
PRINCIPLE OF FREEDOM OF CONTRACT**IN ON-LINE TRADE TRANSACTIONS (E-COMMERCE)****(Comparison of Civil Law System, Common Law System and Islamic Law System)**

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ABSTRACT

Advances in computer and internet technology, as well as cyberspace, facilitate relationships between humans, including trade transactions. The transaction process carried out in the business world without any meetings between the parties is called electronic commerce. *E-commerce* which is carried out through the exchange of information without a physical meeting of the parties, raises very basic problems and requires reconstruction of the theory of contract law, namely: How to implement the principle of freedom of contract in e-commerce transactions and the limitations according to the civil law system, common law system and Islamic law system?

This research was carried out using a normative juridical approach (doctrinal research), with descriptive comparative legal research specifications. The data collection method used is literature study, data analysis using deductive analysis methods. The principle of freedom of contract in transaction *e-commerce* according to the legal system *civil law system*, *common law system* and *Islamic law system* can be implemented properly, even though in general it is a standard contract whose contents and format have been created and prepared by one of the parties (seller/*merchants*). This freedom of contract is seen when there is an agreement between the seller/*merchants* with buyers/consumers who are indicated by filling in the order form provided by the seller/*merchants* and "click" of approval by the buyer/consumer. The transaction continues with payment via transfer and delivery of goods via courier which can be proven by a receipt for the transfer and delivery of goods. Freedom of contract is limited by state law, viz does not conflict with the law, decency and public order. Meanwhile, according to Islamic law, transaction *e-commerce* equated with buying and selling orders (*Greetings*) and the law is permissible (*permissible*) which must be based on mutual consent (without compulsion), implemented with true intentions (sincere, good faith), not detrimental to other parties and beneficial.

Keywords : Principle of Freedom of Contract; *E-Commerce*; *Civil*; *Common*; *Islamic*; *Law System*.

INTRODUCTION

Globalization is a characteristic of relations between earth's inhabitants that transcend conventional boundaries, such as nations and states. There is an increase in meaning and events occurring throughout the world that are spreading rapidly to form a single world, integrated economically, socially, culturally, technologically, business and other influences that penetrate traditional boundaries and barriers, time, space and industrial business are increasing easily. Globalization has an impact in all fields, so that there is a tendency for states without borders to emerge and increasingly eliminating the concept of nation states (the ends of nation states).(1).

Advances in telecommunications technology have made distances that previously had to be traveled physically closer, because humans no longer have to be physically present if they want to meet others who are very far away on the earth. Advances in computer and internet technology, coupled with cyberspace technology, are making the world increasingly smaller. The results of this very advanced communication technology are not only used to facilitate relationships between humans, but more than

that, humans can also carry out trade transactions using sophisticated telecommunications technology.(2).

Increasing network usage *interconnection-networking* (internet) in everyday life, public attention will also increase regarding their rights to obtain benefits of information technology. Every individual has the right and ability to relate to other individuals without any restrictions that prevent it. This development also has an impact on the social aspect, where the way of relating between people also changes. This indirectly affects the business sector. Transaction processes carried out in the business world without any meetings between the parties using the internet are included in electronic transactions. There are various forms of electronic transactions in the business world, including electronic commerce or what is usually called e-commerce or e-com. Electronic commerce, which in this writing will be referred to as e-commerce, can be interpreted grammatically as electronic commerce. The purpose of electronic trading is trading carried out electronically using the internet as a medium. Apart from that, the definition of e-commerce also includes distribution, purchasing, selling, marketing goods and services through the system electronic like Internet or television, website (www/world wide web), or computer network other. E-commerce can involve electronic data transfer, electronic data exchange, automated inventory management systems, and automated data collection systems(3). In a business context, the internet has a transformational impact that creates a new paradigm in the business world in the form of 'Digital Marketing'. This perspective can experience a crisis of confidence so that it becomes faded and less authoritative, at that time it becomes a sign that there has been a shift in the paradigm of business transactions from traditional which has actually shifted to the paradigm of on-line (virtual/virtual) transactions known as E-Commerce. Compare this with a paradigm according to Thomas S Kuhn, which is a perspective, values, methods, and basic principles in solving a problem by a particular scientific community.(4)

Electronic trading (*e-commerce*) which is carried out through the exchange of information without a physical meeting of the parties, as described above, raises very basic problems and requires reconstruction of the theory of contract law, namely:

1. How to implement the principle of freedom of contract in e-commerce transactions according to the civil law system, common law system and Islamic law system?
2. Are there any limitations to the principle of freedom of contract in transactions? *e-commerce* according to the civil law system, common law system and Islamic law system?

RESEARCH METHODS

This research was carried out using a normative juridical approach (doctrinal research), with descriptive comparative legal research specifications. Henry Campbell Black stated that comparative law is the study of the principles of legal science by comparing various legal systems(5). The descriptive comparative legal research method is a method that only explains two or more different legal systems descriptively, without trying to relate one to another.(6). The data collection method used is library research, namely by studying concepts, theories and general information through books, journals and primary, secondary, tertiary legal materials and so on. The data analysis method used is deductive analysis to draw conclusions from major and minor premises from the data obtained(7).

RESULTS AND DISCUSSION

1. Implementation of the Principle of Freedom of Contract in E-Commerce Transactions

Freedom of contract is one of the main principles in civil law, especially in contract law, which is well known in *civil law system, common law system* nor *Islamic law system*. Even internationally, efforts to harmonize and unify laws governing contracts also contain the principle of freedom of contract. *The Universal Principles of International Commercial Contracts* which was completed by *The International*

Institute for the Unification of Private Law (UNIDROIT) in 1994 in Rome, also includes freedom of contract as a principle regulated in the first article (8).

a. The Principle of Freedom of Contract in the Civil Law System

The principle of freedom of contract in *civil law system* originates and develops from concept *sobligation* (engagement). Draft obligation it was first used in *civil law traditions* in Roman times by Emperor Justinian. *Sobligation* in Roman terminology can refer to the rights of creditors (*creditor's rights*) as well as on creditor obligations (*creditor's obligations*). In its current development, *obligation* in Roman law contains the meaning of obligation (*duty*) and responsibility (*liability*). Relationships containing promises are now known as agreements (contracts) and *obligation* that arises is called *contractual obligations*. The responsibilities that arise are called *contractual liability*. In *contractual liability* one party voluntarily (*voluntarily*) willing to pay or provide an achievement to another party who can voluntarily receive it, so the element of volunteerism is the basis in this *contractual liability*. Voluntarism is the basis of *contractual liability* (responsibility on the basis of a contract) is only possible if the parties have the freedom to enter into a contract (to choose whether to bind themselves to a contract or not). This freedom to determine whether or not to be bound by a contract is known as the principle of freedom of contract (*freedom of contract/free consent*) (9).

Freedom of contract in *civil law traditions* consists of 5 (five) types of freedom, namely: (10)

1. Freedom to make or not make agreements.
2. Freedom to choose with which party to make an agreement.
3. Freedom to determine the contents of the agreement.
4. Freedom to determine the form of agreement.
5. Freedom to determine how to make agreements.

b. The Principle of Freedom of Contract in the Common Law System

According to PS Atiyah principle *freedom of contract* and *sanctuary of contract* becomes the foundation (basic concept) of agreement/contract law according to *common law system*, that is (11):

1. Contracts are based on mutual agreement (*contracts were based on mutual agreement/meeting of minds/consensus ad idem*);
2. The making of a contract is the result of free choice that is not interfered with by external controls such as government or legislative intervention.

Based on the basic concept of the free choice of the agreement/contract makers within common law system Therefore, freedom of contract has the following meaning (12):

- a. No one is bound to enter into any contract if he does not wish to do so (*no body was bound to enter into any contracts at all if he didn't choose to do so*);
- b. Each person has a choice of people with whom he makes a contract (*every one had a choice of persons with whom he could contract*);
- c. People can make various kinds (forms) of contracts (*people can make virtually any kind of contract*).
- d. People can create various contracts with the contents and terms of their choosing (*people can make any kind of contract on any terms they choose*).

The Unidroit Principle of International Commercial Contracts in article 1.1 states that freedom of contract (freedom of contract) states that the parties are free to enter into a contract and to determine the contents of that contract (the parties are free to enter into a contract and to determine its contract). Freedom of contract according to The Unidroit Principle of International Commercial Contracts This is a very important basic principle in international trade, therefore there are rights for business actors:

- a. To determine freely about which parties they will offer their goods or services to.
- b. To determine by which party it will be supplied.
- c. To freely agree to the terms of a transaction (13).

c. The Principle of Freedom of Contract in the Islamic Law System

In the Islamic Law system, an agreement must be based on the freedom of will and voluntariness of each party entering into a transaction as stated in the word of Allah SWT (QS 4:29) which means: "O you who believe, do not devour each other's wealth in a false way, except by means of commerce which is carried out with mutual consent between you...". Islamic law gives freedom to everyone to carry out agreements (contracts) as they wish, by providing laws (principles) *permissible* (ability) to business activities (*muamalah*) in accordance with the development of human needs in the fields of agriculture, industry, trade in goods and services.

Various contracts have been regulated by *Sharia* (Islamic law) and are faced with the concepts of halal and haram. Contracts are essentially based on the freedom of will of the parties which must be manifested in the expression of true intentions. The basic principles of contracts according to Islamic law are as explained by Bassiouni as follows (14):

"Contracts are essentially predicated on the free will of the parties and must manifest the true expression of their intent."

d. Implementation of the Principle of Freedom of Contract in E-Commerce Transactions

On transaction *e-commerce* Before goods or services are received, a contract has previously been entered into between the seller/service provider (*marchant*) and buyers/recipients of services (consumers). Sellers/service providers usually create a catalog of goods/services offered, apart from that, also provisions on payment methods and other provisions as clauses (content) of the contract, then the buyer/recipient of services will express their agreement to these provisions by "clicking" to agree or fill in the columns provided, and make payments online and provide confirmation of proof of payment to the seller of goods/services. After the confirmation is received by the seller, the goods/services will be sent according to the address written by the buyer (consumer).

When viewed from an angle *civil law system* and *common law*, then the contract, even though it is classified as a standard contract (the contents of the contract have been determined by one of the parties, in this case the seller/*marchant*) but there is freedom to determine the will to agree to the terms offered. Therefore, the implementation of the principle of freedom of contract is the beginning of the transaction *e-commerce*. The nature of Islamic law transaction *e-commerce* permitted, analogous to buying and selling orders or *Greetings* (15). Freedom of contract in terms of transaction *e-commerce* This of course must be based on willingness (*Antarodlin*) of the parties. This willingness between the parties shows that there is freedom of will to determine whether the transaction will be carried out *e-commerce* or not.

2 Limitations of the principle of freedom of contract in transaction *e-commerce* according to *civil law system, common law system and Islamic law system*.

Transactions in e-commerce are trade transactions using internet technology where the seller and buyer do not meet each other directly, but rather through the internet network where the seller (merchants) has prepared an offer and purchase application which must be filled out by buyers (consumers) who agree to make a transaction. Hence, transactions e-commerce This is a standard contract. Freedom of contract in transactions e-commerce in civil law system limited by the good faith of the parties to the transaction so that the transaction is a fair transaction, not full of deceit and lies. Apart from that, freedom of contract in transactions e-commerce according to civil law system limited by legislation, meaning it must not conflict with the law, public order and morality. Pay attention to articles 1337 and 1338 of the Indonesian Civil Code (which adheres to the civil law system).

Transaction *e-commerce* in common law system including standard contracts. Countries with common law system highly upholds individual rights, including internal transaction *e-commerce*. Countries such as England and the United States stipulate in their constitutional law that the right to transact (including transaction *e-commerce*) is a constitutional right, meaning a right protected by

state law but at the same time limited by state regulations of a nature mandatory such as regulations regarding business competition, insurance, taxes, antitrust, anti dumping, and so on, as well as regulations regarding public welfare.

In the Islamic legal system, transactions e-commerce which is matched to order buying and selling transactions (Greetings) freedom of contract is limited to goods or services that are forbidden in Islam. Regarding objectse-commerce must meet the requirements of the object contract (contract), namely:

- a. Existed at the time of contract (contract) is held, the goods displayed on the internet display or offered already exist when the transaction occurs e-commerce.
- b. Justified bysharia, physically (substances) the goods are halal and useful, even if they are in the form of services, then these services are justified bysharia (Islamic law).
- c. It must be clearly known, the object offered in e-commerce The specifications must be clear in the chronology or display of offers on the internet. If there is no conformity to the specifications of the goods offered and sent to consumers, this transaction will be haram because fraud has occurred.
- d. Can be handed over, handover in transactions e-commerce in the form of payment via online (transfer) and delivery of goods via courier can really be carried out correctly (actually) which can be proven through transfer and delivery receipts. This handover is a very important thing in transaction law according to Islamic law(16).

CONCLUSION

The principle of freedom of contract in transactionse-commerceaccording to the major legal systems in the world, namelycivil law system, common law system And Islamic law systemcan be implemented well, even though transactionse-commerce In general, it is a standard contract whose contents and format have been created and prepared by one of the parties (seller/merchants). This freedom of contract will be seen when there is an agreement between the seller/merchants with buyers/consumers who are indicated by filling in the order form provided by the seller/merchants and "click" of approval by the buyer/consumer. The transaction continues with payment via transfer and delivery of goods via courier which can be proven by a receipt for the transfer and delivery of goods.

Freedom of contract, which is a constitutional right of every citizen, is guaranteed to be implemented and is at the same time limited by state law. OK, I agreecivil law system or common law system transactione-commerceis free to be done by anyone and regarding anything (freedom of contract) as long as it does not conflict with the law, morality and public order. Meanwhile, according to Islamic law, transactionse-commerce equated with buying and selling orders (Greetings), then the law is permissible (permissible) as long as it complies with the provisions of buying and selling/transaction law in Islamic Law. The principle of freedom of contract is highly upheld by Islamic law, that transactions or commerce must be based on mutual consent (without compulsion), implemented with real intentions (sincere good faith), not detrimental to other parties and beneficial.

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