

IDEAL ELECTRONIC CONTRACT MODEL AS A FORM OF E-COMMERCE DISPUTES SETTLEMENT

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Abstract

This study focuses on electronic contracts in the Indonesian Home Credits Financing Institution by analyzing the effect of electronic contracts on electronic transactions in Indonesia. Then find the ideal model of electronic contracts as a form of e-commerce legal dispute resolution. This study uses normative legal research methods, with a legal approach and a conceptual approach. Based on the research that has been done, the influence of electronic contracts in electronic transactions (e-commerce) in Indonesia has brought about major changes by changing the model of non-electronic (conventional) commercial transactions into electronic (modern) transactions and inspiring online dispute resolution. Then the ideal model of electronic contracts as a form of e-commerce legal dispute resolution in Indonesia, must contain 10 important things in the e-contract clause namely: 1. Freedom of Contract; 2). Offers and Receipts; 3). Good intention; 4). Use of Terms; 5). Risk Transfer; 6). Please Loss; (7). Emergencies; 8). Changing Contracts; 9). Termination reasons; 10). Choice of Law and Dispute Resolution online, as stated in the e-contract of Indonesian Home Credits.

Keywords: *Electronic Contract (e-contract), Electronic Transaction (e-commerce), Indonesian Home Credits.*

A. INTRODUCTION

Rapid technological developments bring progress to almost all aspects of human life (Rahardjo, 2002:1). One of the rapid developments in the field of trading is e-commerce by using e-contracts (electronic contracts), which provide convenience and allow humans to transact quickly without being constrained by space and time limits.

E-commerce is a form of trade that has its own character, namely trade that crosses regions and even national borders, the meeting of

buyers and sellers is not met, done anywhere and anytime, using internet media. This condition on the one hand is very beneficial for consumers, because they have many choices to get goods and do not need to move from their place of residence, but on the other hand violations of consumer rights are very risky because of the distinctive characteristics of e-commerce.

Electronic trading business activities (e-commerce) are often found in the existence of contracts / agreements to carry out product sale

and purchase transactions offered through websites or internet sites. The contract is generally in the form of an electronic contract (e-contract), namely a contract / agreement made by the parties through an electronic system, where the parties do not meet each other directly. This is different from the conventional contract in the real world (offline) which is generally made on paper and agreed to by the parties directly through face to face.

Cita Yustisia Serfiani, an Electronic Contract (E-contract) is made through an electronic system. "Electronic system" is a series of devices and electronic procedures that function to prepare, collect, process, analyze, store, display, announce, transmit, and / or disseminate electronic information (Serfiani, 2013:99).

Electronic information is one or a set of electronic data, but not limited to writing, sound, images, maps, designs, photos, electronic data interchange (EDI), electronic mail, telegram, telex, telecopy or the like, letters, signs, numbers, access code, symbol.

Recognition of electronic contracts as a form of agreement in the Indonesian Civil Code is still a complicated matter. Article 1313 of the Civil Code only states that an agreement is an act in which one or more people attach themselves to one or more other people. If referring to this definition, an electronic contract can be considered as a form of agreement that complies with the provisions of Article 1313 of the Civil Code. Even though in practice, an agreement is usually interpreted as an

agreement that is written in paper-based form and if necessary is stated in the form of a notary deed.

Article 1320 of the Civil Code states that a new agreement is valid if it meets subjective requirements (there is agreement between the parties and competent parties to make an agreement) and objective conditions (the object of the agreement must be clear and the agreement is carried out because of lawful reasons). In conventional transactions where parties meet each other, it is not difficult to see whether the agreement made fulfills these conditions. Problems arise in the event that transactions are carried out without a meeting between the parties.

One of the largest financial service providers in Indonesia, Home Credit Indonesia (PT Home Credit). Home Credit Indonesia is a financial institution under the auspices of the Home Credit Group as a provider of world-class financial services and has a strong market in various parts of Europe and Asia.

Home Credit Indonesia not only offers offline financing, but also online financing to the public. Jaroslav Gaisler, Chief Executive Officer of Home Credit, said that the company has channeled financing of 1.8 trillion in 2016 and jumped to 5.3 trillion in 2017. This means that throughout 2017, the company has booked credit growth of more than 190% year on year.

The driving factor for the jump in the company's performance is in line with the amount of expansion carried out by the company. One of

them is the addition of distribution points from around 4,400 points in 2016, to 11,800 points in 2017 and increased to 14,400 points in April 2018. This was also offset by an increase in the number of employees, from around 4,500 people to 12,000 people.

This expansion step is able to push the number of contracts obtained by Home Credit. In 2016, the company received more than 547,000 contracts and increased to 1.3 million contracts last year. The increasing number of contracts that occurred at Home Credit Indonesia, ethically moral also has a big responsibility to the Indonesian people as consumers of the online Home Credit financing institution when a dispute occurs in the future. So that the form of corporate responsibility can at least be seen from whether or not the inclusion of the dispute resolution clause offered in the contents of the electronic contract (e-contract).

Based on the description above, the author has examined the extent of the influence of an electronic contract in electronic transactions and found the development of a contract model as a form of e-commerce legal dispute resolution in the future, in which this study is focused on e-contract in the Institution Home Credit Financing in Indonesia.

B. RESEARCH METHODS

This study uses normative legal research methods through a legal approach and conceptual approach. Accurate collection of data / information with primary data as supporting / supporting and secondary

data from literature. This primary data is obtained by survey observation (through electronic contract documents) and interviews with related parties, in this case consumers who use electronic contracts in e-commerce transactions. While secondary data is obtained by conducting literature studies, both through reference books, seminar results papers, legal regulations and research results relating to the object of research.

Data analysis used in this study is descriptive-qualitative by analyzing data / information obtained through descriptive research with library research which is then systematically compiled and described qualitatively.

C. DISCUSSION

1. Effect of an Electronic Contract in Electronic Transactions (E-Commerce) in Indonesia

Current contract developments can be found in electronic transaction activities (e-commerce) using available technology. Almost every day electronic transaction activities occur in one country or between countries in order to improve the economy and achieve public welfare.

The development of this model of trade or business activity has shifted from a conventional model to a modern one. Formerly the community as consumers to get an item, only has one choice, namely to meet directly with the seller (business actor) in a certain place with goods that are still

limited. Currently, consumers have many choices to get goods and do not need to move from their homes, but on the other hand there is a widespread violation of consumer rights due to different characteristics of e-commerce activities.

The existence of e-commerce transactions that allow trade to be carried out online has inspired an online dispute resolution. In the midst of confusion over the legal system that is not easy to keep abreast of and the rapid progress of the times, technology has given rise to the idea of completing a series online. The idea in this discussion is about the online dispute resolution (ODR) mechanism (Siburian, 2004:9). The way to resolve the dispute is very interesting because it is done online so that it makes it easier for parties to resolve disputes wherever they are without time and place.

Legal relations that occur between parties using the internet facilities based on legal subjects involved, can be grouped in:

1. *Business to business;*
2. *Business to customer;*
3. *Customer to customer;*
4. *Customer to business;*
5. *Customer to government* (Miru, 2011:143).

In Indonesia, e-commerce has been regulated in the Republic of Indonesia Law Number 11 of 2008 concerning Information and Electronic Transactions, State Gazette of the

Republic of Indonesia of 2008 Number 58, and Additional State Gazette of the Republic of Indonesia Number 4843 (hereinafter referred to as ITE Law) The ITE Law consists of 13 Chapters and 54 Articles that define e-commerce as Electronic Transactions is a legal act carried out with, using a Computer, Computer network and / or other electronic media (vide Article 1 paragraph 2 of the ITE Law) and regulating relations e-commerce with business people, consumers and the government (Raditio, 2014:4).

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According to Islamic law related contracts (sharia agreements) can only be done through the internet, through the mechanism of trade contracts via the internet (e-commerce) both those that are business to business e-commerce and business to consumer e-commerce. Of course you have to fulfill the pillars and

the legal requirements for an agreement. With the existence of transactions through the internet, it is expected to facilitate every business activity that exists.

As for the pillars of an agreement is the existence of obedient consent, because the contract is an agreement between consent and obedience. In order for the true *kabul* to have legal consequences, it is required with three conditions as follows:

- a. The *Ijab* and *kabul* must be declared by people who have at least reached the age of tamyiz who are aware of and know the contents of the words uttered until his statement truly expresses his heart's desire.
- b. *Ijab* and *kabul* must be fixed on objects that are objects of contract.
- c. *Ijab* and *kabul* must deal directly with an assembly.

The main principle found in electronic transactions (e-commerce) is in accordance with Q.S. *An-Nisa'* verse 29 above which states that if the sale and purchase must be based on the likes or likes, if there are already likes and likes between the parties, then the sale is valid. If it is associated with a trade contract through the internet (cyberspace transaction), it can be concluded that according to Islamic law is valid and the validity criteria, that is, must be based on liking or willingness to be willing (willingness) in buying and selling through the internet.

In the view of Islamic law, electronic transactions (e-commerce) can be accepted by scholars. This is because there are many advantages besides the form of clarity that can be understood together. This is also reinforced by several fatwas which protect in "different forms" in this transaction. Rules that can be applied relate to al-dādat and 'urf. Just say in this case, for example "al-'ādatu muhkamātun." (Habits commonly used by the community, can make legal traditions).

a. Legal basis.

In muamalah studies, e-commerce contracts can be concluded with the law of salutation or salaf. The contract in this area is carried out first, then the goods are delivered in the next time. According to Haris Faulidi, the forerunner of e-commerce at the time of the Prophet, which was marked by Q.S. *al-Baqarah* verse: 282.

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَيْتُمْ بِدَيْنٍ إِلَىٰ أَجَلٍ مُّسَمًّى فَاكْتُبُوهُ

Meaning: "to those who believe, if you do mu'amalah not in cash for a specified time, let you write it down."

The appearance of this verse can indeed be double. First, about debts that must be listed. Second, because of the proliferation of salaf (as-salaf) transactions that normally developed at that time. Bukhari's Hadith, which confirms the indications of salaf buying and selling as

follows: "..... Whoever does the salaf, should do it with a clear dose, scale, and deadline."

In this way, it can be simply concluded that as-salam transactions are highly permissible in Islamic law, with the basic law of clarity and mutual interest (maslahat). Another element that is also permissible 'if the original law of something is permitted, unless there is illat which can affect the original law. Illat is meant, for example if e-commerce does not have a "guarantee of trust" to give up each other, then illat can change the original law (Zaman, 2010:44).

b. Terms of transaction.

Muslim scholars have agreed, this method certainly has several pre-conditions that must be met. Among others:

First, Shighat. Shighat is a statement of consent. An indication of Shighat's fulfillment with the form of offers from merchants. Then the user authorizes by "clicking," filling out the form, and determining the type of payment and agreeing to the place of submission. Second, rab as-salam (actor). The actors referred to in this case are both parties, both from the seller and the buyer. In the rules of buyer jurisprudence called al-muslim, and the seller is called al-muslim aih alaih. Third, the object of

transaction (al-muslimah). In that term in general, Islamic economic thinkers only say that there must be goods that are traded.

In general, the form of payment for electronic transactions is divided into two:

1. Full Payment. In this payment mode, the buyer pays in advance the goods in full with the payment method that was agreed upon beforehand.
2. Made by Order. In some cases, buyers do not believe in aspects of business in developing countries. This is based on general conditions that support the building of trusts, for example security and economic aspects (Zaman, Ibid, 33-34).

Related to the transaction process, between the process of electronic transactions (e-commerce) and non-electronic commercial transactions (conventional) have similarities, which consist of the bidding process, receipt of offers (purchases) of payments, and delivery of goods. The difference between the two transactions is simply that electronic commerce (e-commerce) is done without face to face and the process occurs much faster and easier. Because there is no difference in concept between the two types of transactions, a

contract that occurs in an electronic commercial transaction (e-contract) is basically the same as the contract that occurs in conventional commercial transactions. Thus the things that apply to conventional contracts can also be applied to electronic contracts (e-contracts).

But in practice in Indonesia, there are still many differences of opinion regarding the validity of an e-contract. The perpetrators of electronic commercial transactions argue that contracts that occur due to electronic commercial transactions are legal. The notary also argues that electronic contracts (e-contracts) can be considered valid by remembering that there are certain things that cannot be used as objects in electronic contracts, such as registered objects (immovable objects). On the contrary, the court is of the opinion that such a contract is difficult to say as a legal contract because there is no guarantee that the contract has fulfilled the legal requirements of an agreement as stipulated in Article 1320 of the Civil Code, particularly in terms of when the agreement and skill of the parties occur.

To overcome the problem regarding the timing of the agreement, there was an agreement between the

Commercial Court Judges to implement a 3-click system. However, this only applies to cases that are under the authority of the Commercial Court, while for cases that are the authority of the District Court there is still no agreement regarding when an agreement will occur.

The existence of an electronic contract (e-contract) is what has a major influence in e-commerce transactions in Indonesia. With the electronic contract changing the form of commercial transactions from non-electronic (conventional) to electronic (modern) and inspiring to do online dispute resolution, as listed in the electronic contract clauses (e-contract), especially in the e-contract Home Credits Indonesia.

2. The Ideal Model of Electronic Contracts (E-Contract) as a Form of E-Commerce Legal Dispute Resolution in Indonesia

The Consumer Protection Act Number 8 of 1999 regulates consumer rights, and actions that are prohibited for producers. Law Number 11 Year 2008 concerning Information and Electronic Transactions also stipulates in Article 18 Paragraph (2) "The parties have the authority to choose the applicable law for Electronic Transactions. Making and implementing legal electronic contracts under Civil Law and regarding their validity other than

subject to Law Number 11 of 2008 concerning Information and Electronic Transactions as special legal rules, are also subject to the Civil Code as general law.

Based on the method of occurrence, there are several forms of electronic contracts (e-contracts) which have been carried out so far:

- a. Electronic contracts (e-contracts) are carried out through e-mail communication. In this contract offers and receipts are exchanged. Via electronic mail or combined with other electronic communication media (Smedinghoff, 1996:76).
- b. Electronic contracts (e-contracts) are carried out through websites and other online services. In the form of this contract, the offer is made through the website and the consumer accepts the offer by filling in the form contained in the website (Kantaatmadja, 2002:2).

With regard to electronic systems, systems used in electronic transactions (e-commerce) must use reliable, safe, and operating electronic systems as they should. This means that for an electronic contract to have binding power, the electronic contract must meet the following requirements (Aswin, Thesis, 2006):

- a. Confidentiality
This relates to the confidentiality of data and / or information and the protection

of such data and / or information from unauthorized parties.

b. Integrity

This relates to the protection of data and / or information on efforts to modify the data and / or information by parties who are not responsible as long as the data and / or information is stored or sent to other parties. The security system must be able to ensure that the data and / or information received must be the same as the data and / or information stored or transmitted.

c. Authorization

Authorization is related to monitoring of access to data and / or certain information. This is intended to limit actions by unauthorized parties to be able to do something within the information network environment. This limitation concerns the extent to which parties are authorized to be able to do things such as accessing, entering, reading, modifying, adding, deleting, and printing data and / or information.

d. Availability

Data and / or information stored or transmitted through communication networks must be available at any time if necessary.

e. Authenticity

This is related to the ability of a person, organization or

computer to prove the identity of the owner of the data and / or information. If a message has been received, the recipient must be able to verify that the message was actually sent by the real party. To guarantee authenticity this can be done using a certification authority.

f. Non repudiation

Matters relating to proof to an independent third party regarding the authenticity of data and / or information.

g. Auditability

Data and / or information must be recorded in such a way that the data on all the required confidentiality and integrity requirements has been fulfilled.

In designing an electronic contract, there are a number of things that must be considered, namely the basic principles commonly made in international business transactions, as follows: a) Contracting Freedom; b). Offer and Acceptance; c). Good faith; d). Use of Terms; e). Risk Transfer; f). Penalty; g). Force Major; h). Changing Contracts; i). Termination reasons; and j). Choice of Law and Settlement of Disputes (AK Syahmin, 2011:95).

In preparing an electronic contract (e-contract), it is necessary to pay attention to the use of the term. Electronic contract clauses that use terms that are standard and clear in meaning, can only be used in simple contracts and are subject to Indonesian law,

as well as concerning Indonesian parties. As for complex electronic contracts and transnational aspects, these terms should be included in the contract in question, or referenced to certain provisions of the written law.

Regarding the ideal model of electronic contracts, it is closely related to the inclusion of clauses in the contract. The ten main points (material) that have been mentioned, should be contained in an e-contract. This is related to the Principle of Legal Certainty of the parties involved in the agreement. If things happen that are beyond the capacity of the parties, a change in the contract must also be possible. When it is not possible, this seems to indicate an unbalanced position between the parties and can cause disputes with large and inefficient costs for both parties.

From the standpoint of tradition rooted in the teachings of Confucius, the law always coexists with punishment. Therefore, Chinese, Japanese and Koreans are reluctant (reluctant) to bring business disputes before the court. Because the image of the court is only a place for bad people. Civil disputes are resolved through negotiation, conciliation and mediation (Cohen, 1968:110).

Their views on contracts are not the same as those of Western society. For Eastern people, especially China, Japan and Korea, contracts are no more as symbols of cooperation, not legal documents so they can be

changed at any time when conditions and situations change. Business relationships are more emphasized in the relationship of trust (personal) than legal relations. Japanese people in business say: "trust the people rather paper"(M.Marck, 1989: 111-116 and L.Brak, 1988: 17-27).

In an electronic transaction that uses electronic contracts must take into account the consequences that will be caused. Because the use of an electronic contract (e-contract) has become a habit in the business world, the validity of the electronic contract must be recognized. Electronic contracts can be said to be valid as long as the object in the contract is only about objects that are easily transferable or movable objects and do not apply to immovable objects (recorded).

Consumers in e-commerce transactions have a greater risk than the seller or merchant. Or in other words consumer rights in e-commerce are very vulnerable. In addition there are other things that can further harm the buyer / consumer, that is, data can be stolen by a third party when there is communication between the buyer and seller, the thief can get a credit card number by infiltrating a server or a personal computer, and the buyer can be tricked by a fake (fictitious) seller.

Seeing the many uses of electronic contracts in electronic transactions, the ideal model of electronic contracts is expected to be a solution to dispute resolution

in the future. This led to the need for early recognition (monitoring) and handling of breach of contract. Enforcement and enforcement of contracts, handled differently (agreements apply with routine activities). Contract compliance must be carried out under constant supervision. Monitoring this electronic contract has its own challenges. The challenges faced in these surveillance activities can lead to large costs beyond reach, because they cross the boundaries of a country's territory and can involve an organization that can include confidential information, for example, a person's bank account.

Dispute resolution caused by one party defaulting will take into account transaction costs. This is related to the prolonged and lengthy dispute resolution process, and it will cost a lot of money. Even though the electronic contract (e-contract) made by the parties has been determined how to resolve the dispute, namely through a court, but in reality the parties rarely resolve the dispute to court.

In business circles, rarely do parties sue their opponents to court. This was stated by Stewart Maculay, who had conducted research on entrepreneurs in Wisconsin, United States (in Lawrence M. Friedmann, 2001: 197), finding that many of them tended to override contract (formal) law and contract doctrine. Especially they avoid suing each other even though the case is

really according to formal law (HS Salim, 2007:182). Therefore, it is better if dispute resolution is done through Online Dispute Resolution (ODR) rather than bringing the dispute to the court. By including the legal choice clause and dispute resolution namely through Online Dispute Resolution (ODR), it is expected to be able to become a solution and guarantee legal certainty for the parties that bind themselves in an e-contract.

D. CONCLUSION

From the discussion above, conclusions can be drawn as follows:

1. The effect of electronic contracts (e-contracts) in electronic transactions (e-commerce) in Indonesia is to bring major changes by changing the model of commercial transactions from non-electronic (conventional) to electronic (modern) and inspire online dispute resolution as listed in the electronic contract (e-contract) clauses, specifically in the Indonesian e-contract Home Credits.
2. The ideal model of electronic contract (e-contract) as a form of settlement of e-commerce legal disputes in Indonesia, which must contain 10 important things in the e-contract clause which is related to: 1) Contracting Freedom; 2). Offers and Receipts; 3). Good faith; 4). Use of Terms; 5). Risk Transfer; 6). Please Loss; 7). Emergency conditions; 8). Changing Contracts; 9). Termination reasons; 10). Choice of Law and Dispute Resolution.

The ten main items (material), as stated in the e-contract of Indonesian home credit and should

be contained in the electronic contract (e-contract) applicable in Indonesia.

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