

THE PROBLEMS OF INTERNATIONAL CIVIL LAW OF INDONESIA IN PROTECTING TRANSNATIONAL E-COMMERCE CONSUMERS

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Abstract

Technological advances on a transnational scale have had a considerable impact on all levels of Indonesian society. One of the technological advances is the existence of gadgets. Not only positive effects, but they also bring negative impacts. Furthermore, the existence of gadgets continues to grow with more transactions being carried out. Unfortunately, this can be a dispute. The purpose of this research is to propose the problems of Indonesian International Civil Law which have not regulated and provided guarantees to protect transnational e-Commerce interests and their solutions. The method used in this research is normative with a statutory and conceptual approach. The results of this study are the existence of Consumer Protection Law (UUPK), Electronic Information and Transactions Law (ITE Law), Money Supply Law (UUUP), and International Civil Law (HPI) of Indonesia have not provided a clear guarantee of protection related to the choice of law in transnational scale e-commerce contracts. Besides, they also have not been able to accommodate the interests of consumers. One of the solutions offered is concretizing the principle of the recipient country. It is a rule that allows end-users to apply the Consumer Protection Law of their country. This principle is excluded from consumer transactions. This also does not apply .e-commerce contracts. This principle is taken from the Rome and Brussels Convention which is incorporated into the Directive, namely the Law for the EEC community (Europe Union). To provide legal guarantees for consumers, thus the interests's of consumers can be protected.

Keywords: Consumers; E-Commerce; Law

1. INTRODUCTION

We are currently in the era of industrial revolution 4.0 with main characteristics, including the use of information technology in various fields. One of the fields is electronic commerce (*e-commerce*). Based on statistical data, in 2015, the value of e-commerce transactions in Indonesia was the highest in ASEAN with a value of US\$ 1.7 billion in 2015. This value was jump 94 % to US\$ 12.2 billion in 2018 and predicted will grow to US\$ 53 billion in 2025. Meanwhile, Vietnam is projected to become the country with the second-largest e-commerce transaction in ASEAN in 2025.¹

The total population in Indonesia reaches 268.2 million which is the largest in Southeast Asia. Of this number, 56 percent are urbanites who live in urban areas. The

¹ Temasek, 2018, *Transaksi e-commerce asia tenggara diproyeksi mencapai Rp 1469 triliun pada 2025*, (Online) "https://Databoks.Katadata.Co.Id/Datapublish/2018/11/30/Transaksi-e-Commerce-Asia-Tenggara-Diproyeksi-Mencapai-Rp-1469-Triliun-Pada-2025," n.d. (13 Desember 2020).

penetration of internet users in Indonesia reaches 150 million people or about 56 percent of the total population. This number is the same as the number of active social media users who reach 150 million or 56 percent of the total population. Cellular phone users (*cell phones*) reach 355.5 million or 133 percent of the total population. It means that everyone uses more than one cell phone. Meanwhile, active social media users using cellphones reached 130 million or 48 percent of registered cellphones.²

The data as presented above indicates that the potential for the development of Indonesia's digital economy is linear with its population which is in the largest category in Southeast Asia. This can have a positive impact on the development of the Indonesian economy as a whole. The Indonesian E-commerce Association (idEA) in 2017 surveyed with results showing that online transactions through social media such as Facebook, Instagram reached 66 %. In the top position, Facebook takes up a market share of up to 43 %. Only 16 % of sellers and buyers use the marketplace platform. There are 7 % who choose to use their website. This survey shows the phenomenon that buyers and sellers use social media more as a place for e-commerce transactions compared to marketplace platforms that are widely available or through their websites. The Indonesian E-commerce Association (idEA) conducted on about 2,000 MSMEs in 10 cities in Indonesia.³

The presentation of the statistical data above is an indicator of the very rapid growth of e-commerce in Indonesia. However, preventive measures are needed to anticipate potential problems that arise behind the rapid growth of e-commerce. One of the problems is the emergence of disputes between consumers and business actors in these electronic transactions. At this time, e-commerce is not only penetrated in one country but also across countries due to easy access that can also be reached by all groups. However, the problem is how the dispute resolution provided by the current e-commerce is still not friendly to consumers. One of e-commerce is traveloka. This marketplace is engaged in transportation services. In terms and conditions regarding policies in the legal department, Traveloka uses the Singapore Arbitration International Center or hereinafter referred to as SIAC. Talking about the authority to determine the choice of law and forum that has been granted by the law above, the organizer of the electronic system (*e-commerce*) has been carried out as outlined in the terms and conditions or policies; such as Blibli which chooses Indonesian law and Indonesian court forums.⁴ lazada too,⁵ bukalapak⁶ BANI forum (Indonesian National Arbitration Board).

² Sunarto, "Fungsi Yurisprudensi Dalam Rangka Pembangunan Hukum Perikatan Nasional," (Surabaya, 2019). delivered to Seminar Pembentukan Undang-Undang Perikatan Nasional, 2-3.

³ Wyndo Mitra, "Data Statistik Mengenai Pertumbuhan Pangsa Pasar E-Commerce Di Indonesia Saat Ini, Start-up Bisnis, Datapublish, 04 januari 2019, diakses 20 Oktober 2020." <http://startupbisnis.com/data-statistik-mengenai-pertumbuhan-pangsa-pasar-e-commerce-di-indonesia-saat-ini/>, n.d.

⁴ Blibli, syarat dan ketentuan, accessed on 12 Februari 2021 <https://www.blibli.com/faq/tentang-blibli/syarat-ketentuan/>,

⁵ Lazada, syarat dan ketentuan, accessed on 12 Februari 2021 https://www.lazada.co.id/termsfuse/?spm=a2o4j.helpcenter.footer_top.9.2ea0755bxNDuF4.

⁶ Bukalapak, syarat dan ketentuan, accessed on 12 Februari 2021 <https://bukalapak.com/terms>,

Meanwhile, Traveloka chose Singapore law and the Singapore Mediation Center forum and if it is not finished, it will be resolved in the court of the Republic of Singapore.⁷

In essence, problem-solving is a path to examine a problem that is being faced. The cause of the problem should be analyzed so that the best solutions can be found in solving the problem.⁸ Concerning the principles of international law in the field of e-commerce, it generally allows a country to regulate activities that have substantial and substantial effects. Therefore, protection is needed for the country based on the laws in force in that country. International Civil Law of Indonesia which is one of the legal umbrella in resolving international disputes, has not provided a firm guarantee of protection related to the choice of law in e-commerce contracts on a transnational scale so that a legal gap appears. The above potentials occur when the choice of jurisdiction is not in accordance with the consumer's domicile. The choice of law is also not the same as the law of the consumer's domicile. The transaction value is Rp. 1,000,000. The choice of jurisdiction is the Jakarta District Court. The consumer's domicile is in Papua. The choice of jurisdiction and law is referenced from Singapore. The parties are domiciled in Indonesia. This indirectly prevents consumers from accessing it because accommodation towards the jurisdiction and law locus is more expensive than the value of the disputed transaction. So the adage "demands the loss of a goat, even a missing cow" is applies in this context. In this regard, there is still a void in norms related to the resolution of transnational e-commerce transaction disputes that are experienced by many people who act as consumers.

In terms of dispute resolution, most civil law countries adhere to the principle of the country of reception, namely rules that allow end-users to apply the Consumer Protection Law of their country. This principle is excluded from consumer transactions. It does not apply to e-commerce contracts between entrepreneurs. This principle is taken from the Rome Convention and the Brussels Convention which has become the law for the EEC community (*Europe Union*). To overcome the legal gap in the resolution of transnational e-commerce disputes, it is necessary to carry out legal reforms that adapt the implementation of the country of reception principle into Indonesian regulations so that the interests of consumers can be protected.

The focus of the discussion in this paper is to explain that until now when Indonesian have used the internet as a new style but existing regulations or norms have not been able to provide a sense of security or side with consumers who are shopping with Transnational e-commerce. The choice of forum is also legal on terms and conditions as if it only favors business actors and does not accommodate the interests of consumers. There is research that also discusses related to consumer dispute resolution, namely Sarman Sinaga Reconstruction of business dispute resolution in electronic transactions

⁷ Traveloka, syarat dan ketentuan, diakses pada tanggal 12 Februari 2021 <https://www.traveloka.com/termsandconditions>, (12 Februari 2021)

⁸ Muhammad Faiz Aziz and Muhamamd Arif Hidayah, "Perlunya Pengaturan Khusus Online Dispute Resolution (Odr) Di Indonesia Untuk Fasilitas Penyelesaian Sengketa E-Commerce," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 9, no. 2 (2020): 275.

(E-Commerce) based on a dissertation of the Faculty of Law of Islam Sultan Agung University, Semarang in 2019. His research was focused on resolving business disputes in electronic transactions (e-commerce) now does not reflect the value of justice. While this research is about building protection for e-commerce consumers by concretizing the Country of Reception Principle derived from the Rome Convention and the Brussels Convention to be applied to existing norms in Indonesia so that when a transnational dispute occurs, Indonesian consumers can resolve it at their domicile until they do not live cause lasting loss.

The research method used in this paper is a normative research type with a statutory and conceptual approach. The types and sources of data used in this study are primary legal sources, secondary and tertiary sources of law. Data collection techniques used are literature studies on laws, regulations, books, state documents, research reports, and scientific journals related to this research. The technique of analyzing legal materials is a grammatical, systematic, and authentic interpretation method.

2. DISCUSSION

2.1. International Civil Law Has Not Yet Protecting Transnational E-commerce Consumers

Disputes usually occur because of a default by one of the parties, both from business actors and consumers themselves, the default itself occurs because it is caused by several aspects, including:⁹ 1) There is one party who does not do what is promised to be done; 2) One of the parties implements what has been agreed but not as it should; 3) One of the parties does what has been agreed but not as it should; 4) One of the parties does something that according to the agreement cannot be done. Not only the problem of default which can be a problem in the use of E-Commerce. There is also the existence of *onrechtmatige daad* and article 1365 of the Civil Code. A violation of the law is any unlawful act that causes harm to another person. It obliges the person who because of his mistake to issue the loss, compensate for the loss.¹⁰

The process of resolving existing disputes between business actors and consumers at the E-Commerce level involves international or cross-country relations. Several marketplaces decide to use the Singapore Arbitration International Center or SIAC forum, such as Traveloka, which is engaged in E-Commerce transportation services, providing a standard clause in their policy that SIAC will be used in case resolution.

The selection of forums and laws contained in the standard e-commerce clauses only sided with one party, namely business actors. It did not take sides and prioritize the interests of consumers. This has resulted in many cases of consumer disputes which are transnational. It cannot be resolved because the costs incurred to resolve disputes which are far greater than the price of buying goods from the marketplace. Until there

⁹ Subekti, *Hukum Perjanjian*, 16th ed. (Jakarta: PT. Intermedia, 1996).45

¹⁰ "Kitab Undang-Undang Hukum Perdata (Burgerlijk Wetboek) Diterjemahkan Oleh R. Subekti Dan R. Tjitrosudibio, Kitab Undang-Undang Hukum Perdata" (1983).310.

is an assumption that if you buy a goat, you have to take out a cow. This paradox makes consumers reluctant to settle disputes. One example of the costs that must be incurred when resolving a dispute through the SIAC The Tribunal Fee and other costs related to the SIAC will be determined in accordance with the details applicable at the time the arbitration proceedings commence. The parties, in this case, must have agreed on an alternative in determining costs before the establishment of an arbitral tribunal. The Registrar will determine the number of fees to be paid by the parties. The details of costs at SIAC are as follows :¹¹

a. Application fee

Table 1. SIAC litigation fees

Amount sued (S\$)	Administrative costs (S\$)
Up to 50,000	3.800
50.001 up to 100,000	3.800 + 2,200 % above advantages 50,000
100,001 up to 500,00	4.900 + 1,200 % above advantages 100.000
500.001 up too 1.000.000	9.700 + 1,000 % above advantages 500.000
1.000.001 up to 2.000.000	14.700 + 0,650 % above advantages 1.000.000
2.000.001 up to 5.000.000	21.200 + 0,320 % above advantages 2.000.000
5.000.001 up to 10.000.000	30.800 + 0,160 % above advantages 5.000.000
10.000.001 up to 50.000.000	38.800 + 0,095 % above advantages 10.000.000v
50.000.001 up to 80.000.000	76.800 + 0,040 % above advantages 50.000.000
80.000.001 up to 100.000.000	88.800 + 0,031 % above advantages 80.000.000
Above 100.000.000	95.000

Source: Singapore International Arbitration Rules

this submission is the fee charged for each application or counterclaim;

- Singapore side: S\$ 2,140
- Foreign Party: S\$ 2,000

b. Administrative costs

This fee is calculated based on all arbitrations held at SIAC and also the maximum amount paid to SIAC. This fee is used for the use of facilities such as the cost of court equipment and others.

¹¹ Birkan Kahraman, "Peraturan Arbitrase Singapore International Arbitration Centre Peraturan Siac (Edisi Ke-6, 1 Agustus 2016)," 147.

Concerning the principles of international law in the field of e-commerce, it generally allows a country to regulate activities that have substantial and substantial effects. Therefore, protection from the state is needed to the principle of law choice used. Law No. 8 of 1999 concerning Consumer Protection, Law No. 11 of 2008 concerning Information and Electronic Transactions, Law No. 7 of 2014 concerning Trade, as well as Indonesian HPI have not provided a firm guarantee of protection related to the choice of law in e-contracts. -commerce on a transnational scale so that a legal gap appears. Regulations or International Civil Law which have not dominantly defended the interests of consumers, which are transnational, make consumers continue to suffer losses because they cannot defend their rights. Because of this, the government must start paying attention to this and provide policies that can help consumers get their rights.

2.2. Solutions in Protecting Transnational E-commerce Consumers

Looking from the point of view of current economic growth, which is followed by tremendous technological advances, to be able to open up international markets that can increase job opportunities for the community as well as increase a country's foreign exchange, now the online market is the dream of all people, both young and old, shopping behavior through online media. This market started from 2011 until now it is growing rapidly. The online market place or hereinafter referred to as E-commerce is favored by the community because the system used is easier, more practical, modern, and can be done anytime and anywhere.¹²

The types of market places that exist in Indonesia can be classified into several parts, including vertical market places, horizontal market places, and global market places, as for the explanation of each type as follows:¹³ 1) A vertical marketplace is a marketplace with a classification in which it sells products consisting of various sources but only one type of product they market, as is the case when a marketplace sells cellphone products, only cellphones will be offered in the marketplace, even though they come from various sources; 2) Horizontal market place is a type of market place that sells various products but the products are interrelated with each other, just as one market place sells cellphones but in it, there are also various accessories and spare parts of cellphones offered in the market place; 3) Global market place is a type of market place which sells various products even between goods that do not have any relationship with one another, in Indonesia alone this market place has been widely circulated, such as Shoppe, Lazada, Tokopedia, Olx, Bukalapak and others.

The activities of this marketplace help people from all fields, both marketing, sales, and distribution, information is also easier to reach consumers, plus people's enthusiasm for shopping online, especially with conditions like this where all community movements are limited due to Covid-19 which has not yet disappeared from the surface of the world,

¹² Putu Artaya and Tubagus Purworusmiardi, "Efektifitas Marketplace Dalam Meningkatkan Konsentrasi," no. April (2019). 3.

https://www.researchgate.net/publication/332523654_Efektifitas_Marketplace_Dalam_Meningkatkan_Konsentrasi_Pemasaran_Dan_Penjualan_Produk_Bagi_Ukm_Di_Jawa_Timur.

¹³ Artaya and Purworusmiardi. *ibid*, .5.

in this case, it is increasingly opening up opportunities for small traders to market their wares through the existing market place. This situation is predicted to increase because the development of technology supports the development of online trade flows in meeting the needs of the wider community.

In Indonesia, in resolving a dispute, you can choose to use litigation or non-litigation, as for the non-litigation route in Indonesia, there are several ways including negotiation, mediation, conciliation, and arbitration. In terms of the use of E-commerce, the perpetrators, both producers, and consumers prefer Arbitration, this can be proven by several e-commerce platforms in Indonesia using arbitration as a solution to the problem the exact reason why they choose Arbitration is that it is more flexible for the parties, this is because in the procedural law there are no standard regulations regarding electronic data, but with electronic data, Arbitration can be used as strong evidence.¹⁴ This relates to the fulfillment of consumer rights contained in Article 4 letter e of Law No. 8 of 1999 concerning Consumer Protection which reads: “The right to obtain protection advocacy and efforts to resolve consumer protection disputes properly”.

There are several factors behind the effectiveness of regulation including the legal factor itself; Law enforcement factors; Factors of facilities and infrastructure; community factors; and cultural factors.

The five factors are interrelated with each other, when these five factors can be fulfilled then a regulation can be said to be effective and able to protect the interests of all levels of society. The choice of forum and the choice of law applied to the standard clauses of some e-commerce are in the country of origin of the e-commerce, for reasons of freedom of contract. Indeed, about the freedom of contract, the parties are free to agree, that is, they are free to determine the content and extent of the agreement, their rights and obligations in the contract, and the form of the contract they want. Likewise in international contracts, the parties have the freedom to determine the law that applies to the contracts they make. According to Clive M. Schmitthoff, the autonomy (freedom) of the parties is the basis for the formation of international trade law 15 “The autonomy of the party’s will in the law of contract is the foundation which an autonomous law of international trade can be built. The national sovereign has, as we have seen, no objection that in the area an autonomous law of international trade is developed by parties....”¹⁵ The principle of freedom of contract in English literature is stated in the term “Freedom of Contract” or “Liberty of Contract” or “Party Autonomy”. Heck called it private autonomy, meaning the right of individual people to determine something specifically according to their wishes in their legal relationship, as long as it does not conflict with public order.

To achieve the goal of the principle of freedom of contract, the parties to the agreement must have a balanced bargaining position. Pitney emphasized that it is impossible to enforce freedom of contract without at the same time recognizing the balance of the bargaining positions of the parties. But unfortunately in this case the bargaining

¹⁴ Arif Rahman, “Penyelesaian Sengketa Konsumen Melalui Badan Penyelesaian Sengketa Konsumen (BPSK) Kota Serang,” *Ilmu Hukum STKIP Pelita Pratama* 2 (2018): 16.

¹⁵ Soerjono Soekanto. *ibid.* 16

position of consumers is very low or even unable to bargain. Because the existing system in e-commerce is taking it or leaving it. So it is the business actor who determines all the aspects contained in the standard clause.

The purpose of this paper is to provide suggestions or solutions so that the state can protect the interests of consumers. That is by concretizing the principle of the country of reception at International Civil Law. International Civil Law should be a special international law that is a unified system.

Most civil law countries adhere to the principle of the country of reception, namely rules that allow end-user consumers to apply the Consumer Protection Law of their country. This principle is excluded from consumer transactions and does not apply to e-commerce contracts between entrepreneurs. This principle is taken from the Rome Convention and the Brussels Convention which is incorporated into the Directive, namely the Law for the EEC (Europe Union) community. To overcome the legal gap in the resolution of transnational e-commerce disputes, it is necessary to carry out legal reforms that adapt the implementation of the country of reception principle into Indonesian regulations so that the interests of consumers can be protected.

The reality is that in Indonesia the UUPK, which has imperfect regulations in reaching consumer protection in international transactions, makes it important to lay a firm philosophical and juridical foundation on the active role of the state to be present to provide legal protection in the form of making regulations that are real and firmly apply the principle of the country of reception on consumer contracts that are carried out across national borders (cross borders). Of all the existing regulations, including Consumer Protection Law (UUPK), Electronic Information and Transactions Law (ITE Law), Money Supply Law (UUUP), and International Civil Law (HPI) of Indonesia. It is necessary to open space to put the principle of choice of law to overcome the existing legal gap. The proper use of the principle of the country of reception is applied in Indonesia because the potential for such large e-commerce transactions has a strategic role not only to refute the national economy and on the other hand it appears the role of the state in protecting the interests of consumers which is non-negotiable along with the onslaught of the free market and the enactment of the MEA. which has been in effect since 2015.

The government can concretize the principle of the country of reception. Country of Reception, which is the principle of content, allows end-user consumers to apply applicable laws in the country where the consumer is domiciled. However, it should be noted that this principle only applies to transactions between consumers and does not apply to e-commerce contracts between entrepreneurs.¹⁶ This is found in the 1980 Rome Convention article 5 (2) which states "...a choice of law by the parties shall not the result of depriving the consumer of the protection afforded to him by the mandatory rules of the country in which he has his habitual residence ". This provision emphasizes that in a consumer contract, the legal choices made in the contract cannot eliminate the

¹⁶ Tapio Puurunen, "The Judicial Jurisdiction of States Over International Business to Consumer Electronic Commerce from the Perspective of Legal Certainty," *Davis Journal of International Law and Policy*, 2002, 24.

consumer's rights to legal protection that he should get from the consumer protection law of the country where he has permanent residence. This is to fortify or limit e-commerce business actors in providing standard clauses in terms of their choice of law and choice of forum, with dispute resolution where the consumer is domiciled, this will help resolve disputes properly.

There are several arguments why the principle of the country of reception has a real urgency in protecting consumers, first, as has been stated that consumers are the riskiest parties when conducting e-commerce transactions. This risk is because consumers do not have a balanced bargaining position with business actors due to many factors, such as Ziegel said that trade liberalism results in an imbalance in negotiations, asymmetric information imbalances about the technical components of a product being circulated, and an imbalance in material resources. The complexity of products that are born from sophisticated information technology also makes consumers weak because of their inability to assess the quality of the product, which is due to the lack of access to it, while business actors are getting stronger because they have access to information on the products produced.

Second, the protection of consumers to create a good economic structure that can contribute to human welfare.¹⁷ According to the United Nations Consumer Protection Guidelines, consumers have the legal right to be protected from several aspects:¹⁸ (1) from harmful products, (2) protecting their economic interests, (3) from misleading information, (4) receiving consumer education, (5) availability of an effective compensation claim mechanism, (6) encouraging healthy consumption patterns.¹⁹

This policy can be based as an effort to protect public welfare which must take precedence over foreign legal provisions whose contents are considered to be contrary to the rules of national law. Public order is one of the principles in HPI which is known as public order (France), openbaar order (Netherlands). The principle used to stipulate is that if the application of foreign law can result in a violation of the basic principles of local law (lex fori), the foreign law can be set aside based on public order.²⁰

3. CONCLUSION

The existence of regulations governing consumer protection and laws regarding transactions that are transnational have not been able to accommodate the interests of consumers, both Law No. 8 of 1999 concerning Consumer Protection, Law No. 11 of 2008, concerning Information and Electronic Transactions, Law No. 7 2014, concerning Trade and HPI of Indonesia. There are still many e-commerce consumer disputes that have not been resolved until now due to the selection of forums and the selection of laws

¹⁷ Sakinah Shaik Ahmad Yusoff, *Perlindungan Pengguna Di Malaysia: Falsafah Dan Politik, Dalam Sakinah Shaik Ahmad Yusoff, et Al, Undang-Undang Komersil Dan Pengguna* (Kuala Lumpur: Dewan Bahasa&Pustaka, 2007).90

¹⁸ Divisi Persaingan, *Perlindungan Konsumen Dan Hak Kekayaan Intelektual ASEAN, Buku Pegangan Tentang Hukum Dan Peraturan Perundang-Undangan Perlindungan Konsumen Di ASEAN*, (Jakarta: Sekretariat ASEAN, 2018).5

¹⁹ Paul Selvaraj, *Kepenggunaan Di Malaysia: Dahulu, Kini Dan Masa Hadapan, Dalam Rahmah Ismail et All (Penyunting), Undang-Undang Pengguna Dan Keadilan Sosial* (Kuala Lumpur: Penerbit UKM Press, 2018).122

²⁰ Bayu Seto Hardjowahono, *Dasar-Dasar Hukum Perdata Internasional*, Buku Kesat (Bandung: Citra Aditya Bakti, 2006).122

that are not in favor of consumers. One solution so that the interests of consumers can be realized is for the Indonesian government to concretize the principle of the country of reception to fortify or limit e-commerce business actors in providing standard clauses in terms of their choice of law and choice of forum. So, consumer protection can be fulfilled.

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