 30 of 1999 about Arbitration and Law Number 11 of 2008 about Information and Electronic Transaction. It also consisted of secondary law material related to primary law material source such as books and journals relevant to Arbitration and Alternative Dispute settlement.

C. LITERATURE REVIEW

In particular, the culture that embraces the resolution of disputes has for many years centered on the long process

of litigation. Parties to the conflict feel safer to resort to advice, to representation and to the decision of a judge or a Magistrate to resolve their dispute (Dennis Otieno Oricho, 2010).

Alternative forms of dispute settlement (ADR), including agreement-based ADR (such as mediation and conciliation) and adjudicative ADR (such as arbitration), continue to proliferate and are increasingly institutionalized, leading to their characterization as 'appropriate' or 'proportionate' dispute settlement (Lorna McGregor, 2015).

This Overview of Alternative Dispute settlement (ADR) is intended to serve as a practical introduction to the various mechanisms for resolving disputes between parties. It is designed to inform deliberations among judges, justice ministry officials, and administrators who are considering the possibility of adding new dispute settlement options to the traditional adjudicative model operative in their government-based court systems. This Overview provides some guidance on how to design and implement an expanded ADR program in an existing court system (Markus Zimmer, 2011).

New technologies disrupt not only by changing how we do things but by changing how we think about what we are doing, about what needs to be done and what can be done. Alternative dispute settlement (ADR) was not simply a more efficient approach than what happened in court and, over time, it will be clear that Online Dispute settlement is not simply a more efficient process than ADR. ADR brought with it a new mindset, and so will Online Dispute settlement. ADR involved not only new tools and techniques but different assumptions, principles and values, and so will Online Dispute settlement. Today, the logic of the field of dispute settlement largely remains as it was in the last quarter of the twentieth century. That is inevitably going to change as access barriers are reduced, effectiveness is increased, machines become more intelligent, software becomes more powerful and some components and beliefs of the ADR field are challenged (Orna Rabinovich-Einy & Ethan Katsh, 2014).

D. ANALYSIS AND DISCUSSION

1. Legality of Online Arbitration as Alternative Dispute settlement out of the Court in Indonesia

Online arbitration can be a solution amid the slow development of legal resolution in dealing with the dynamics occurring within society, particularly amid the more rapidly developing technology. The procedure of organizing online arbitration is as follows (Paustinus Siburian, 2004):

- (a) The necessary regulation concerning the application for conducting arbitration and its implementation (it includes the regulation applied by arbitration council about the information provided by one party pertaining to the presence of dispute, in this consumer dispute meaning the provision of complain form online, and in B to B dispute the availability of online contains the request for arbitration including the regulation of providing arbitration agreement);
- (b) Providing the method of selecting arbitrator, accepting or declining the position;
- (c) Providing the arbitration procedures including providing procedural regulation such as the procedure of filing the case online, replying, proposing evidence, argumentation and possibilities of postponement;
- (d) Providing the procedure of using electronic message, such as organizing the procedure using electronic document, video conferencing, and audio conferencing only, including providing evidence in the form of witness and expert witness' information;
- (e) Providing online judgment and preconditions needed for a verdict to be accepted and implemented;
- (f) Providing a possible procedure to arrange the resistance or to appeal to the verdict;
- (g) Providing a means of storing data particularly in the resistance pertaining to one party due to the assumption that one party's rights have been infringed;

- (h) Providing a procedure enabling the process to run confidentially by providing encryption technology and electronic signature.

Online arbitration itself is similar to the conventional arbitration; the difference lies on the process of registering the case, arbitrator selection, judgment, document submission, arbiter discussion, and notification about the verdict all of which are conducted online in online arbitration. In many developed countries, online arbitration has been known since a long time ago and has usually settled dispute. The institutions offering ADR online are, among others: *e-Resolutions.com*, *Online Mediators*, *Virtual Magistrate*, *American Arbitration association* and etc. Online arbitration in Indonesia is something new and has not been governed specifically in certain regulation. The opportunity of realizing online arbitration is included into Article 4 clause (3) of Law Number 30 of 1999 reading:

"In the case of there is an agreement to settle dispute through arbitration, it occurs in the form of mail exchange; therefore telex, telegram facsimile, e-mail deliveries, or other communication media should be obligatorily accompanied with a receipt by the parties".

Considering the provision of Article 4 clause (3) of Law Number 30 of 1999, it can be said that the organization of online arbitration is possible when there is an agreement first between parties to organize arbitration online. In non-litigation dispute settlement using online arbitration, the provisions about agreement prevails as governed in Book III of Civil Code about Binding. Corresponding to the provision of Article 1313 of Book III of Civil Code, "An agreement is an action by which one or more people bind themselves to one or more people". As included in Article 1338 clause (1) of Book III of Civil Code reading "All agreement developed legally applies as the law for those developing it". Similarly, arbitration agreement made online, when it has been agreed by the disputing parties, it will automatically be the law for the parties developing and binding themselves to the agreement.

Regarding an arbitration agreement's legality, the implementation of agreement should refer to Article 1320 of Civil Code, stating that for an agreement to be legitimate, four conditions should be met:

1. Agreement among those binding themselves
2. Competency of developing an agreement
3. A certain thing
4. A rightful cause

Considering the provision of Article 1320 of Civil Code, an arbitration agreement should meet the precondition of agreement legality. It also is also true for online arbitration agreement in which the parties should met the four condition of agreement legality.

In agreement, there is a theory of desire. Theory of desire states that the factor determining an agreement is desire. Nevertheless, there is an inseparable relation between desire and statement. Therefore, a desire should be stated. However, when there is an incompatibility of desire to statement, an agreement will not be established (Herlien Budiono, 2010). Considering this theory, online arbitration can be done when there is a desire between two parties, as included into the clause of agreement that has been entered into by those parties.

However, because the form of online arbitration uses information technology, internet, there is a more specific regulation, exactly in the Law Number 11 of 2008 about Information and Electronic Transaction. In Information and Electronic Transaction Law, the term of agreement using information technology is electronic contract (Article 1 number 17). Electronic contract is the agreement entered into by the parties using electronic system. In Information and Electronic Transaction law related to an electronic contract's legality, there is a provision of Article 5 clause (3) of Information and Electronic Transaction Law stating that Electronic Information and/or Electronic Document is stated as legitimate when it uses Electronic System corresponding to the provision governed in this Law.

In addition to be based on Book III of Civic Code about Binding, the provision governing the legality of online arbitration is also based on Republic of Indonesia's Law Number 30 of 1999 about Arbitration and Alternative Dispute Settlement. It is because Republic of Indonesia's Law Number 30 of 1999 about Arbitration and Alternative Dispute Settlement, in addition to governing in more detailed the foundation of regulation about the dispute settlement through arbitration, and

basically online arbitration is the form of non-litigation dispute settlement; the difference lies only in its implementation procedure. For that reason, Republic of Indonesia's Law Number 30 of 1999 about Arbitration and Alternative Dispute Settlement is also a legal foundation in the term of online arbitration legality.

In online arbitration, it can be found that the dispute settlement process will surely use electronic media in its procedure of having case (*procedure beracara*). Regarding this, Article 4 clause (3) of Law Number 30 of 1999 has accommodated the procedure of having case online as long as the disputing parties have agreed it, and it has been equipped with the parties' receipt.

Considering the provision of Article 6 of Law Number 11 of 2008 about Information and Electronic Transaction reading: "In the case of there is a provision other than that governed in Article 5 clause (4) requiring that some information should be written or authentic, Electronic Information and/or Electronic Document is considered as legitimate as long as the information included into it is accessible, displayed, guaranteed for its intactness (completeness), and can be accountable for, thereby explaining a condition". Therefore, online arbitration agreement can be considered as legitimate as long as the information included into it is accessible, displayed, guaranteed for its completeness, and can be accountable for.

It is in line with the provision of Article 34 of Law Number 30 of 1999 stating that: (1) Dispute settlement through arbitration can be done using both national and international arbitration based on the agreement among the parties. (2) "Dispute settlement through arbitration institution as intended in clause (1) is conducted according to regulation and procedure of the institution selected, unless it is specified differently by the parties. Based on the provision of Article above, it can be said that dispute settlement with arbitration channel through arbitration institution will be determined by the corresponding arbitration institution, unless it is specified differently by the parties.

Therefore, it can be said that it enables the arbitration institution to apply arbitration online by determining the online arbitrating procedure on the parties' agreement.

Based on the provision of Article 1 clause (3) of Republic of Indonesia's Law Number 30 of 1999 about Arbitration and Alternative Dispute Settlement, arbitration agreement is the one constituting arbitration clause included into a written agreement into which the parties enter before the dispute occurs, or a distinctive arbitration agreement into which the parties enter after the dispute occurs. Considering the provision of Article aforementioned, arbitration agreement is made in written form.

Corresponding to the provision of Article 9 clause (1) of Law Number 30 of 1999 about Arbitration and Alternative Dispute Settlement reading, "In the case of the parties choose dispute settlement through arbitration after the dispute occurs, the agreement concerning this should be made in written form and signed by the parties". It means that although arbitration is conducted online, the agreement should be made in written form and signed by the parties. It is intended to prevent the misuse from occurring because all systems are electronic based.

The verdict in online arbitration should be made in written form, signed and authentic. It refers to Chapter VI of Law Number 30 of 1999 about the implementation of arbitration verdict, in which the chapter mentions that within as lately as 30 (thirty days) since the date when the verdict is pronounced, the original sheet or authentic copy of arbitration verdict should be submitted and registered by arbiter or those authorized to the Registrar of District Court (Article 59 clause (1)).

2. The Regulation of Online Arbitration as an Alternative Dispute Settlement in Indonesian Legal System

Considering the provision of Article 4 clause (3) of law Number 30 of 1999, it can be said that the organization of online arbitration is possible when there is an agreement first between the parties to organize online arbitration. To the agreement between the parties, clause of online dispute settlement is added.

The regulation related to online arbitration in Indonesia has actually been accommodated by Law Number 30 of 1999 about Arbitration and Alternative Dispute Settlement. It can be seen from the regulation in

Article 31 clause (1) of Law Number 30 of 1999, explaining that the parties in a firm written agreement can determine independently the arbitration procedure to be used in the dispute investigation as long as it is not in contradiction with the provision of this law. This provision explains that the parties determine the arbitration procedure independently; therefore online arbitration has an opportunity of being applied to the dispute settlement.

In online arbitration, it can be found that the parties in dispute settlement will meet face to face. The Law Number 30 of 1999 has accommodated it in Article 4 clause (3), explaining that in the case of there is an agreement to settle dispute through arbitration, it occurs in the form of mail exchange; therefore telex, telegram facsimile, e-mail deliveries, or other communication media should be obligatorily accompanied with a receipt by the parties. From such the provision, it can be seen that online arbitration has been accommodated in the Law Number 30 of 1999.

The problem is that there has been no executing regulation becoming the guidelines to the parties in using online arbitration as the dispute settlement method. The executing regulation is important to accommodate the effectiveness and efficiency of online arbitration process in Indonesia. In addition, it is also important to be the standard accommodating the element of justice in dispute settlement.

Regulation principle in online arbitration should meet the following justice elements:

- (a) Online arbitration process should be transparent;
- (b) Arbitration institution should be neutral and independent;
- (c) The procedure should be done quickly;
- (d) Online arbitration system should be more acceptable to society;
- (e) Procedure should be international in nature;
- (f) In transaction between employers and consumers, it is better to bind the employers, in which the agreement between employers should be more binding to the parties.

Corresponding to the provision of Article 6 of Republic of Indonesia's Law Number 11 of 2008 about Information and Electronic Transaction, online arbitration can be considered as legitimate as long as the information included into it is accessible, displayed, guaranteed for its completeness, and can be accountable for.

Considering the Provision of Article 18 clause (4) of Law Number 19 of 2016 stating that: "The parties are authorized to determine the forum of trial, arbitration, or other alternative dispute settlement institution authorized to deal with the dispute likely resulting from International Electronic Transaction they have made". Based on the provision of article, the parties are given freedom to choose the dispute settlement institution to cope with the dispute resulting from international electronic transaction. Thus, online arbitration is possible to do as an alternative dispute settlement pertaining to online activity.

E. CONCLUSION

The legality of online arbitration in Indonesia can be seen from the online arbitration agreement that should meet four (4) conditions of an agreement's legality based on Civil Code. Considering the provision of Article 4 clause (3) of Law Number 30 of 1999, it can be said that the organization of online arbitration is possible when there is an agreement first between the parties to organize online arbitration. To the agreement between the parties, clause of online dispute settlement is added. The organization of online arbitration using information technology in resolving dispute is governed specifically concerning the legitimacy of an agreement in the Law Number 19 of 2016 about Information and Electronic Transaction. The regulation related to online arbitration in Indonesia has actually been accommodated by Law Number 30 of 1999 about Arbitration and Alternative Dispute Settlement. The problem is that there has been no executing regulation becoming the guidelines to the parties in using online arbitration as the dispute settlement

method. The executing regulation is important to accommodate the effectiveness and efficiency of online arbitration process in Indonesia. In addition, it is also important to be the standard accommodating the element of justice in dispute settlement.

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