



WORLD CLASS ISLAMIC CYBER UNIVERSITY
UNISSULA
SULTAN AGUNG ISLAMIC UNIVERSITY

Sept 5th 2019

THE 5 th INTERNATIONAL AND CALL PAPER

Legal Reconstruction in Indonesia Based on Human Rights

Imam As Syafei Building

Faculty of Law, Sultan Agung Islamic University

Jalan Raya Kaligawe, KM.4 Semarang, Indonesia

UNISSULA PRESS

The 5th PROCEEDING

“Legal Reconstruction in Indonesia Based on Human Right”

IMAM AS SYAFEI BUILDING

Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

Diterbitkan oleh :
UNISSULA PRESS

ISBN. 978-623-7097-23-5

The 5th PROCEEDING

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Hal I-X, 1-358

Cetakan Pertama Tahun 2019

Penerbit PDIH UNISSULA

Jl. Raya Kaligawe Km. 4 Semarang 50112

PO BOX 1054/SM,

Telp. (024) 6583584, Fax. (024) 6594366

ISBN. 978-623-7097-23-5

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PREFACE

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegnan, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

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Study of the theory of Legal Protection Against Online High Yield Investment Program Contracts in Indonesia (HYIP)

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Abstraksi

One internet business that offers convenience and with large profits is investing in the High Yield Investment Program (HYIP). HYIP offers a contract with a high percentage of profits to consumers (investors) within a certain period. Contracts in online HYIPs are electronic contracts (e-contracts). Based on law no. 19 of 2016 concerning amendments to law no. 11 of 2008 concerning information and electronic transactions. The problem raised is about the comparison of electronic contracts in Law Number 19 of 2016 with contracts in the Civil Code and studies from the perspective of the theory of legal protection of online HYIP defaults in Indonesia.

This research used the method of normative juridical legal approach, or library law research, which is legal research conducted by examining literature or secondary data.

The research results obtained are that the electronic contract as regulated in Act No. 19 of 2016 when compared to the contract as regulated in the Civil Code, then both are the same. Online HYIP contracts still appeared vaguely in fulfilling the legal requirements of the contract, so that the HYIP contract could be said to be valid under Indonesian civil law, then the online HYIP contract must fulfill the legal requirements of the contract stipulated in Article 1320 of the Civil Code. Therefore to decide whether the contract is valid or not, one needs to look at the contract one by one because it couldn't be concluded that all online HYIP contracts are legal or invalid.

Legitimate online HYIP contracts according to Article 1320 of the Civil Code have legal force. The existence of the legal force, then there is also protection for the parties making the contract. Legal protection in online HYIP contracts is regulated in the Civil Code, Law No. 8 of 1999 concerning consumer protection and Law No. 11 of 2008 concerning information and electronic transactions which then there are some changes contained in Act Number 19 of 2016 concerning Amendments to Act Number 11 of 2008 concerning Information and Electronic Transactions.

Keywords: Legal Protection Theory, HYIP Contract

A. Background

Information and communication technology (ICT) in the modern era is developing very rapidly, not only used as a communication medium, but also used as a business media. Many businesses can be done with ICT media, especially in internet networks such as buying and selling, offering online services, investing,

trading etc..

Various facilities in doing business using the internet make many people choose, as can be done in a fast, inexpensive and easy way to access, besides that the delivery of messages and dissemination of information is carried out concise both in the form of analog and digital electronic data.⁶⁷ In order to achieve these efficiency and produc-

⁶⁷ LKHT Fakultas Hukum UI, *Pokok-pokok Pikiran Rancangan Undang-Undang Informasi dan Transaksi Elektronik (RUU-IETE)*, dimuat dalam Jurnal Hukum dan Teknologi No. 1 Jil. 1 Tahun 2001.

tivity goals, it is ultimately consumers who directly or indirectly receive and bear the impact, hence the existence of legal protection for consumers is considered important.

One internet business that offers convenience and with large profits is investing in the High Yield Investment Program (HYIP). HYIP offers a contract with a high percentage of profits to consumers (investors) within a certain period.

HYIP is a program that can provide large profits to consumers, but also has a high risk. There are so many HYIP programs that do not pay according to the agreed contract (default). This is because some things like the company went bankrupt, the company was fake and even did have the intention to cheat from the beginning. HYIP providers who do default certainly make investors lose large amounts and of course violate the rights of consumers (investors).

Contracts in online HYIPs are electronic contracts (e-contracts) based on Law no. 19 of 2016 concerning amendments to law no. 11 of 2008 concerning information and electronic transactions.⁶⁸

Although the electronic contract has been explicitly mentioned in law no. 19 of 2016, but electronic contracts have various differences from conventional contracts in general. The difference between an electronic contract and a conventional contract causes doubt as to whether the electronic contract is valid or not, especially in the capability of the contract maker. Electronic contracts are made through an electronic system so that these contracts can be made without the parties meeting in person, so the identities of the parties are not known with certainty so that their skills in making contracts are questioned.

The validity of the HYIP electronic contract is still unclear so the form of legal protection for consumers (investors) HYIP is also unclear. It is our interest to study and analyze the comparison of electronic contracts in Law Number 19 of 2016 with contracts in the Civil Code and study about legal protection against online HYIP violations in Indonesia from the perspective of Legal Protection Theory.

B. RESEARCH RESULT AND DISCUSSION

1. Comparison of Electronic Contracts in Law Number 19 of 2016 with Contracts in the Civil Code

Electronic contract as regulated in Act No. 19 of 2016 when compared to the contract as regulated in the Civil Code, then both are the same, both of which involve other parties to establish legal relations in the field of agreement.⁶⁹ As for what distinguishes between conventional contracts in the Civil Code with electronic contracts is the media of making the contract and the proof of the contract.⁷⁰

Conventional contracts in the Civil Code can be made in writing or not in writing, whereas in electronic contracts the media used are electronic systems, namely a series of electronic devices and procedures whose functions are to prepare, collect, process, analyze, store, display, announce, send, and / or spread electronic information.⁷¹

Another difference between conventional contracts in the Civil Code and electronic contracts in Act Number 19 of 2016 is on the proof. Proof is convincing the judge of the truth of the excuses or arguments presented by the parties in a dispute.⁷² Article

⁶⁸ Look at Article 1 number 17 of Law No. 19 of 2016

⁶⁹ Look at Article 1313 of the Civil Code

⁷⁰ Look at the provisions of Article 1 paragraph (17) of Law no. 19 of 2016 concerning amendments to Law no. 11 of 2008

⁷¹ Look at Article 1 paragraph (5) of Law Number 11 of 2008 concerning ICT

⁷² M. Arsyad Sanusi, *Hukum Teknologi & Informasi*, Cet. 5, (Jakarta: Tim KemasBuku, 2005) hal. 216

5 paragraph (2) of Law No. 11 of 2008 that electronic information and / or electronic documents and / or printouts thereof are extensions of valid evidence in accordance with the applicable procedural law in Indonesia. An electronic evidence if you want to be used as legal evidence, it is necessary to see the authenticity, integrity and availability.⁷³

The validity of HYIP Electronic Contracts according to M. Arsyad Sanusi, there are five legal requirements for the establishment of electronic contracts, namely offer, acceptance, written requirements and signatures, skills and authority to conduct transactions, and considerations.⁷⁴ An online HYIP contract is an electronic contract made through electronic mail (e-mail).

In an online HYIP contract, the party making the offer is the HYIP service provider. An HYIP service provider will offer and explain the investment plan that can be chosen by investors. Investors can choose to agree or disagree with the investment plan offered. By agreeing to the investment plan offered, an agreement has occurred between the investor and the HYIP service provider.

In an online HYIP contract⁷⁵, the HYIP service provider will show his background or company background so that the identity of the HYIP service provider can be known and confirmed that they are capable of making a contract. However, the investor can be from anyone so that his identity is difficult to know and difficult to ascertain whether the investor is capable of making a contract or not, so it needs to be careful in seeing whether the investment sector offered is against the law or not.

Online HYIP contracts still appear vaguely in fulfilling the legal requirements of the contract, so that the HYIP contract can be said to be valid according to Indonesian civil

law, then the online HYIP contract must fulfill the legal requirements of the contract stipulated in article 1320 of the Civil Code. Therefore, to decide whether the contract is valid or not, one needs to look at the contract one by one because it cannot be concluded that all online HYIP contracts are legal or invalid.

2. Study of Legal Protection Theory Against Default High Yield Investment Program (HYIP) Contracts in Indonesia

Fitzgerald quoted the term Salmond's theory of legal protection that the law aims to integrate and coordinate various interests in society because in a traffic of interest, protection of certain interests can be done by restricting various interests on the other hand. Legal protection must see the stages, namely legal protection born of a legal provision and all legal regulations provided by the community which basically constitutes the community's agreement to regulate the behavioral relationship between members of the community and between individuals and the government that is considered to represent the interests of the community.⁷⁶

According to Satjipto Rahardjo, legal protection is to provide protection for human rights that have been harmed by others and that protection is given to the community so that they can enjoy all the rights granted by law.⁷⁷ Legal protection for the parties is essentially the same, namely the role of government to protect the interests of producers and consumers in the framework of trade. The role of government referred to here covers national and international aspects. That is, the demand for legal certainty in entering into an agreement must be clear in terms of aspects of national law through the establishment of regulations in the field of consumer protection, as well as aspects of internation-

73 Article 5, 15 and 16 of Law Number 11 Year 2008 Regarding Information and Electronic Transactions

74 M. Arsyad Sanusi, 2005, *Hukum Teknologi & Informasi*, Cet. 5, (Jakarta: Tim KemasBuku), hlm. 158

75 In the form of various types of investment contracts ranging from buying and selling, property, to trading

76 Satjipto Rahardjo, *Ilmu Hukum*, Bandung : PT. Citra Aditya Bakti, 2000, h. 53

77 *Ibid*, h. 69

al law through international agreements.⁷⁸

A contract in a transaction raises a promise that one party promises to do something, while the other party has the right to demand the implementation of that promise. This needs to be emphasized because if one party who has agreed to the contents of the contract is likely not to comply, that party can be called a default. Therefore the parties, namely online HYIP service providers (business actors) and investors (consumers) have their respective responsibilities.

Legitimate online HYIP contracts under Article 1320 of the Civil Code have legal force meaning that there is protection for the parties making the contract. Legal protection in online HYIP contracts is regulated in the Civil Code, Law No. 8 of 1999 concerning consumer protection and Law No. 11 of 2008 in conjunction with Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions.

Legal Protection according to Article 5 paragraph (1) and paragraph (2) of Law no. 11 of 2008 that electronic information and / or electronic documents and / or printouts thereof are extensions of valid evidence in accordance with the applicable procedural law in Indonesia. The ITE Law does not regulate the criteria for goods that can be traded in e-commerce transactions, but the ITE Law requires businesses to provide complete and correct information regarding the products offered.

If there is a dispute / conflict between business actors and consumers in an agreement, there are several ways that can help dispute resolution between business actors and consumers, both through litigation and non-litigation..

C. CLOSING

1. Conclusion

The difference between electronic contracts in Law Number 19 Year 2016 and contracts in the Civil Code is the media for making the contract and the proof of the contract. In the case of conventional contract-making media, it is paper and ink to make a letter of agreement (written) or oral word media (unwritten). Whereas in electronic contract the media used are electronic systems. In the case of proving conventional contracts, valid evidence is found in Article 1866 of the Civil Code. Whereas in an electronic contract that electronic information and / or electronic documents and / or printouts are legal legal evidence. And reaffirmed in article 5 paragraph 2 of Law No. 11 of 2008 that electronic information and / or electronic documents and / or printouts are extensions of valid evidence in accordance with the applicable procedural law in Indonesia. The validity of the online HYIP contract is still vague in fulfilling the legal validity of the contract in accordance with article 1320 of the Civil Code.

According to Satjipto Rahardjo, legal protection is to provide protection for human rights that have been harmed by others and that protection is given to the public so that they can enjoy all the rights provided by law, relating to online HYIP contracts, based on the Civil Code, Law - Act No. 8 of 1999 concerning consumer protection and Law No. 11 of 2008 in conjunction with Law Number 19 of 2016, both investors and business actors need to be protected for their rights and obligations, so that the contracts made must comply with existing rules or regulations, namely fulfilling the requirements of Article 1320 of the Civil Code and the Law 11 of 2008 jo Law No. 19 of 2016. Asaz Good faith in entering into an agreement must be put forward and if there is a problem or dispute, then in the contract the agreement must

⁷⁸ Apriyanti, skripsi: *“Pelindungan Hukum Terhadap Konsumen dalam Transaksi e – commerce ditinjau dari Hukum Perikatan”* (Jakarta: UIN Syarif Hidayatullah, 2014) hal. 54

also include the media to resolve the dispute, both through litigation and non-litigation.

2. Suggestion

For consumers (investors) must be careful by looking at the legality of the investment and the validity of the contract. As for resolving disputes, it is suggested to go through non-litigation because

generally it is more familial and faster.

For Business Actors (HYIP Service Providers) must complete licensing in accordance with their business and must provide complete and correct information relating to the terms of the contract, manufacturer, and product offered.

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