

**LEGAL ASPECT OF ONLINE ARBITRATION IN EUROPEAN UNION
AND CHINA**

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Abstrak

Indonesia saat ini dikenal sebagai negara dengan pasar e-commerce terbesar di Asia Tenggara. Hal ini membuat suatu keharusan bagi Pemerintah Indonesia untuk menyediakan mekanisme penyelesaian sengketa yang efisien dan efektif untuk menyelesaikan sengketa yang timbul dari transaksi e-commerce. Arbitrase daring sebagai arbitrase yang dijalankan secara daring menggunakan internet dan teknologi dapat memberikan solusi atas sengketa yang timbul dari transaksi e-commerce. Oleh karena itu, artikel ini akan membahas aspek hukum arbitrase daring di Uni Eropa dan China sebagai negara-negara yang memiliki sistem arbitrase daring termaju dan pasar e-commerce terbesar. Penulis akan menggunakan metode normatif dengan perbandingan, pendekatan undang-undang dan akan berdasarkan peraturan-peraturan dari sumber primer dan sekunder. Artikel ini akan membandingkan 6 aspek arbitrase daring di Uni Eropa dan China, mengenai arbiter, peran pemerintah, ruang lingkup, prosedur, pelaksanaan dan faktor yang mempengaruhi pelaksanaan. Perbandingan ini dapat memberikan rekomendasi mengenai prospek arbitrase daring di Indonesia.

Kata Kunci: Arbitrase Daring, e-Commerce, Penyelesaian Sengketa

Abstract

Indonesia is highly regarded as a country with the biggest e-commerce market in South-East Asia. This creates urgency for the Indonesian Government to offer an efficient and effective dispute resolution mechanism to settle dispute arising from e-commerce transaction. Online arbitration as an arbitration conducted online through means of internet and technology may provide solution to the disputes arising from e-commerce transactions. Thus, this article sets out the legal aspect of online arbitration in European Union and China as countries with the most developed online arbitration and largest market of e-commerce. The author will use normative research through comparative, statue approach and will be based on the regulations from primary and secondary resources. This article compares six aspects of online arbitration in European Union and China, covering the arbiter, role of government, scope, procedure, enforcement, and factors affecting enforcement. The comparison may give further recommendation on the prospective of online arbitration in Indonesia.

Keywords: e-Commerce, Dispute Resolution, Online Arbitration

A. Introduction

In the era of globalization, it is indisputable that Indonesia has become one of the most attractive countries for investment in the world.¹ Indonesia has been recognized as the biggest e-commerce market in South East Asia (SEA).² This derives from Indonesia's contribution of 49% in the e-commerce market in SEA.³ Many businessmen and expert predicted that the growth of e-commerce in Indonesia will increase by 40% every year,⁴ and will reach US\$65 billion annually by 2021.⁵ Addressing e-commerce in Indonesia, it is important to know the definition of e-commerce. In general, e-commerce means buying and selling of consumer products over the internet.⁶

In Indonesia, the internet users keep increasing due to more affordable internet price and the enthusiasm of using an internet in daily basis.⁷ The development of internet and technology have designed new opportunities for the international business transaction through the use of online technology.⁸ This situation is a good start for Indonesia compared to US where the US Government has to support the financing through National Information Infrastructure by initiating a program called The High Performance Computing and Communications (HPCC). The program enabled internet to be accessible across the US.⁹ Whereas in Indonesia, the Government only gives a minimal contribution to the advancement

¹ Sakina Rakhma Diah Setiawan, "E-Commerce Apa yang Pimpin Indonesia?", *Kompas*, <https://money.kompas.com/read/2019/08/26/122218226/e-commerce-apa-yang-pimpin-pasar-indonesia>, 26 September 2019

² "Pertumbuhan E-Commerce Pesat di Indonesia", *Warta Ekonomi*, <https://www.wartaekonomi.co.id/read216302/pertumbuhan-e-commerce-pesat-di-indonesia.html>, 26 September 2019

³ *Ibid.*

⁴ Sakina Rakhma Diah Setiawan, *Loc. Cit*

⁵ "Indonesia's E-Commerce Sales Predicted to Reach US\$65b in 2022", *Jakarta Post*, <https://www.thejakartapost.com/news/2018/12/10/indonesias-e-commerce-sales-predicted-to-reach-us65b-in-2022.html>, 26 September 2019

⁶ Theerasak Thanasankit, *E-commerce and Cultural Values* (Hershey: Idea Group Publishing, 2003), p. 150

⁷ "Membuka dan Mengembangkan Potensi E-commerce di Indonesia," *Kementerian Sekretariat Negara*, <http://presidenri.go.id/berita-aktual/membuka-dan-mengembangkan-potensi-E-commerce-di-indonesia.html>, 26 September 2019

⁸ Andra Leigh Nienstiel, "Online Dispute Resolution: A Canada-United States Initiative," *Canada-United States Law Journal* 32, No. 1 (2006), p. 313

⁹ Donald A. B Lindberg, "HPCC and the National Information Infrastructure: An Overview" (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC225993/pdf/mlab00102-0045.pdf>), p. 30.

of internet.¹⁰ Media news reported that the growth of internet in Indonesia is supported by the infrastructure development carried out by the big or local internet services provider.¹¹ The fact that Indonesia is the fourth highest populated country in the world with 246,864,000 people makes a good prospect for the growth of e-commerce.¹² Furthermore, the growth of e-commerce is also stimulated from the variants of products provided.¹³ Many e-commerce companies provide efficient, compelling, and affordable products for the consumers. Despite the significant growth of e-commerce in Indonesia, it is indisputable that in every transaction there is a possibility of a dispute. The growth of e-commerce is also followed by the growth of potential dispute arising from e-commerce transactions. This also becomes one of the obstacles in the increasing of international online business transaction.¹⁴ Every occurring dispute should be solved efficiently in order to avoid any disruptions in the business industry.¹⁵ There are many ways to solve e-commerce or commerce disputes, for example, through alternative dispute resolution (ADR) or litigation. ADR is defined as legally-permitted process of dispute resolution other than litigation,¹⁶ or alternative to the court adjudication,¹⁷ which includes arbitration, mediation, conciliation, and negotiation.¹⁸ On the other hand, litigation means to carry on a legal contest by judicial process.¹⁹

For the purpose of this Article, the Author will focus on arbitration. Arbitration is defined as a dispute resolution mechanism by one or more arbiters appointed by the disputing

¹⁰ Asril Sitompul, *Hukum Internet: Pengenalan Mengenai Masalah Hukum di Cyberspace* (Bandung: PT Citra Aditya Bakti, 2001), p. 1

¹¹ Agustin Setyo Wardani, "Jumlah Pengguna Internet di Indonesia Sentuh Angka 171 Juta", <https://www.liputan6.com/tekno/read/3967287/jumlah-pengguna-internet-di-indonesia-sentuh-angka-171-juta>, 4 November 2019.

¹² "Indonesia Overview," *The World Bank*, <http://www.worldbank.org/en/country/indonesia/overview> 25 September 2019

¹³ "Perkembangan E-Commerce di Indonesia", <https://berinovasi.com/2017/12/11/perkembangan-e-commerce-di-indonesia/>, 4 November 2019.

¹⁴ Nenstiel, Andra Leigh. "Online Dispute Resolution: A Canada-United States Initiative." *Canada-United States Law Journal* 32, No. 1 (2006), p. 313; Yufei Yuan and Ofir Turel, "A Business Model for E-Negotiation in Electronic Commerce," *InterNeg Working Paper INR02/04*, January 2004, p. 2

¹⁵ Hutrin Kamil and M. Ali Mansyur, *Kajian Hukum Online Dispute Resolution di Indonesia berdasarkan Undang-Undang Nomor 30 Tahun 1999*, (Semarang: Universitas Islam Sultan Agung, 2014), p. 112

¹⁶ Stephen J. Ware, *Alternative Dispute Resolution* (West Academic Publishing, 2001), p. 2

¹⁷ Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution in A Nutshell* (St Paul: West, 2013), p. 2

¹⁸ Ashwinie Kumar Bansal, *Arbitration & ADR* (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2009), p. 2

¹⁹ "Litigate", Merriam-Webster, <https://www.merriam-webster.com/dictionary/litigate>, 26 September 2019.

parties and issue a final and binding award.²⁰ The distinction between arbitration and other types of ADR lies on its binding decision.²¹ Business actors prefer to solve their disputes through arbitration due to the following reasons:²²

1. arbitration process is private between the parties only, while in litigation it becomes a formal process which usually held in a court room;
2. in arbitration the process is quicker than in litigation because in litigation for instance in Indonesia, the Supreme Court states that each year the case registered in court keep increasing, however, there is a lack of number of judges in Indonesia. Thus, litigation process takes a longer time than arbitration; and
3. in arbitration, the parties may choose the arbiter based on their expertise, while in litigation, the judges are appointed by the court.

This results litigation becomes the least choice for business actors.²³ As e-commerce and internet growth rapidly, this leads to the growth of online dispute resolution (ODR) because the conventional mechanism, such as litigation, may be time-consuming, expensive, and raise jurisdictional issues.²⁴ Gabrielle Kaufmann-Kohler and Thomas Schultz provide a definition of ODR, “*ODR is usually defined either as a sui generis form of dispute resolution or as online alternative dispute resolution*”.²⁵ The sui generis means that it has its own class or kind.²⁶ The disputes settled through ODR are disputes arising from either online or offline

²⁰ R. Subekti, *Kumpulan Karangan Hukum Perikatan, Arbitrase, dan Peradilan*, (Bandung: Alumni, 1980), p.5.

²¹ Sri Retno Widyorini, “Penyelesaian Sengketa Dengan Cara Arbitrase”, *Hukum dan Dinamika Masyarakat* 4, No. 1 (2006), p. 60.; Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*. (London: Sweet and Maxwell, 2004), p. 1-3

²² Kementerian Koordinator Bidang Perekonomian Republik Indonesia, *Pedoman Investor Mekanisme Penyelesaian Sengketa Di Kawasan Hutan*, p. 6

²³ Rahmi Yuniarti, *Sengketa Dalam Penyelesaian Sengketa Waralaba* (Lampung: Universitas Lampung, 2016), p. 559

²⁴ Lucille M. Ponte, “Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions”, p. 12; Robert C. Bordone, “Electronic Online Dispute Resolution: A Systems Approach – Potential Problems and a Proposal”, *Harvard Negotiation Law Review* 3, (1998), p. 176

²⁵ Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (Netherlands: Kluwer Law International, 2004), p. 5

²⁶ Black’s Law Dictionary, 4 November 2019.

interactions.²⁷ At first, ODR aimed to become a network based equivalent of offline face-to-face dispute resolution processes, this includes negotiation, mediation and arbitration. The first trial of ODR was an experiments using human mediators who employed the network in lieu of meeting face-to-face but using the skill which they developed online.²⁸ Through ODR, parties are allowed to engage in some different alternative dispute resolution methods, such as (1) negotiation, (2) mediation, and (3) arbitration.²⁹ However, for the purpose of this article, the author will focus on online arbitration (OArb).

OArb means arbitration conducted through electronic means of communication, such as email, video conference, chat rooms, etc.³⁰ The common method used in OArb is video conference.³¹ The reason is because parties can be heard or seen easily, and testimonies of witnesses may be taken.³² Some people say that this method is more secure than other method.³³ The use of electronic communication plays a major role in OArb.³⁴ There are several advantages of OArb, this includes the fast paced, saving time and costs, easy access, delocalization, and its flexibility.³⁵ The most desirable advantage of OArb is the speed and cost effective, this makes parties prefer OArb rather than other mechanism.³⁶ The characteristics of OArb give a more effective mechanism in settling disputes, which may decrease some risks of online transaction, which eventually will encourage the cross-border businesses.³⁷

²⁷ Maria Mercedes Albornoz and Nuria Gonzalez Martin, "Feasibility Analysis of Online Dispute Resolution in Developing Countries," *The University of Miami Inter-American Law Review* 44, No. 1 (2012), p. 3

²⁸ O. Rabinovich-Einy and Ethan Katsh, *Technology and the Future of Dispute Systems Design*, (Harvard Negotiation Law Review, 2012), p. 151 & 171

²⁹ Andra Leigh Nenstiel, Op.cit., 2006, p. 314

³⁰ Ethan Katsh and Janet Rifkin, *Online Dispute Resolution Resolving Conflicts in Cyberspace*, (San Fransisco: Jossey Bass, 2001), p. 93

³¹ Julia Hornle, "Online Dispute Resolution – The Emperor's New Clothes", *International Review of Law, Computer, and Technology* 17, (2003), p. 31

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Gabrielle Kaufmann-Kohler and Thomas Schultz, Op.cit., 2004, p. 169

³⁷ Andra Leigh Nenstiel, Op.cit., 2006, p. 313

ODR has become one of the public concerns in the world. As the result, United Nations Commission on International Trade Law issued technical notes on ODR in 2017.³⁸ The technical notes are descriptive and non-binding, which aims to contribute to the development of ODR systems. The technical notes become a guideline for countries to settle disputes arising from sales using electronic communications without the need of physical presence or hearing. Some countries like European Union (EU) and China have realized the significance of an effective dispute resolution mechanism, and enacted regulations on this matter. EU has adopted a Directive and a Regulation on Online Dispute Resolution for Consumer Disputes. While China International Economic and Trade Arbitration Commission (CIETAC) as the biggest arbitration institution in China issued an OArb Rules, which then adopted by the China Council for the Promotion of International Trade or China Chamber of International Commerce.³⁹ Based on the explanation above, the author will discuss OArb system in EU and China. This is because to date, EU is recognized for providing the most developed system of ODR includes OArb,⁴⁰ and China is known as the world's largest number of internet users or 731 million users in 2016 with its e-commerce market as the world's largest e-commerce.⁴¹

In regard to Indonesia, OArb platform has not yet to be introduced. However, this new mechanism might offer a more efficient and effective way for business actors and consumers to settle their disputes in e-commerce. Thus, this article will examine the legal aspect of OArb in EU and China, covering the arbiter, roles of government, scope, procedure, enforcement, and factors affecting the compliance. This Article aims to i) contribute to the legal studies in Indonesia and ii) serves as a guideline in construing policies in dispute resolution, e-commerce and OArb. The Author will use normative research through

³⁸ United Nations Commission on International Trade Law, "Technical Notes on Online Dispute Resolution (2017)", UNCITRAL http://www.uncitral.org/uncitral/en/uncitral_texts/odr/2016Technical_notes.html, 26 September 2019

³⁹ Preamble, *China International Economic and Trade Arbitration Commission Online Arbitration Rules, 2009*

⁴⁰ Zheng Sophia Tang, *Electronic Consumer Contracts in the Conflict of Laws*, (Portland: Hart Publishing Ltd, 2015), p.125

⁴¹ Danielle Long, "China's ecommerce market to pas \$1.1tn in 2017", *The Drum*, <http://www.thedrum.com/news/2017/07/05/china-s-ecommerce-market-pass-11tn-2017>, 26 September 2019

comparative and statute approach. The Author will review the relevant regulations to know the differences and similarities of the OArb system in EU and China. This is to ensure that the author may provide a relevant recommendation on the possibility of OArb in Indonesia. The writing of this article will be based on the regulations from primary and secondary resources.

B. Discussion

Cross border transaction is slowing down due to the absence of effective methods in resolving disputes.⁴² This usually happens to small value claims which most consumers do not want to file their complaint to the court. The reason is because the cost to file and obtain the remedy from the court is greater than the amount claimed. As a result, most consumers often do not try to even complaint about their goods or services. This also becomes one of the reasons why consumers distrust e-commerce. Therefore, there exists a need for an effective and efficient dispute resolution mechanism. EU has provided European Online Dispute Resolution platform which has been operated by the European Commission (<https://ec.europa.eu>), while China provided CIETAC (China International Economic and Trade Arbitration Commission) Online Arbitration (<http://www.cietac.org>) and regulates the OArb based on CIETAC Rule on Online Arbitration. Whereas, EU regulates the OArb by enacting:

- (i) Regulation No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Regulation on Consumer ODR), this regulation aims to create a system and mechanism for an efficient and effective ODR (e.g., Database, Processing of Personal Data and Consumer Information); and
- (ii) Directive 2013/11/EU of The European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No. 206/2004 and Directive 2009/22/EC (Directive on Consumer ADR), this

⁴² Pablo Cortes, Op.cit., 2011, p. 1

directive regulates provisions which aim to promote “a high level” of a consumer protection (e.g., Role of Competent Authorities, Information and Cooperation and Procedures).

For the purpose of discussion, the author will focus on the comparison of 6 different aspects, being

1. the arbiter, on their appointment and competency;
2. roles of government, on its contribution to the implementation of OArb;
3. scope of OArb, on the types of disputes that may be solved through OArb;
4. procedure, on the i) process, ii) requirements and iii) timeline of the OArb;
5. enforcement, on the implementation of the award; and
6. factors affecting the compliance, on the factors which may affect the implementation of the award issued by the OArb.

B.1 Arbiter

In EU, the OArb is conducted by OArb Entities from the member states. OArb Entities mean any entity which is referred to and established to carry out the OArb.⁴³ All OArb Entities which are listed in the ODR platform have been checked to ensure that they meet certain standards and are registered with the national authorities.⁴⁴ Furthermore, the arbiters conducting OArb shall meet certain requirements, this includes their expertise, independence and impartiality.⁴⁵ The European Commission will check the compliance of this requirement and each member states will ensure the registration of arbiters in their national.⁴⁶

⁴³ Article 4 *Directive 2013/11/EU of the Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC.*

⁴⁴ European Commission, “Resolve Your Consumer Complaint”, European Commission, http://ec.europa.eu/consumers/solving_consumer_disputes/docs/adr-odr.factsheet_web.pdf, 26 September 2019.

⁴⁵ Article 6 *Directive 2013/11/EU of the Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC.*

⁴⁶ *Ibid.*

While, in China, the arbiters conducting the OArb are arbiters qualified and listed in the CIETAC.⁴⁷ Even if the parties are allowed to appoint arbiters outside the CIETAC, it still needs the approval of CIETAC.⁴⁸ This means that both EU and China regulate clearly about the arbiters who may conduct OArb. This is to ensure that the persons conducting OArb are eligible and capable, so as to achieve the advantage of OArb.

B.2 Role of Government

In order to ensure that each OArb Entities conducting OArb comply with the regulation, they must submit their report to the competent authority in every two years.⁴⁹ Competent authority means any public authority designed by member states established at national, regional or local level to function for the purpose of ODR Regulation and Directive.⁵⁰ This may be regarded as the supervision mechanism initiated by the Government of each member states and the European Union.

The Chinese Government does not directly express their role in OArb. However, they record the article of association (AoA) of CIETAC as the arbitration institution to the China Council for the Promotion of International Trade or China Chamber of International Commerce (CCPIT).⁵¹ CCPIT is a trade body of the Chinese Government aim to operate and promote foreign trade, to use foreign investment, to introduce advanced foreign technologies, to promote development of economic and trade.⁵² From this, it shows that EU directly controls the conduct of OArb to maintain that each OArb Entities conducting OArb are in accordance with the regulation. While Chinese Government may not expressly show their

⁴⁷ Article 25, *China International Economic and Trade Arbitration Commission Online Arbitration Rules, 2009*

⁴⁸ *Ibid.*

⁴⁹ Article 19(3) *Directive 2013/11/EU of the Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC*

⁵⁰ Article 4(1)(i) *Directive 2013/11/EU of the Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC*

⁵¹ Article 37 CIETAC, “Article of Association”, <http://www.cietac.org/index.php?m=Page&a=index&id=36&l=en>, 26 September 2019

⁵² CCPIT, “About US”, CCPIT, <http://www.ccpit.org.cn/contact.asp?action=about>, 26 September 2019

role or involvement in the OArb, but they at least still carry out the general corporate supervision by recording the AoA of CIETAC.

B.3 Scope

Generally, in EU, the OArb is applicable for disputes arising from online sales or service contract between consumer and trader in the territory of the Union. This means that EU only handles disputes arising from Business-to-Consumer (B2C) or Consumer-to-Business (C2B) transactions.⁵³ EU OArb is applicable for disputes arising from online sales or service contract between consumer and trader in the territory of the Union. However, the EU sets out nine exceptions where the OArb may not be applicable. The exceptions, among others, are regarding i) public providers of further or higher education, ii) health services, iii) disputes between traders, iv) direct negotiation between the consumer and the trader, or v) attempt made by a judge to settle dispute in the course of judicial proceeding.⁵⁴

While in China, the CIETAC covers several kinds of transactions, which includes B2C, Business-to-Business, Business-to-Government, Consumer-to-Consumer, Consumer-to-Government, Government-to-Business, Government-to-Consumer, B2C, and C2B.⁵⁵ This shows that OArb in EU has a narrower scope than OArb in China. The reasoning behind EU's narrower scope is because the OArb introduced by EU is initially aimed at facilitating the resolution of consumer disputes, domestic and cross-border, arising from e-commerce.⁵⁶ Notwithstanding this fact, if the OArb is successful in resolving the disputes, it absolutely will lead to other expansion of other sectors.⁵⁷

⁵³ Article 2 *Directive 2013/11/EU of the Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC*

⁵⁴ Article 2 *Ibid.*

⁵⁵ CIETAC, "Article of Association", CIETAC <http://www.cietac.org/index.php?m=Page&a=index&id=36&l=en>, 26 September 2019

⁵⁶ Net Neutrals EU, *Online Dispute Resolution: An International Business Approach to Solving Consumer Complaints* (Author House, 2015), p. 6

⁵⁷ *Ibid.*, p. 8

B.4 Procedure

Procedure plays an importance role in the proceeding of arbitration. This is because it will affect the way parties and arbiter conducting the arbitration proceedings. Besides, it may also affect the outcome of the arbitration. EU gives a more flexibility for parties to choose the OArb Entities where each entity has different procedure. The rationale behind this provision is because EU consists of as many as 28 member states.⁵⁸ Each member state has its own legal framework or national laws, besides they are also bound by international law.⁵⁹ Therefore, the Regulation and Directive stipulated by EU only serve as the umbrella in conducting the OArb.⁶⁰

In general, if a party intends to submit dispute through the OArb platform provided by EU, the party only needs to follow the four simple steps. First, filling in an online complaint form and submit it online to ODR platform at <http://ec.europa.eu/odr>. After clicking the link, it will lead to consumer or business page allowing the selection of language. The platform gives a friendly access to consumers in their respective languages.⁶¹ Second, sending the complaint to the relevant trader, who proposes an ADR entity to the consumer, which then be followed by transferring the complaint automatically to the entity after the trader and consumer agree on which OArb Entity is to handle their dispute. Lastly, the OArb entity will handle the case entirely online and reach into an outcome in 90 days. The ODR Regulation is only specifically applied to transactions conducted online. Thus, every trader is required to provide an electronic link to the ODR platform. Below is the example of OArb procedure carried out by OArb Entity in Italy, France and Portugal:⁶²

⁵⁸ European Union, “Countries”, European Union, https://europa.eu/european-union/about-eu/countries_en, 24 September 2019

⁵⁹ EUR-Lex, “National law”, Eur-Lex, <http://eur-lex.europa.eu/collection/n-law.html>, 20 September 2019

⁶⁰ Article 25 (2) *Directive 2013/11/EU of the Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC*

⁶¹ Article 5 *Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Regulation on Consumer ODR)*

⁶² European Commission, “Consumers”, European Commission, <https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.adr.printFullADRAAsPdf>, 27 September 2019

Table 1 Camera Arbitrale di Milano

<i>Camera Arbitrale di Milano</i>	
<i>Country</i>	<i>Italy</i>
<i>Contact Information</i>	http://www.risolvionline.com
<i>Type and Sector of Disputes</i>	<ul style="list-style-type: none"> - consumer goods - energy and water - general consumer services - leisure services - postal services and electronic communications - other (includes both goods and services)
<i>Procedure</i>	<i>The procedure is non-binding. The fees are varied, may be paid by trader or consumer. The procedure has an average length of 65 days. The process will be done in writing or orally and does not require the physical presence of the parties.</i>
<i>Grounds for Refusal</i>	<ul style="list-style-type: none"> - the consumer did not attempt to contact the trader first to try and resolve the dispute bilaterally - the dispute is frivolous or vexatious - dealing with the dispute will seriously affect the functioning of the dispute resolution body.

Table 2 Centre de Mediation et d'Arbitrage de Paris (CMAP)

<i>Centre de Mediation et d'Arbitrage de Paris (CMAP)</i>	
<i>Country</i>	<i>France</i>
<i>Contact Information</i>	http://www.mediateur-conso.cmap.fr
<i>Type and Sector of Disputes</i>	<ul style="list-style-type: none"> - consumer goods - financial services - leisure services
<i>Procedure</i>	<i>The procedure is non-binding and will be done in writing or orally. Some cases will require the physical presence of the parties and/or their representatives. This process has an average length of 90 days. No fees have to be paid by the consumer, all fees will be paid by the trader.</i>
<i>Grounds for Refusal</i>	<ul style="list-style-type: none"> - the consumer did not attempt to contact the trader first to try and resolve the dispute bilaterally - the dispute is frivolous or vexatious - the complaint is being or has previously been considered by another dispute resolution body or by a court - the consumer has not submitted the complaint to the dispute resolution body within the required

	<p><i>time limit</i></p> <ul style="list-style-type: none"> - <i>dealing with the dispute will seriously affect the functioning of the dispute resolution body.</i>
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Table 3 Centro de Arbitragem de Conflitos de Consumo da Regiao Autonoma da Madeira

<i>Centro de Arbitragem de Conflitos de Consumo da Regiao Autonoma da Madeira</i>	
<i>Country</i>	<i>Portugal</i>
<i>Contact Information</i>	<i>http://www.srrh.gov-madeira.pt</i>
<i>Type and Sector of Disputes</i>	<ul style="list-style-type: none"> - <i>consumer goods</i> - <i>education</i> - <i>energy and water</i> - <i>financial services</i> - <i>general consumer services</i> - <i>health</i> - <i>leisure services</i> - <i>postal services and electronic communications</i> - <i>transport services</i> - <i>other (includes both goods and services).</i>
<i>Procedure</i>	<i>There are no fees have to be paid by the consumer or trader. The average procedure has an average length of 45 days. The procedure is binding upon agreement by one or both parties. This procedure is done in writing or orally and in some cases require the physical presence of the parties or their representatives.</i>
<i>Grounds for Refusal</i>	<ul style="list-style-type: none"> - <i>the complaint is being or has previously been considered by another dispute resolution body or by a court</i> - <i>the value of the claim is below or above the required threshold.”</i>

In China, the CIETAC specifically regulate about the appointment of arbiter,⁶³ evidence,⁶⁴ or means of communication⁶⁵. If parties intend to submit a request for arbitration,

⁶³ Article 20, *China International Economic and Trade Arbitration Commission Online Arbitration Rules, 2009*

⁶⁴ Article 10, *Ibid.*

⁶⁵ *Ibid.*

there must be an arbitration agreement agreed by and between the parties.⁶⁶ While in EU, it is left to each OArb Entities to set their own procedures.⁶⁷ Further, the existence of ODR Contact Point in the EU also distinguishes EU from China. This ODR Contact Point functions as an assistance to party who has difficulty in submitting their complaint. The assistance includes to provide i) general information on consumer rights; ii) explanation on the procedural rules; or iii) relevant documentation.⁶⁸

B.5 Enforcement

There shall be a distinction between binding and non-binding nature of the award. The reason is because it will affect the enforcement process of the award. By definition, arbitration means “*a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedure affording the parties an opportunity to be heard*”.⁶⁹ From the definition, it is understood that arbitration issues a binding award. However, EU recognizes both binding and non-binding arbitration.⁷⁰ Naturally, the decision only has a binding effect if it was informed and the parties agreed to it.⁷¹ This might not be common for arbitration field in Indonesia because Law No. 30 Year 1999 on Arbitration and Alternative Dispute Settlement (Arbitration Law) only recognizes a final and binding award.⁷² The reason to why EU recognizes both binding and non-binding award is to ensure consumer protection. This might be seen from the preamble of the ODR

⁶⁶ Article 3, *Ibid.*

⁶⁷ Article 19 *Directive 2013/11/EU of the Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC*

⁶⁸ Article 7 *Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Regulation on Consumer ODR)*

⁶⁹ Gary Born, *International Commercial Arbitration* (Hague: Kluwe Law International, 2009), p. 217

⁷⁰ Article 9 (5), *Op. Cit.*

⁷¹ Clause 43 of the Preamble *Directive 2013/11/EU of the Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC*

⁷² Article 60 of Law No. 30 Year 1999 on Arbitration and Alternative Dispute Settlement.

Directive, which tries to achieve “*high level of consumer protection*”.⁷³ Most countries prohibit parties to enter into agreement in a contract before dispute arises, the agreement states that disputes will be solved through binding arbitration or mediation.⁷⁴ As a result, this prevents consumers from choosing the dispute resolution mechanism that they want.⁷⁵ Therefore, EU recognizes the non-binding arbitration to protect consumer from having unfair dispute resolution mechanism.⁷⁶ The ODR Directive keeps the non-binding effect of the outcome on consumers when the parties did not previously agreed on the nature of the proceeding.⁷⁷ If the parties have not agreed on the binding effect of the outcome, then the outcome will be non-binding.⁷⁸ In non-binding arbitration, the final award may only be a recommendation issued by the OArb, the parties have a freedom to decide if they want to follow the award or not.⁷⁹ Furthermore, if the parties agreed to a binding OArb then the award have a binding effect. It will be followed by voluntary compliance first. However, if the party fails to comply with the award, the other party can go before the judge for enforcement,⁸⁰ based on contractual dispute.⁸¹

However, the most efficient system of enforcement of an award is self-enforcement or voluntary enforcement.⁸² The reason is because it is considered to be the simplest and best way to enforce a decision from online dispute and is feasible with the means of technology.⁸³ Voluntary enforcement means indirect enforcement, which means the party will rely on the

⁷³ Preamble 1 *Directive 2013/11/EU of the Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Article 11 and Preamble 43 of ODR Directive.

⁷⁸ Karolina Mania, *Online Dispute Resolution: The Future of Justice* (Poland: International Comparative Jurisprudence, 2015), p. 84.

⁷⁹ UNCITRAL ODR Draft Procedural Rules, *supra* note 15 art. 7

⁸⁰ Maxime Hanriot, *Op.cit.*, 2016, p. 4

⁸¹ Tamuna Beridze, “New Consumer Protection Directive on Alternative Dispute Resolution and Regulation on Online Dispute Resolution Challenge or Effective Tool for Protecting Consumer Rights?”, *Central European Law Conference for Students, Strengthening the Rule of Law in the EU*, (2016), p. 176

⁸² Jasna Cosabic, “Law – A Challenge of Dispute Resolution”, *Research Institute for European and American Studies*, (2016), p. 3-4

⁸³ *Ibid.*

willingness of the losing party to comply with the decision.⁸⁴ However, since it is voluntary, there may still be a failure of the parties to comply with the decision.⁸⁵

The OArb in China issues a binding and final decision.⁸⁶ However, the CIETAC Rule does not give an elaboration on the enforcement mechanism of OArb. According to the Chinese Arbitration Law 1994 promulgated by the Chinese National People's Congress, an arbitral award is to be in the writing form signed by the arbitrators and sealed by the arbitration commission.⁸⁷ Furthermore, it shall be deemed effective on the date it is rendered. Concerning OArb, even if the award may be issued and served on the parties in electronic form, it shall be made in paper form when the party needs to apply to the court for enforcement.⁸⁸ After receiving the request for enforcement, the Court may have the option to refuse the enforcement.⁸⁹ The ground for refusal includes problem in the arbitration agreement, matters solved in the arbitration, or the law was incorrectly applied.⁹⁰ If the court feels the necessity to re-investigate the dispute, the court has the authority to do so.⁹¹ This served as the supervision that the arbitration complies with the applicable law. This award may be directly registered to the court as long as it complies with the requirement to register an award.⁹²

B.6 Factors Affecting Compliance

In EU, most of the OArb issue a non-binding award, however, most of the business actors are still complying with the decisions. The reason is because there exists several factors, which then affect their compliance, such as trustmark and rating.⁹³ In digital market, a trustmark is a logo displayed on the website of the trader which defines the credibility,

⁸⁴ Kaufmann-Kohler, Gabrielle and Thomas Schultz, Op.cit., 2004, p. 225

⁸⁵ *Ibid.*; Pablo Cortes, Op.cit., 2011, p. 204

⁸⁶ Appendix 1 *China International Economic and Trade Arbitration Commission Online Arbitration Rules, 2009*

⁸⁷ Hong Xue, "Online Dispute Resolution for E-commerce in China: Present Practices and Future Developments", *Hong Kong Law Journal* 34, no. 2 (2004), p. 389

⁸⁸ Hong Xue, Op.cit., 2004, p. 389

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*; Pablo Cortes, Op.cit., 2011, p. 204

commitment and guarantee of a trader.⁹⁴ This logo aims at giving assurance and confidence to consumers to conduct e-commerce transaction.⁹⁵ If a trader does not comply with the decision of the award, the disclosure of this information will absolutely put the company in a disadvantaged position. As it will impact the reputation of the company and they will get hard time in building the confidence and trust in consumers.

Furthermore, social media is something difficult to be controlled, and information is spread very quickly.⁹⁶ This will make a lead to a drop of trader rating.⁹⁷ Conducting e-commerce activities relies heavily on the trust in the consumers. The reason is because in cross border e-commerce transaction the difficulty lies on the trust between the purchaser and the trader.⁹⁸ To tackle this issue, trader will rely on the trust mark and ratings.⁹⁹ This is because digital market is more sensitive and depends on the acceptance of the public.¹⁰⁰ Therefore, this situation will put the traders into no choice but to comply with the decision of the award.

However, in China, the author has not found any research on the trademark or other factors, which may affect the compliance with the decision. Notwithstanding the absence of these factors, as discussed in Point B.5 above, OArb in China issues a binding award. Therefore, the absence of such factors does not prevent the Parties to register the award to the court to be enforced.

EU, however, provides research on the satisfaction of the ODR platform, and it shows that 45% of EU consumers think that it is easy to resolve the disputes through ADR and 70% of EU consumers are satisfied with how their complaint was handled by the ADR.¹⁰¹ The satisfaction of consumers shows that the OArb serves as a good and efficient mechanism to

⁹⁴ Kaufmann-Kohler, Gabrielle and Thomas Schultz, *Op.cit.*, 2004, p. 225

⁹⁵ Jasna Cosabic, *Op.cit.*, 2016, p. 3-4

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ European Commission. *Report on Cross-Border E-commerce in the EU* (Commission Staff Working Document SEC, 2009), p. 11

⁹⁹ Maxime Hanriot, *Op.cit.*, 2016, p. 15

¹⁰⁰ Jasna Cosabic, *Op.cit.*, 2016, p. 3-4

¹⁰¹ Vera Jourova, "Settling Consumer Disputes Online", European Commission, http://ec.europa.eu/consumers/solving_consumer_disputes/docs/adr-odr.factsheet_web.pdf, 23 September 2019

settle disputes between consumers and traders. The reason to why consumers were satisfied with the existence of the platform because this platform enables them to submit their complaint easily. Besides, the EU gives a clear regulation about this matter and the clear regulation gives assurance to the consumers. Also, the process of submitting complaint is simple, efficient, and accessible to everyone regardless their level of background, education, age, and nationalities to submit their complaint.

B.7 Comparison to Indonesia Arbitration Law

Indonesia has not recognized OArb and the Arbitration Law has not addressed this matter specifically. However, OArb might provide advantages to Indonesia's legal system. This may be seen from the consumers' satisfaction of the OArb platform provided by EU.¹⁰² Indonesia should consider the OArb system in EU, as EU has the most complete specification and regulation on this matter, which brought them the consumers' satisfaction. However, the EU regulations and directive only regulate about the ODR platform or website. These regulation and directive do not specifically regulate about the procedure and conduct of OArb. While in China, the rule on ODR is issued by an arbitration association with details in the procedure and conduct of arbitration.

On the enforcement of the award, China and Indonesia have a similar procedure, that i) the award is final and ii) needs to be registered to the competent courts. To implement the OArb in Indonesia, the Government should create an OArb website to provide parties a platform to submit their dispute and regulate about the detail procedure of this mechanism. In conducting the OArb, it may be left to arbitration institution like Badan Arbitrase Nasional Indonesia (BANI). Nonetheless, the Government must supervise the conduct of OArb. However, Indonesia may not be ready to introduce a non-binding award to the arbitration field and, therefore, to implement a voluntary enforcement. This is because it requires certain factor to be able to effectively implement that. To be able to successfully implement the non-binding award, there must be certain factors, which may directly and/or indirectly affect the

¹⁰² *Ibid.*

compliance of the parties. For instance, there must be a highly regarded Trustmark institution or procedure of blacklist, to affect the voluntarily compliance. Notwithstanding that, Indonesian Government may continue to adopt the current provision, that is for BANI to issue a binding award and to register the award to the competent court. This is to ensure the compliance of the award and provide consumers with legal certainty. It should be noted that Indonesia is the fastest growing market for internet in Asia. This shows the enthusiasm of people using the internet. Besides, Indonesia's e-commerce has growth rapidly and remains the bright spot for investment. With that in mind, the Government shall continue to develop the e-commerce system includes the dispute settlement mechanism.

C. Conclusion

OArb means an arbitration conducted through internet or technology, includes email, video conference, or chat room. The internet and technology become the main characteristic of ODR. Considering that e-commerce has growth rapidly and the fact that the growth is also followed by a dispute arising from the transaction (e.g., fraud, unclear website policy or data protection), having an efficient and effective dispute settlement mechanism is important. The advancement of OArb and the huge market of e-commerce lead the Author to choose EU and China to provide a comparison. The comparison covers the arbiters, the roles of government, scope, procedure, enforcement, and factors affecting compliance. Both countries regulate about the requirement of an arbiter to ensure that the arbiters meet certain requirements to conduct OArb. However, concerning the role of government, Chinese Government does not directly regulate about OArb, unlike EU which directly supervise the OArb through its competent authority. Furthermore, EU only covers disputes arising from B2C or C2B transactions, unlike China which covers several types of e-commerce disputes. EU recognized both binding and non-binding award, this distinguished EU from China which only recognize binding award. In EU, there are some factors which may affect the compliance of the decisions, this includes blacklist, trademark, and rating. These factors closely related to the company's reputation. It indirectly affects the enforcement of the

outcome. While, in China, the author has not found any research on trustmark or other factors which may affect the compliance or enforcement.

Indonesia indeed has a prevailing Arbitration Law, however, the Arbitration Law was issued in 1999. At that time, OArb has not been widely recognized, hence, the Arbitration Law has not addressed the issue of OArb. The Indonesian Government shall introduce OArb as it is proven to be an effective and efficient mechanism in settling disputes. The EU provides a good example on how the Government may offer an efficient dispute resolution mechanism and at the same time promoting consumer protection. Thus, the Indonesian Government may design a platform for parties submitting their complaints like EU or assign it to the private party like China. If the Government intends to assign the implementation OArb to the private party, like BANI, it is still necessary to carry out direct supervision by the Government. This is to ensure that the OArb is conducted in accordance with the regulations.

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