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(Indonesia’s Information Technology Law Perspective Study)

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WHAT MAY LEAD BEHIND ONLINE DISPUTE RESOLUTION RAPID STEP?

(An Indonesia Information Technology Law Perspective)

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ABSTRACT

An innovative way of human intelligence cooperates with the development of information technology, has changed the face of conventional trade into the practice of faceless trading or so called electronic commerce. The practicality that electronic commerce offers to human beings, also bring such an issue of practice in many countries related with the electronic commerce dispute settlement. Indonesia has showed its effort with the establishment of Law 30/1999 on Arbitration and Alternative Dispute Resolution and Law 11/2008 on Information and Electronic Transaction, though they lack of the model practice of dispute resolution that may coherence with the distinct character of electronic commerce itself, which is online dispute resolution itself.

This paper attempt to analyze: (1) article 18 Law 11/2008 regulates on parties choice of law and choice forum and the use of international private law principle in dispute settlement, that may incoherence with the nature of practicality in electronic commerce itself ;(2) the existence of online dispute settlement and its prospect in Indonesia’s legal system.

Result of this paper show that the existence of article 18 law 11/2008 on information and electronic transaction has made its effort in regulates dispute settlement methods in electronic commerce, through choice of law option, use of conventional alternative dispute resolution and principle of international private law. Yet this choice has not fulfilled the essential meaning of legal protection and legal certainty as aims to reach in the practice of electronic commerce. This paper also analyzes the presence of online dispute resolution as a development of alternative dispute resolution that divides into online negotiation, online mediation and online arbitration. As online dispute resolution offer new vista in the development of Indonesia alternative dispute settlement, the way Indonesia attempt to collaborate the practice of this online dispute resolution by applying cooperation between good legal sector consist of good legal regulation, well society and social control and adequate security system to enhance online dispute resolution practice and fulfill legal certainty toward parties.

1. Introduction

Latest happening in correlation between globalization and trade development is inseparable issue nowadays. What globalization offer has brought such a development in the face of trade. Rapid advances in science and technology has offer practicality and efficiency in the changing way of trade conduct, from face to
face trading into faceless trading, commonly known as electronic commerce and electronic contract¹.

Influence of society demand and fast paced development, has not make electronic commerce a newbie, to serve buyer and seller in goods and services transaction dealing one to another. By the conduct of electronic commerce, it serves buyer with space for a various selection of available products in any as quality and quantity, he/she desired. Yet for seller, the assistance of electronic commerce will be a meaningful action in gather customer comes from around the world and offer various products, without any limitation of state border area (borderless trade)².

Naturally, the practice of electronic commerce is just the same with the conventional trade apart from the use interconnected network/internet services as the main service to operates the process. Agreement between party and necessity to fulfill one’s obligation to another is needed and vice versa. Yet, it possible to happen when sometimes a breach of contract happen between parties and lead to the happening of dispute³.

What dispute means in this research is dispute term in private law apart from public law. Dispute as it is happen in private law has its usual relation with the practice of business transaction, therefore dispute settlement method both litigation and non-litigation method is worthy method to consider⁴. Dispute settlement practice aims to provide practicality, so that it will not bring disturbance for the future development of one’s business.

Yet, electronic commerce assistance in provide new way of business practicality still face its problem dealing with dispute settlement method, since the natural practice of electronic commerce in borderless area in conduct business, make it has difficulty dealing with validity of dispute settlement award since its place conduct happens in cyberspace area. Therefore, the conduct of electronic commerce dispute settlement has two main points that are: to settle dispute between parties and to

build parties confidence to interact in electronic contract issue. Yet, it is hope that the dispute settlement media offer the same efficiency and practicality as electronic commerce offer⁵.

Dealing with this issue, international law established regulations in regulate the practice and role of dispute settlement body, especially those who take part in the form of alternative dispute resolution as an option for dispute settlement legal enforcement, apart from the practice of litigation body like court that blamed in provide lack of efficiency of cost and practicality of time, as alternative dispute settlement has provide. Regulations that has provided are 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards or New York Convention, UNCITRAL Model Law on International Commercial Arbitration 1985 that has been amended in 2006 to provide recognition upon electronic data transaction upon the use of international commercial arbitration⁶.

Indonesia as a part of international society member, not also missed its role to participate in efforts to regulate the practice of electronic commerce dispute settlement, since the development of technology also removes barrier to the practice of trade itself. In regulating alternative dispute settlement, Law number 30 year 1999 on Arbitration and Alternative Dispute Resolution have been established to regulates the standard to conduct dispute settlement between parties. Follow in 2008, Law number 11 year 2008 on Information and Electronic Transaction established to regulates and removes barrier in conduct electronic contract, yet with its all part of role including provide option method for parties to settle dispute between them⁷.

Unfortunately, latest happening in Indonesia related with electronic commerce dispute has not show great effort from the regulation above to settle the dispute successfully, since many legal practice happen in Indonesia related with electronic commerce.

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⁷ Frans Hendra Winata, 2011, Hukum Penyelesaian Sengketa Arbitrase Nasional Indonesia & Internasiona, Sinar Grafika, Jakarta, hlm 45
commerce dispute only settle with the conventional criminal law yet supported with the lack of function in Indonesia’s present alternative dispute resolution regulation.

This paper attempt to analyze (1) the existence of article 18 Law number 11 year 2008 on Information and Electronic Transaction in guarantee legal protection to cope with electronic commerce dispute settlement; (2) the existence of online dispute resolution and its prospect in Indonesia’s legal system.

2. Results and Discussion

2.1. Legal Protection and its Application on Article 18 Law Number 11 Year 2008 on Information and Electronic Transaction

The existence of globalization and its development has bring such a vast development in many aspect in human life, yet it also transform the nature of human to communicate one to another in conduct trade, as it is assisted information technology in trade known as electronic commerce. Indonesia as a part of international society also realize to take part in supporting national sustainable development by providing sufficient support of infrastructure, yet in this research through the existence to regulates the practice of electronic commerce as a part of electronic transaction. The existence of electronic commerce has known as a new type of legal action, as such it convert the practice of face to face trading to faceless trading, yet this time of legal action still requires legal consequence, so that it will fulfill balance of rights and obligations toward parties and legal certainty to conduct such action.

The existence of free consent principle has been regard as one of the essential principle for the validity formation for contract, yet in the stipulation of this principle has been regard as basic rights of every party for the fulfillment of its right follow by the conduct of their obligation toward other. Along with free consent principle, in

8 Bambang Sutiyoso, 2006, Penyelesaian Sengketa Bisnis, Citra Media, Yogyakarta


analyzing the practice of legal certainty, we cannot apart from the essential value of rights that has regard as a part of human rights itself in line with freedom of humanity that has accepted and appreciate as a social value needed in endowshumanity reality. In analyzing the guarantee of rights fulfillment in the context of dispute resolution in electronic Commerce practice, it is no far from the essential meaning in rights of freedom as a part of basic rights in human rights.

Law has its role in regulates and guarantee legal protection along with state role as an institution that has full authority in execute legal protection for everyone especially in its territorial. In the context in this research, the role of national legislation and government active effort become the essential value to guarantee the consistence of legal protection in conduct electronic commerce.

The background in the establishment of Law number 11 year 2008 in Information and Electronic Transaction aims to facilitate information technology facility in its own responsible action, without set aside national unity principle and fulfill legal certainty and well society order. The existence of Law number 11 year 2008 in Information and Electronic Transaction aims to provide comprehensive use of legal regulation that regulates electronic information, electronic document, digital signature, electronic certificate, privacy, dispute settlement. Regulation of dispute settlement that become the main point in this research has been consider as an important issue, since it may possible that dispute may happen in the process of electronic commerce take place. Dispute settlement has been consider as government responsibility, as a part of state responsibility to provide legal protection and justice fulfillment toward parties in electronic commerce practice. The fulfillment of state responsibility endows in legal regulation established by government, as a part of legal rights provides by law specifically to legal subject, therefore its regulation must clearly expressed in

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law\textsuperscript{15}. What has become Law number 11 year 2008 in Information and Electronic Transaction effort is fulfill justice as a part of modern humanity demand. Legal thinking that explain about the correlation between law and justice value express in John Rawl opinion, in well society order that has essential role in fulfilling justice society. Equality and balance between constitution and law been cosider as the basis of individual rights and obligation in social interaction.

Justice value that has develop by John Rawl is well known as justice as fairness that demand on the procedure that able to well guarantee a distribution. Justice as fairness also means a vice versa benefit, meaning that what become benefit to one party should not bring loss to another\textsuperscript{16}. In its comprehensive understanding, John Rawls see justice principle as a cooperative guidelines as a result from consensus comes from equal and rational party\textsuperscript{17}. What become the aims of justice in the context of electronic commerce dispute settlement, regard justice not just facilitate by legal regulation, yet the nature of parties in electronic commerce has its own essential role, therefore a comutative justice has an coordinative between parties in the meaning of harmony and equality.

Law number 11 year 2008 on Information and Electronic Transaction established to regulates and removes barrier in conduct electronic contract, yet with its all part of role including provide option method for parties to settle dispute between them. What Law number 11 year 2008 on Information and Electronic Transaction regulates, aims to provide legal protection to the practice of electronic commerce and guarantee legal certainty to the related parties. The method of dispute settlement provides in article 18 as mentioned:

(1) electronic transaction that are stated in electronic contracts shall bind the parties

(2) parties shall have the power to choose applicable law to the entered electronic transaction

\textsuperscript{15} I Gede Arya B. Wiranata, dalam dalam Muladi (Editor), Op.cit., hlm. 229.
\textsuperscript{17} Endang Prasetyawati, Endang Prasetyawati, 2010, Konstruksi Hukum Pembiayaan Konsumen Yang Berkeadilan, Ringkasan Disertasi, Program Doktor Ilmu Hukum Pascasarjana Universitas Brawijaya.hlm. 88.
(3) If parties do not make choice of law in international electronic transaction, applicable law shall be under the principles of private international law

(4) Parties shall have power to determine court’s forum, arbitration or any other alternative dispute resolution that has jurisdiction over the related dispute

(5) If parties do not make choice of forum as intended by section (4), the jurisdiction of the court, arbitration or other alternative dispute resolution institution with jurisdiction to handle disputes, that may arise from such transaction shall be determined under the principles of the private international law

Based on above article, Law number 11 year 2008 on information and electronic transaction mentioned there are three option that may consider to settle electronic contract dispute that are: choice of law, use of current alternative dispute resolution, and use of international private law principle. Yet, the option to choose this three option as methods to consider to settle electronic contract dispute, cannot separate from the essential meaning of legal protection and legal certainty, since the practice of these three option must be able to fulfill the requirements to settle electronic contract dispute.

Fulfillment of legal protection that aims to legal certainty in its practice cannot separated from moral’s role, since it also underline good faith principle and pacta sunt servanda principle in commonly contract law system.  

What means by fulfillment of legal protection in this research is the application that offer by law to dispute settlement, and how all the methods offer makes possible apply sufficient legal protection and legal certainty for all related parties. Sufficient practice of legal protection shall provide both preventive protection and repressive protection. Preventive protection apply, in the application of legal regulation related with electronic commerce dispute settlement. Repressive protection apply, in the application of sufficient dispute settlement method to provide practical electronic contract dispute settlement.  

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18 Satjipto Rahardjo, Membedah Hukum Progresif, Kompas Media Nusantara, Maret, 2007, hlm 228
19 Philipus M. Hadjon, Perlindungan Hukum bagi Rakyat Indonesia, Bina Ilmu, (Surabaya: Bina Ilmu, 1987), hlm. 2
Three methods offer in article 18 Law number 11 year 2008, that are choice of law, use of conventional alternative dispute settlement and use of international private law principle, related with the existence and its effort to fulfill legal certainty can describe as following explanation.

The use of choice of law in a contract to provide parties to choose their own law applies among them to govern the essential law applies on the contract. Choice of law has been consider to determine appliance law and eliminates uncertainty for the sources of law in the contract\(^{20}\). However, in the event of electronic commerce transaction, the choice of law option is not a best choice to apply, since the nature of electronic commerce transaction make it impossible for choice of law option, especially for business to customer transaction. The existence of standard contract in many forms, that customer must fill and leave no spaces to deal with term and condition before purchase goods and services. Yet, type of term and agreement in electronic commerce contract, such as click wrap agreement, shrink wrap agreement and browse wrap agreement makes it own barrier to provide freedom of contract principle among parties and leave the traces of “take it or leave” the agreement, without giving any chance for choice of law option take place to settle dispute among parties\(^{21}\).

The use of conventional dispute resolution such as negotiation, mediation and arbitration are possible to use in dispute settlement. Though in its practice, nature of electronic commerce will bring some barriers especially related with jurisdiction issue and validity of electronic data recognition.

The use of international private law principle is also such an issue to consider, since the doctrine in proper law of contract is used. The doctrine in proper law of contract consider as applicable law to govern matters arising from contract. In the event of conventional private law matters\(^{22}\), the appliance use of common proper law of doctrine may be used, such as (1) lex loci solutionis principle that explain a place where contract conduct its result is the valid place to regard as its forum; (2) Lex loci


\(^{22}\) Chesire, G.C, North, P.M. Fawcett, J.J., Private International Law, 13\(^{th}\) Ed. Hlm 533
contractus principle that explain where contract made its first encounter agreement, is the valid place to regard as its forum\textsuperscript{23};

Based on above statement, it is show that three option as offer in article 18 Law number 11 year 2008 on information and electronic transaction has not bring their coherence in settle electronic commerce dispute, therefore a model of electronic commerce dispute settlement is needed, which is online dispute resolution to assist electronic commerce dispute settlement and help to provide legal certainty towards contract parties.

### 2.2. Online Dispute Resolution and Its Role in Indonesia’s Dispute Settlement Development

Online dispute resolution (ODR) is a branch of dispute resolution which uses technology to facilitate the resolution of disputes between parties. Online dispute resolution has essential role in support the development of electronic commerce, yet guarantee its legal certainty toward parties. In its practice, Online dispute resolution offer communication and time efficiency demand by parties, with its flexibility and assistency facility offer by online dispute resolution\textsuperscript{24}

It primarily involves negotiation, mediation or arbitration, or a combination of all three\textsuperscript{25}. These type of methods aims to bridging confidence toward parties in communicate and settle dispute that may happen one to another. In this respect it is often seen as being the online equivalent of alternative dispute resolution (ADR). However, Online dispute resolution in its form can classify into two types, that are (1) negotiation, divide into two type that are automated negotiation, where negotiation process designed to determine economic settlements for claims in which liability is not challenged. This type of automated negotiation divide into double blind bidding, for single monetary issues between two parties and visual blind bidding, for negotiations with any number of parties and issues. Second type of negotiation is assisted negotiation, that has a similar role as the mediator in a mediation. The role

\textsuperscript{23} Bayu Seto Hardjowahono, 2006, Dasar Dasar Hukum Perdata Internasional Buku kesatu, Citra Aditya Bakti, Bandung, hlm 285


\textsuperscript{25} UNCTAD, (2003), E-Commerce and Development Report 2003, p.177
of the technology may provide a certain process and/or to provide the parties with specific (evaluative) advice; (2) arbitration, is a type of dispute settlement where a neutral third party (arbitrator) delivers a decision which is final, and binding on both parties. In an arbitration procedure parties usually can choose the arbitrator and the basis on which the arbitrator makes the decision, and once the procedure is initiated parties cannot abandon it.

The practice of above online dispute resolution may bring a new vistas for Indonesia’s alternative dispute resolution development. Balance of social aspect, legal aspect and technology aspect consider to be essential factors in the practice of online dispute resolution in Indonesia. Social aspect related with the practice of online dispute resolution endows the awareness of parties in conduct electronic transaction, yet it also relates with the value of trust and transparency that must obtain by parties. Legal aspect may consider to be the more essential aspect in successing the practice of online dispute resolution, as it may face the scarcity of unclear regulation related with the practice of online dispute resolution. Good organization of legal aparature and build sufficient regulation dealing with the practice of electronic commerce will enhance the vast growth of methods dealing with dispute settlement. Since Law number 30 year 1999 on alternative dispute resolution and arbitration has been main regulation in Indonesia’s dispute settlement system, the practice of online dispute resolution will bring promising development in Indonesia’s dispute settlement system, yet related with its validity it did not violate Indonesia’s dispute resolution legal system. As it is support with UNCITRAL statement, regulates that data information though it has its form in data message did not mean that it lack of its legal validity. In further research, the use of extensive interpretation as one of judge rechtvinding, article 1320 Burgerlijk Wetboek that regulates on contract validity did not restrict the type of electronic document in agreement, includes also extensive meaning of data and information, related with the practice of alternative dispute resolution and arbitration make it a sensible sense for online dispute resolution to take part in developing and supporting Indonesia’s dispute settlement development. The importance of legal aspect enforcement cannot

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28 Article 1320 Burgerlijk Wetboek on the validity of contract describes 4 requirements to fulfill for a contract to be bound, that are: consent between parties, parties in conformity with legal requirement, causa halal and do not violate good order in society
apart from compensation mechanism, where the role of compensation mechanism is a complement in enhance the work of legal aparature and build legal regulation, as this compensation mechanism need to support by the work of Committee of Consumer Dispute Settlement along with the existence of security standard through trustmark procedure in electronic commerce transaction. The work of Indonesia Committee of Consumer Dispute Settlement can reach its optimal work within the support of regional organization such as ASEAN with the foundation of The ASEAN Coordinating Committee on Consumer Protection (ACCCP), The Southeast Asian Consumer Protection Agencies Network (SEA-CPAN) dan The Southeast Asian Consumer Council (SEA-CC). The work of Committee of Consumer Dispute Settlement, as it is regulates in article 19 Law number 8 year 1999 on Consumer Protection may include the control and regulation upon worker liability related to damage and consumer loss related to the practice of trade\textsuperscript{29}. In further action, existence of supportive instrument such as security standardization of electronic commerce practice. As this type of method use by Republic of Singapore with the work of Case Trust as authorized agent to issue trust mark, to provide legal protection toward electronic commerce consumer and as a mediator in a electronic commerce dispute\textsuperscript{30}

In CaseTrust certification, compliance Internet Code of Practice compliance used as the underlying judgment granting certification to businesses, with a high payoff of consumer confidence. Certification filing process is conduct by collecting supporting documents and payment of administrative expenses, including the completeness of the organizational structure and business activities of the applicant, and resulted in the four groups of applicants certified in four types which include: browsing, purchasing, sales and security. With the compliance standards specified, seller has the capacity as trusted retailer\textsuperscript{31}, within this trusted status in the practice of electronic commerce transaction, it aims to fulfill policy formation both in the nature of legal and institutional arrangements to introduce how the transaction security certification.

The appliance of technology aspect shall complete the practice of social aspect and legal aspect in conduct online dispute resolution, through the use of Hyper Text

\textsuperscript{29} Bc ketentuan Pasal 19 Undang Undang Nomor 8 Tahun 1999 tentang Perlindungan Konsumen
\textsuperscript{31} Assafa Endeshaw, op cit, hlm 287-288
Transfer Protocol and Secure Socket Layer as website security and apply encryption system by the role of digital signature. Hyper Text Transfer Protocol and Secure Socket Layer may use with digital signature through the encryption system and combination of public key hold by client and server and private key exclusively use by client. Yet the existence of digital signature in Indonesia legal system already has its recognition as a valid evidence as it is regulate in article 11 Law number 11 year 2008 on Information and Electronic Transaction.

The collaboration between social aspect, legal aspect and technology aspect means as the prospect of success enhancement of online dispute resolution practice in Indonesia, as a part of alternative dispute resolution method development. The practice of new method of alternative dispute resolution, open new vistas in social and legal development in Indonesia hopes to bring promising future in the practice of electronic commerce and its dispute settlement may provide legal protection and enhance parties confidence in conduct electronic commerce transaction.

3. Conclusion

Online dispute resolution as its form as new type of alternative dispute resolution has offer promising future in resolve electronic commerce transaction dispute. Indonesia has show its effort by it regulation in article 18 law number 11 year 2008 on Information and Electronic Transaction by providing three optional methods through parties choice of law, choice of forum and the appliance of international private law principle. Yet these three optional method has not been regard to provide sufficient legal protection toward parties, therefore the existence of online dispute resolution as a new way is needed. An equal combination between legal shelter in good legal regulation established by government, society understanding in practicizing electronic commerce transaction and information technology role to provide good security system are needed in enhance online dispute resolution that bring justice and legal certainty toward parties.

In further action, the existence of independent association to provide and bridging electronic commerce issue is needed, where the independent association has its role to provide trust mark to protect both parties in conduct electronic commerce transaction, and has it role to become a center for electronic commerce dispute settlement. A modification toward Law number 11 year 2008 on Information and Electronic Commerce also needed to regulates about the extensive meaning of
alternative dispute settlement methods and regulates the existence of online dispute resolution in the current law that applies.