

The Prospect Of Online Dispute Resolution (ODR) And Business Dispute Resolution In The Legal System In Indonesia

Pan Lindawaty Suherman Sewu¹

¹ Maranatha Christian University, Bandung - Indonesia

E-mail: lindawaty.ss@law.maranatha.edu

Abstract- WHO decided COVID-19 as a global pandemic. Pandemic is a situation in which a disease is spread to a lot of people in a number of countries at the same time. The number of the spreading of the corona virus is significantly increasing and globally continuing. The potentiality of disputes of business activities in the period of COVID-19 is predicted by many people to be increasing. This is due to the decreasing business activities which in the end will lead to the decrease of economic growth. There are many parties that have been bound to business agreement finding it difficult to fulfill their obligations. Potential disputes will exist and dispute resolution can be done through adjudication, non-adjudication, litigation, non-litigation, and also alternative dispute resolutions such as negotiation, mediation, consolidation. However, the problem is how a dispute resolution in a business dispute which is done online can be done in accordance with the legal system in Indonesia, considering that at present online dispute resolution is a need which is suitable for the disruptive era and COVID-19 pandemic which requires all parties to take care of themselves according to health protocol. The method of research applied is normative law research, which is an academic research procedure to find the truth based on the scientific logic on the normative side. A normative research is a process to find the law, the legal principles, and the legal doctrines, in order to answer the legal issues being faced. The legal material analysis used in this research is an analytical descriptive method, which describes things related to problem parsing, elaboration, interpretation, as well as analysis so that it is expected to result in a conclusion based on legal materials that can be accounted for. Indonesia can develop this On line Dispute Resolution (ODR) in order to organize the governance of ODR in a good way and meet the society's needs to resolve disputes. Improvements are required in various legal principles and norms, readiness of legal institutions and law enforcement, and legal culture connected with ODR in Indonesia.

Keywords- Business Dispute Resolution; Legal System In Indonesia;; Online Dispute Resolution (ODR).

I. INTRODUCTION

World Health Organization (WHO) has currently set the Coronavirus Disease 2019 or COVID-19 as pandemic. Coronavirus Disease 2019 or COVID-19 is a disease that can cause respiratory

disorders and pneumonia. This disease is caused by an infection of Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2). WHO has stated that Covid-19 cannot disappear in a short period of time and it becomes a serious problem not only in Indonesia but also all over the world. A lot of efforts and research have been made in order to find a vaccine to overcome COVID-19.

The economic impact occurring because of COVID-19 is outstandingly great; as a result, business activities have to keep on revolving. The society is demanded to change their culture into the New Normal way of life, as stated by the Government's COVID-19 Spokesman, dr. Achmad Yurianto, in a conference press in BNPB Building, Jakarta, on Monday, 18 May 2020. The order of the new normal life does not mean to limit everyone's productivity; we all still have to be productive while paying attention to health protocol in preventing the spread of COVID-19, namely by physical distancing, wearing masks, washing hands regularly, and avoiding crowds of people. "This is what I say to be part of the new normal norm. We will enter the new normal era. This is the only way if we want to control COVID-19 well," he said. [1]

Business activities must take place although in pandemic conditions and a business agreement is an inseparable part of a business activity. In order to strengthen the business activity done by the parties, usually their activity is set forth in an agreement. This new era makes it possible for an agreement to be closed by signing the document in a face-to-face meeting at the same time, or circularly or online.

The potential disputes over business activities that take place during the COVID-19 pandemic are predicted by many parties to be increasing. This is due to the decreasing number of business activities

which in the end leads to the decrease of economic growth. This eventually results in many parties bound to business agreements finding it difficult to fulfill their obligations. This will potentially cause a business dispute.

Business disputes must definitely be resolved in a good way. Business dispute resolution can be done through a lot of ways, namely adjudication, non-adjudication, litigation, non-litigation, and also alternative dispute resolutions such as negotiations, mediation, consolidation. There is a problem of how to resolve business disputes in an effective and efficient way in the disruptive era and certainly by applying health protocol.

II. PROBLEMS

What becomes a problem is, how dispute resolution in business disputes, whether through adjudication, non-adjudication, litigation, non-litigation, or alternative dispute resolution such as negotiation, mediation, consolidation, can be done online and in accordance with the legal system in Indonesia, considering that at present online business dispute resolution is a requirement that is suitable for a disruptive era and COVID-19 pandemic, which obliges all parties to take care of themselves according to health protocol.

III. RESEARCH METHOD

The research method use is normative law research, which is an academic research procedure to find the truth based on the scientific logic on the normative side. A normative research is a process to find the law, the legal principles, and the legal doctrines, in order to answer the legal issues being faced. The normative law research is done to produce an argumentation, theory or new concept as prescription to solve the problem being faced¹. The step in doing the normative research is analyzing the rules of law, particularly Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, and other rules of law that are relevant with dispute resolution area. Then it is continued by collecting other secondary materials through library research, in which sources or written texts that can be research materials are studied. In order to answer the research problem, legal materials are collected by identifying and inventorying the rules of positive law, researching

references in the forms of books, journals and research reports, and other sources of legal materials that are relevant to the problems of online business dispute resolution. Afterwards, the legal materials are processed by structuring, describing, systematizing them. The legal material analysis used in this research is an analytical descriptive method, which describes things related to problem parsing, elaboration, interpretation, as well as analysis so that it is expected that it results in a conclusion based on legal materials that can be accounted for.

IV. DISCUSSION

A. Business Relationships and Business Disputes

There are more and more business activities both in quantities and complexity. Business cooperation is becoming more various, depending on what business field is being run. The variety of businesses will definitely produce new problems and challenges; thus, law must be ready to anticipate every development that might appear. Business is one of the pillars that support economic growth. The word “business” in English refers to business activities. In *Black’s Law Dictionary*, the term “business” is defined as: “*Business: Employment, occupation, profession, or commercial activity engaged in for gain or livelihood. Activity or enterprise for gain, benefit, advantage or livelihood;*” [2] Based on the meaning elaborated above, it is clear that business is a commerce activity which also includes broader aspects such as occupation, profession, income, livelihood, and advantage.

The various business cooperation develops because man always changes on day-to-day basis, and the changes in this disruptive era seem to be very fast. Rhenald Kasali in his book *Disruption* puts forward several characteristics of the civilization of the new world:

1. Technology changes man from the civilization of time series into real time. The statistics of time series civilization produces indicators which become measurement of the past since it uses historical data. Real time civilization produces current indicators so that it is more relevant to make a decision, thanks to the technology of big data analysis.

2. The economic mastery from Owning Economy changes into Sharing Economy. In the past if we want to have a business, we have to own it, while at present the resources can be used by sharing, donating, collaborating, networking.
3. The technology in the past, *On the Lane Economy* (waiting on the lane), has developed into *On Demand Economy* (ready when demanded). In the past we have to patiently wait for something, but now when consumers demand something, the product and service will approach them with the help of technology and big data algorithm.
4. Single Supply-Demand changes into Networking Supply-Demand. Previously we study single demand and supply, but today if we have demand and supply, both will involve thousands of parties.
5. Opponents that are faced change from clear opponents into invisible opponents. The opponents right now are not seen, directly appointing consumers, from competitors with no flags, no colors, no identities, and no legal business license.[3]

Based on the above explanation about the increase of the varieties of business activities and the changes in the disruptive era and supported by the rapid development of technology and information makes it possible for the society to get the information very fast, it is understood that one person can be connected with another person with no space and time boundaries.

Trade transactions can be done face to face or in cyberspace. Business transactions which are done by using the Internet change the business face into the contemporary pattern. Online business activities are known as electronic commerce (e-commerce). The electronic transactions in Indonesia are set in Law Number 11 of 2008 concerning Electronic Information and Transactions (EIT Law). Electronic transaction is a legal act that is committed by the use of computers, computer networks, and/or other electronic media. An electronic transaction certainly contains an electronic signature, which is a signature is a signature that contains electronic information that is attached to, associated or linked with other electronic information that is used for means of verification and authentication put by a signatory or signer, who is a legal subject associated or linked

with an electronic signature and put into an electronic contract, which is a contract made through an electronic system.

Furthermore, resolution of disputes using the electronic system is specifically accommodated in EIT Law. This is further arranged in Article 38 EIT Law: "Any Person may institute actions against parties that provide Electronic Systems and/or using Information Technology to his/her detriment". The society may bring personal as well as class action lawsuits against parties that provide electronic systems and/or using information technology to the society loss, in accordance with the rules. Disputes over electronic transactions can be resolved through arbitration or other alternative dispute resolution institutions in accordance with provisions of Rules.

Law Number 7 of 2014 concerning Trade is made and it also sets trades through an electronic system, which is trade using series of electronic equipment and procedures. If there is a dispute related to trade transactions using an electronic system, a person or business institution that has a dispute can resolve it in the court or through other dispute resolution mechanisms.

Besides, at the moment the world is concerned about COVID-19 pandemic that has not ended yet. COVID-19 virus started to spread in Indonesia in March 2020 and is still going on right now in August 2020. Up to now the COVID-19 pandemic in Indonesia still shows an increasing number of people that are contracted. This makes us face a situation where we have to make peace with it. We enter the new normal life, do our activities but we always have to pay attention to the health protocol by wearing masks, having physical distancing, and frequently washing our hands. Therefore, today all aspects of people's lives are having some changes, including business activities.

The condition of the very fast change and the fact that COVID-19 pandemic is still uncontrollable will disturb business activities that are set in agreements. Many parties that are bound in the agreement, both orally and in written, experience constraints in fulfilling their obligation according to the agreement. This will surely cause potential business disputes. In Cambridge dictionary, the word "dispute" refers to "an argument or disagreement, especially an official one between,

for example, workers and employers or two countries with a common border:[4]” Moreover, the dictionary meaning of the word “business” is “the activity of buying and selling goods and services.” Thus, a business dispute can be understood as something that causes an argument or disagreement in the activity of buying and selling goods and services.

B. Types of Business Dispute Resolution

Referring to the explanation about the face-to-face or online business relationships, in this part about resolving disputes, there will be a discussion about the possible business dispute resolution, both through face-to-face and online.

Law on Arbitration and Alternative Dispute Resolution (ADR) is the legal umbrella of the legal arrangement in arbitration and alternative dispute resolution. In line with the focus of this article, which is about online alternative dispute resolution, Article 1 number (10) Law concerning Arbitration and ADR states that: “Alternative Dispute Resolution (or “ADR”) shall mean a mechanism for the resolution of disputes or differences of opinion through procedures agreed upon by the parties, i.e. resolution outside the courts by consultation, negotiation, mediation, conciliation, or expert assessment.”

Consequently, it can be concluded that dispute resolution outside the court can be done through arbitration and the alternative dispute resolution can be done outside the court. The alternative dispute resolution meant by the Law of Arbitration and ADR is as follows:

1. Consultation;
2. Negotiation;
3. Mediation;
4. Conciliation;
5. Expert assessment.

Therefore, in practice, if business disputes occur, there are a number of mechanisms to resolve the disputes outside the court. Basically, the overall content of this law sets the mechanisms of dispute resolution through the arbitration mechanism and alternative dispute resolution.

If consultation, negotiation, mediation, conciliation, and expert assessment are based on good faith by overriding the resolution through litigation in the District Court (Article 6 paragraph (1) of the Law concerning Arbitration and ADR),

this gives the understanding that the result of the alternative dispute resolution basically gives legal certainty to the parties involved in it. However, in practice, if related to the legal system, particularly the elements of legal culture, the legal culture in Indonesia is not well built yet; there are still many parties that doubt the law enforcement and legal certainty of the mutual agreement of negotiation, mediation, conciliation, expert assessment, and even arbitration verdict.

Article 6 paragraph (2) of the Law concerning Arbitration and ADR at its core arranges that the mechanisms of dispute resolution should be done directly face to face between the parties (negotiation) in the maximum period of 14 (fourteen) days and the result is put in a written agreement.

Article 6 paragraph (3) of the Law concerning Arbitration and ADR states that in the event the dispute or difference of opinion cannot be resolved, as contemplated in paragraph (2), then by a written agreement of the parties, the dispute or difference of opinion between the parties may be resolved through the assistance of one or more expert advisors or a mediator. Hence, in this case the dispute resolution is assisted by the third party to become the mediator.

Furthermore, in Article 6 paragraph (4) of the Law concerning Arbitration and ADR at its core states that if the parties fail to reach an agreement as to the resolution of such dispute within fourteen (14) days with the assistance of one or more expert advisors or a mediator, or the mediator is not successful in reconciling the parties concerned, such parties may request an Arbitration or ADR Institution to appoint a mediator.

Thus, the mechanisms in Article 6 paragraph (2) and paragraph (3) of the Law concerning Arbitration and ADR are dispute resolution mechanisms without involving an arbitration or alternative dispute resolution institution, while in Article 6 paragraph (4) it is done by involving an arbitration or alternative dispute resolution institution.

Article 6 paragraphs (5) and (6) of the Law concerning Arbitration and ADR at its core arranges the appointment of the mediator by such arbitration or ADR institution and the period of time, as well as the obligation of undertaking the

confidentiality, and the written agreement that should be signed by all parties concerned.

Meanwhile, the core of Article 6 paragraphs (7) and (8) of the Law concerning Arbitration and ADR is as follows: “The written agreement for such resolution of the dispute or difference of opinion shall be final and binding on the parties concerned, shall be implemented in good faith, and shall be registered in the District Court within no more than thirty (30) days after it has been signed. The agreement for resolution of the dispute or difference of opinion shall be completely implemented within no more than thirty (30) days after its registration.” As a matter of fact, this already gives a strong foundation and legal certainty that dispute resolution can be implemented after its registration; nevertheless, because the legal culture in Indonesia still needs to be built, this thing still needs to be fought by all parties.

Furthermore, the core of Article 6 paragraph (9) of the Law concerning Arbitration and ADR is: If attempts to reach an amicable settlement, as contemplated in paragraphs (1) to (6), are unsuccessful, the parties, based on a written agreement, may submit the matter to resolution by an arbitration institution or ad-hoc arbitration.

Seeing what has been set in Article 6 of the Law concerning Arbitration and ADR, it is actually clear that the legislators have arranged various steps and mechanisms in such a way, starting from dispute resolution done by the parties, then asking for the third party’s assistance, and if this is not successful, it can be done through alternative dispute resolution or arbitration institution.

In fact, all this has given a strong legal basis and foundation to implement arbitration and alternative business dispute resolution which is good and true and has legal certainty. If connected with legal system, specifically legal structure, the Law concerning Arbitration and ADR lacks one thing as until now there is not any implementation rule that will arrange this further.

The arrangement of Arbitration and ADR owned by Indonesia opens the opportunity to set the pattern of arbitration and dispute resolution outside the court which is in line with the development of the era because of the accommodation of electronic transactions which is stipulated in the Law concerning EIT. The

appearance of electronic transactions potentially causes disputes, considering that the parties in the electronic transactions are not bound by country borders, so that there are legal differences that will be applied to the parties, especially if they do not have any choice of law in the international transaction made. If this happens, there are several alternative choices of law, in which international civil law principles are applied, which will be related to the authority issue to determine the court forum, arbitration as well as alternative dispute resolution institution that is authorized to handle disputes that might take place in the international electronic transactions.

At the moment online dispute resolution has no positive legal umbrella in Indonesia where the settings and direction of this thing should be under the coordination of Badan Arbitrase Nasional Indonesia (Indonesia National Arbitration Board) as the party having the authorization to implement the alternative dispute resolution in Indonesia[5].

There are a number of efforts to accommodate the needs of the society as done by the Indonesian judicial by accommodating electronic case administration (Supreme Court of the Republic of Indonesia Regulation Number 3 of 2018), and also electronic case administration and trials in the court (Supreme Court of the Republic of Indonesia Regulation Number 1 of 2019). During the ongoing pandemic the practice of electronic trials is already made possible, but still limited.

Ricardo Simanjuntak explains that dispute resolution in the ASEAN level is arranged in 3 (three) levels of process related to the mechanisms of dispute resolution between ASEAN members[6]. The known ways of resolving disputes, among others, are consultation, good offices, conciliation, mediation.

The many business relationships, business transactions, electronic commerce have become a strong foundation to set the mechanisms of arbitration and online alternative dispute resolution in Indonesia which are in line with the society’s needs in the modern era.

C. Aspects of Legal System in Indonesia

The meaning of the word “system” in Cambridge dictionary is “a set of connected things

or devices that operate together.[7]” System is a set of components or elements that compose something so that it becomes functional or the goal of the thing is accomplished. If something here is law, then system can be understood to be a set of components or elements that include the law itself. Law is a system, which means that law is an order, a whole unity which consists of parts or elements that are closely related to one another[8]. Lawrence M. Friedmann, for instance, mentions that there are three elements that are included in law, namely the substance, structure, and culture of the laws[9].

The legal system in Indonesia is currently a blend of religious law, customary law, and European state law, especially the Dutch law. This happens as a result of the application of Articles 131 and 163 *Indische Staatsregeling* (IS), which basically regulates classes of people and the application of different law based on the classes.

The attempt of building law in Indonesia is always done. Yet, the index of the Indonesian Rule of Law in the last five years (2013-2018) shows a decrease. According to the index, the dimension of Indonesian law building tends to be weak, related to the condition of the judicial system (criminal and civil), regulation enforcement, and the absence of corruption practices. The problems of the development of legal areas currently faced, among others, are the conditions of hyper regulation and regulations which are overlapping, inconsistent, multi interpreted, and disharmonious, which result in legal uncertainty[10].

In the aim of legal substance, National Medium Term Development Plan 2020-2024 notes that it is required to implement the new legal substance, through the changes of legal substance that do not fit the era any longer.

In relation to legal institutions, National Medium Term Development Plan optimizes the system, one of which is strengthening the IT-based institutions in dispute resolution[11].

1. Legal Substance

In discussing the legal substance, the reality of the social order of the pluralistic society is the Indonesian diversity that is based on the state’s basic philosophy, Pancasila. Therefore, legal substance is the result of the actualization of legal value and living law in the society, both in the meaning of written law and unwritten law. The thing that needs to be done in order to improve the

legal system related to the legal substance basically is reordering the legislation while still paying attention to local wisdom and customary law. A good law is essentially a law that can be implemented and does not need further regulations.[12].

If connected with legal arrangements in online dispute resolution, the arrangements of online dispute resolution are currently spread in a number of regulations, such as Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, Law Number 11 of 2008 concerning Electronic Information and Transaction, Law Number 7 of 2014 concerning Trade, Supreme Court of the Republic of Indonesia Regulation Number 3 of 2018 concerning Electronic Case Administration, Supreme Court of the Republic of Indonesia Regulation Number 1 of 2019 concerning Electronic Case Administration and Trials.

Another constraint faced in Indonesia is the absence of the implementing regulations so that it hinders the operationalization of the legislation. A number of laws are made in view of reform, but many cannot be implemented effectively. One of the main reason is the lack of implementing regulations that are instructed by the law despite the fact that not all laws require implementing regulations in the application.

In connection with dispute resolution, there are some values among the society (legal pluralism), namely the value of togetherness and the value of deliberations for consensus. It is expected that these values can be the base of the development of the national law in dispute resolution. Although it is online dispute resolution, it surely can accommodate these values of togetherness and deliberations for consensus. As a result, when we do the implementation, the formula maker must be able to formulate law in the form of policy that reflects the characteristics and character of Indonesia that is pluralistic, so that the legal unification with an Indonesian character becomes the legal principles that fit with the culture and character in which the law is applied.

If the law development is seriously paid attention to and it prioritizes the country as a nation of laws, then it is reasonable that law development in the legal principles of dispute resolution becomes a priority as well because this area will

definitely be of great assistance for the parties in doing business in Indonesia so that there is a legal certainty of face-to-face or online dispute resolution if a business dispute takes place. The legal arrangement in online business dispute resolution during the disruptive era is one thing that should be pursued immediately.

2. Legal Structure

The independence of legal institutions in Indonesia needs to be improved, especially the institutions of law enforcement that bring a big impact in the legal system. Besides independence, the accountability of the legal institutions must also be pursued. There is also the human resource factor in the legal fields, generally speaking, starting from higher education of law, law academicians, law researchers, legislation drafters, until the law enforcement that still need improvement so that they can meet the demand of the era. The judicial system is not entirely transparent in spite of improvement efforts; however, there is still little access for the society to do some supervision of the judicial implementation.

Legal structure needs some improvement so that the legal institutions and professionals have a good quality. Besides, there should be an open and transparent judicial system, simplification of judicial system, improvement of judicial transparency but not forgetting the local wisdom and the diversity of Indonesian culture.

The public must also take part in helping to get out of the legal decline, although according to Satjipto Rahardjo, the public's capability is certainly limited and cannot be expected too much because it is realized that the legal capability is limited[13].

In relation to online dispute resolution, this is the society's contribution and role to build a good order of legal structure. There is a discretion to build a system of dispute resolution based on the society's role, especially for the legal community's contribution in improving the law in Indonesia.

3. Legal Culture

The third component of the legal system is legal culture. Legal culture determines law enforcement. The law enforcement in a community is good if it is supported by good culture through public participation. The component of legal culture is an important one because many times, although the substance and structure components are not good,

the law enforcement can run well due to the good legal culture. On the other hand, no matter how good the substance and structure of a regulation, the result will not be good if the legal culture is not good. Eventually, the law enforcement will face problems in an unsupportive legal culture.

When connected with the system of dispute resolution, particularly dispute resolution outside the court, Indonesia experiences constraints because of the role of the legal culture factor. The legal culture of respecting the court verdict is not well built yet, let alone the legal culture of respecting the verdict of alternative dispute resolution. Dispute resolution done face to face still has some constraints in practice, let alone online dispute resolution. This is still influenced by Indonesian culture which prefers paying by cash and concrete things. Nevertheless, the society must realize the changes happening in the era. The present era prioritizes speed, connections boundless of space and time, and finally the uncontrolled COVID-19 demands a change of legal culture. The legal culture in business dispute resolution which is previously done traditionally through a face-to-face meeting changes into online dispute resolution.

D. CONCLUSION

Based on the above elaboration about the rapid changes in this era which change the order and life style of the society, from a traditional society into a modern one depending on the electronic system, as well as the emergence of COVID-19 pandemic which forces the society to live in a new normal life, various business activities appear and they are done both in a traditional and modern way. The increase of business activities, specifically those depending on an electronic system (online) causes potential disputes which must definitely be resolved. In Indonesia dispute resolution done outside the court has been arranged based on Law concerning Arbitration and ADR, namely through arbitration, consultation, negotiation, mediation, consolidation, and expert assessment. Yet, in accommodating the increasing electronic transaction and trade as well as the society's needs, and considering that the legal system in Indonesia which consists of legal substance, legal structure, and legal culture which need to be built continuously, in line with the Law Number 17 of 2007 concerning National Long Term

Development Plan 2005 – 2026 the point about the reform of Law and Bureaucracy states that: “legal development is directed to support the manifestation of continuing economic growth, setting the economic problems, especially business and industry and for creating investment certainty, especially law enforcement and protection”. Therefore, development in various sectors that is done must strengthen, be relevant, and integrated with the development in other fields. The economic development cannot be separated from law development because law always develops

according to the society’s needs, in line with the rapid development in science and technology. It is time that Indonesia should have the regulation concerning ODR so that the society’s needs can be well protected. Indonesia can develop ODR in order to have the ODR governance that fulfills the society’s needs to resolve disputes. Improvement in various legal principles and norms, the readiness of the institutions and law enforcement, and the legal culture related to ODR in Indonesia is required.

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