



***EXONERATION CLAUSE AS LIMITATION OF CRIMINAL LIABILITY IN DIGITAL
BUSINESS IN INDONESIA***

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ABSTRACT

Digital business in Indonesia is developing very rapidly, many new business actors have emerged with various types of businesses. The development of this digital business cannot be separated from the condition of society as a market, where it is recorded that the majority of Indonesian people are active internet users. The frame of the legal relationship between business actors and the community with a position as a consumer is based on an agreement in which exoneration clauses are commonly found. Given the condition of the Indonesian people with a low level of literacy, the existence of the agreement clause is less scrutinized or not properly understood. On the other hand, many business actors are of the view that the existence of this clause has caused their position to become superior. So that it can ignore all objections raised by consumers, and even avoid criminal liability. The exoneration clause is the cause, so this legal research explores whether the exoneration clause can indeed limit digital business actors in Indonesia from criminal liability. The method used is the Statute Approach, which explores related laws and regulations. However, the depth of this research which is supported by the expertise of each researcher also reveals the Anthropological, Social, and Political sides. The results of the study show that the exoneration clause does not absolutely provide limitations on criminal liability for business actors or digital businesses.

Keywords: *Digital Business, Exoneration Clause, Criminal Liability*

1 INTRODUCTION

Economic activity has grown very advanced, bypassing conventional sides in trade. A new term has appeared, namely the digital economy, the term was recorded as being introduced by Don Tapscott in 1995 in his book. The digital economy is an economic activity based on digital technology, which is commonly associated with internet use. The digital economy is also known as the internet economy, web economy, digital-based economy, new knowledge economy, or new economy. The digital economy era or the new economy

era emerged when organizations began to marry information technology productivity from asset resources with knowledge from human resources to reach cross-border global transactions in the form of a connected economy. In this era, organizations are busy using information technology as an enabler and strategic weapon. So the mindset is no longer what is your business but more how is your digital business model [1].

The digital economy has 12 characteristics, which consist of the following: 1. Knowledge; 2.

Digitalization; 3. Virtualization; 4. Molecularization; 5. Internetworking; 6. Disintermediation; 7. Convergence; 8. Innovation; 9. Prosumption; 10. Immediacy; 11. Globalization; 12. Discordance. The characteristics of Knowledge can be translated that the power of the knowledge is translated into superior innovations through the latest opportunities to create competitive advantage. The Digitization feature means business transactions using digital technology and digital information. Customers or consumers as digital customers use digital devices to conduct transactions with companies selling goods and services as digital enterprises. The feature of virtualization in the digital economy is that it is possible to change physical goods into virtual goods. Intellectual capital is converted into digital capital. The characteristics of molecularization in the digital economy mean that heavy organizations in traditional organizations have changed to light flexible organizations, M-form organizations (multidivisional organizations) have shifted to become E-form organizations or ecosystem form organizations that are easily adaptable to the environment. The characteristic of internetworking is using the internet network to build interconnections to form economic networks. The characteristic of disintermediation means that there is no need for intermediaries, transactions can be carried out directly peer-to-peer. The feature of convergence is the convergence of computing, communication, and content together to form interactive multimedia which is an important platform. The characteristics of innovation, namely human imagination and creativity, are the main sources of value forming an innovation economy. The characteristic of prosumption means that in the old economy the key aspect was mass production, while in the digital economy it is mass customization. The distinction between producer and customer is blurred; every customer on the information highway can also be a producer. (10) Immediacy. The time difference between ordering goods and when it is produced and shipped has shrunk drastically due to the speed of the digital technology process. The hallmark of globalization is that there are no boundaries for global transactions. The characteristic of discordance is that there will be a gap between those who understand technology and those who do not understand technology.

The era of the digital economy ultimately triggers digital disruption, namely the emergence of a digital business model. The term digital disruption shows the occurrence of new business models when digital technology influences changes in the value of business transactions. Digital disruption is carried out by changing traditional values and ways of doing business through internet network interconnections. Several digital business models appear in the digital economy.

Open markets are digital transactions open to everyone directly in peer-to-peer form. One of the positive impacts arising from digital business is the way Indonesian people transact, which has begun to change from conventional transactions (face-to-face sellers and buyers, using cash, requiring a place/shop) to electronic transactions which open up wider opportunities for business actors to expand business with lower costs, an easier buying and selling process, and has a wider consumer reach. Currently it is estimated that more than 25 million people have made transactions via the internet (e-commerce) actively [2].

Simply put, e-commerce can be interpreted as business activities involving consumers, manufacturers, service providers, and intermediary traders using computer networks, namely the internet. Examples of online buying and selling sites (e-commerce) in Indonesia include Tokopedia, Lazada, Blibli.com, Bukalapak, Zalora, Shopee, Berrybenka, Kaskus, Traveloka, and others. Through e-commerce, conventional business activities turn digital. Doing business no longer requires conventional space, land, and so on. Enough with space in cyberspace, then business actors can carry out business. The relationship between business actors and consumers in digital business activities is guided by the framework of the agreement, with the position of business actors as sellers and consumers as buyers. The concessional principle in the agreement does not mean that the parties compile the text of the agreement from scratch, but agreements are generally carried out unilaterally or what is commonly known as a standard clause. In general, there are clauses that prevent business actors as sellers from being held accountable, including criminal charges. Based on this description, the formulation of the problem in this study is: Can the exoneration clause really limit digital business actors in Indonesia from criminal liability? As a legal research, the approach used is the Statute Approach, which analyzes based on related laws and regulations.

2 DISSCUSSION

There has been a change in the culture of Indonesian society, that is a statement that is not too exaggerated. Where it describes a society that originally relied on natural production patterns, changed to rely on intelligence. Likewise with the consumption culture, all of which are also related to the government's political design. So the discussion will begin with the socio-political side of Indonesian society which is associated with the development of digital business, then the characteristics of the exoneration clause, and the next is criminal responsibility.

2.1 Social and Political Conditions of Indonesian Society with the Presence of Digital Business

The story of the people of “Kampung Milyarder” Tuban can at least be a lesson, as well as describing the micro conditions of Indonesian society. That is, when land as a means of production has shifted from agrarian interests to mining interests, it turns out that what stands out is the consumptive side. This also corresponds to media broadcasts that indulge in a consumptive side, for example with aid programs that are broadcast on television and others. Likewise, the government, politically, encourages people to behave more consumptively, especially after 2023 is released from the determination of the emergency status of Covid - 19. So it is illustrated that indeed Indonesia as a potential market, really supports the business climate to develop well. In addition to a ready market, ease of doing business is also continuously being improved. So that digital business in Indonesia has very broad opportunities, this is mainly due to the large population of Indonesia. The total population of Indonesia, based on real time data from the World Population Review for February 2023, has reached 276,639,440 people, with this number placing Indonesia in the fourth rank for the most populous countries in the world. The dense population of Indonesia is a potential market share in economic transactions, and especially digital business whose characteristics are conducting online transactions (e-commerce) [3].

Digital businesses in Indonesia are increasing, based on data from the Central Bureau of Statistics, 34.10% of businesses are conducting e-commerce activities until 2022. This percentage has increased compared to December 31, 2021, which was 32.23%. BPS also noted that 2.87 million online businesses are spread across all provinces. In terms of revenue, transactions in 2020 reached Rp. 266.3 trillion, so there is an increase of 29.6% from 2019. The growth of the digital economy in Indonesia which is extremely fast has led to the prediction that this country will become the largest in terms of digital economy progress in the Southeast Asia region to be proven in 2022. Several indicators include the growth in the number of internet users which has increased significantly, especially also

triggered by the pandemic factor that has been going on since March 2020 [4]. The pandemic in Indonesia and globally has had a major impact on changing people's lifestyles, from those that originally relied on direct interaction models to rely heavily on interactions carried out via the internet network. So in addition to structured consumption, many Indonesian people have shifted from patterns that rely on the stability of natural resources. Shifting to become a business actor or business, which is primarily a digital business. This is of course influenced by capital factors that are not too large, as well as the ease of doing business.

2.2 Electronic Contracts Containing Exoneration Clauses

In principle, the relationship between business or business actors and consumers is based on a contract or agreement, namely an agreement or legal relationship that is carried out electronically by integrating a network of computer-based electronic systems with a communication system, which is further facilitated by the existence of a global computer network or the internet. In this legal relationship, it has legal consequences (gives rights and obligations) for the parties and is regulated by law. In this case the right is the discretion or role that exists in a person (the holder) to act on something that is the object of that right against other people. While obligations are something that must be fulfilled or carried out by someone to obtain their rights or because they have obtained their rights in a legal relationship. Legal object is something that is useful, valuable, valuable for legal subjects and can be used as the subject of legal relations. Meanwhile, legal subjects are everything that can support their rights and obligations or have legal authority (rechtsbevoegdheid) [5].

Legal relations in electronic contracts arise as a manifestation of freedom of contract, which is known in BW. This principle is also known as freedom of contract or *laissez faire*. Article 1338 BW states that "all agreements made legally, apply as laws for those who make them". The principle of freedom of contract is called an "open system", because anyone can make an agreement and anything can be made in that agreement. Thus the

agreement has the same binding power as the law, for those who make the agreement. This understanding implies that the agreement only applies to the parties who make the agreement, so that third parties or outside parties cannot claim a right based on the agreement made by the parties who entered into the agreement. Nevertheless, there are restrictions on freedom of contract as stipulated in article 1320 BW. In that article it is stated that the agreement is valid, if it is based on:

1. The agreement of those who are bound (agreement);
2. The competence of the parties (Capacity);
3. Concerning certain matters (Certainty of terms);
4. A lawful reason (Consideration).

Civil relations between parties in electronic transactions are set forth in electronic documents and are binding on the parties. An electronic contract is an agreement between parties made through an electronic system. In this case the electronic document must be understood as a form of agreement between the parties, which is not only formulated in the form of an electronic agreement but also in the features provided, such as "I agree, I accept" as a form of agreement/agreement. Seeing the formulation, the electronic contract is a standard agreement.

Agreements with standard clauses or Standard Agreements are known in various ways (standardized contracts, standard contracts). Standard agreements or standard agreements arise because of a need in practice, due to economic developments that cause the parties to seek a more practical format. Usually one of the parties prepares standardized terms in a printed agreement format (form) to then be given to the other party for approval. The definition of a standard clause is contained in article 1 point 10 of the Law of the Republic of Indonesia Number 8 of 1999 concerning Consumer Protection (UUPK), which states that "A standard clause is any rule or provision and conditions that have been prepared and determined in advance unilaterally by business actors as outlined in a document and/or agreement that is binding and must be fulfilled by consumers". Regarding agreements with standard clauses, there are limitations as follows: "Agreement with written draft terms included in the agreement that is still to be made, the number of which is uncertain, without discussing the contents in advance." Meanwhile, what is meant by

an agreement with standard clauses is an agreement that contains certain conditions that tend to be more "beneficial" for the party that prepares or formulates it. If under normal circumstances the implementation of the agreement is expected to occur a problem, then something is prepared to resolve it in the agreement [6].

The clauses that have been specified in the agreement are referred to as standard conditions. Regarding standard clauses, the PK Law regulates the following matters: (1) In offering goods and/or services intended for trading, business actors are prohibited from making or including standard clauses in every document and/or agreement if: a. Declare the transfer of responsibility of business actors; b. Stating that business actors have the right to refuse the return of goods that have been purchased by consumers; c. Stating that business actors have the right to refuse the return of money paid for goods or services purchased by consumers; d. Declare the authorization from consumers to business actors, either directly or indirectly, to take all unilateral actions related to goods purchased by consumers in installments; e. Regulates evidence for the loss of use of goods or services purchased by consumers; f. Giving rights to business actors to reduce the benefits of services or consumer assets that are the object of buying and selling services. g. Declare consumer compliance with regulations in the form of new rules, additions, continuations or further changes made unilaterally by business actors when consumers use the services they buy; h. Stating that consumers give power of attorney to business actors to impose mortgage rights, lien rights, or guarantee rights on goods purchased in installments. (2) Entrepreneurs are prohibited from including standard clauses whose location or shape is difficult to see or cannot be read clearly and whose disclosure is difficult to understand; (3) Every standard clause that has been stipulated by business actors in documents or agreements that fulfill the provisions referred to in Paragraphs (1) and Paragraphs (2) is declared null and void by law [7].

In addition to the standard clause, there is also an exoneration clause, which is a clause to transfer the obligations or responsibilities of business actors. The exoneration agreement releases one's responsibility for legal consequences that occur

due to a lack of obligations required by law. An example is compensation in terms of broken promises. In the event that the exoneration requirements state this, compensation is not carried out.

2.3 Criminal Liability of Business Actors or Digital Businesses

In principle, criminal responsibility means determining whether or not a subject is sentenced. The main principle is that there is no crime without guilt. This means that mistakes are placed in the main position to determine whether or not someone is punished; without mistakes, someone cannot be punished. The element of error consists of several things, including: committing a crime, the ability to take responsibility, and the absence of excuses. While the elements of the form of error include intentional or negligent [8].

One of the things that must be fulfilled in a criminal act is the subjective element, namely the existence of an error. There are two kinds of errors in the study of criminal law, namely intentional (dolus) and negligent (culpa). According to Memorie van Toelichting, the word "intentionally" (opzettelijk) which is often found in the articles of the Criminal Code, is interpreted the same as willens en wetens, namely something that is desired and known. There are three forms of intention, namely: 1. Deliberation as an intention (opzet als oogmerk) Deliberation as an intention is a form of intention that requires the perpetrator to carry out an act, wants not to do/neglect a legal obligation, and also wants the consequences of that action to arise. So that when someone takes an action to cause a result he wants, realizing that the result is certain or may arise because of the action that has been taken, one can say that the person has intention. 2. Deliberation as certainty (opzet als zekerheidsbewustzijn) Deliberation as a certainty, namely a form of intentionality in the form of a person's awareness of an effect that, according to human reason, in general must occur due to the commission of a certain action, and the occurrence of these consequences cannot be avoided. The consequences that arise are other consequences of the actionstaken, which are not the desired result.

3. Intentionality as possibility (dolus eventualis) Deliberation as a possibility, namely an awareness to do an action that he already knows that other consequences may arise from that action that he does not want from his actions, but the maker does not cancel the intention to do it. In this dolus, the "what can be done" theory is known, that actually, the consequences of conditions that are known to be likely to occur are not agreed upon, but even so, to achieve what is intended, the risk of consequences arising or besides that intention is also accepted. In the opinion of experts, this negligence is equated with negligence and carelessness. According to the view of many experts [9], *Culpa is defined as an error in general, but in legal science it has a technical meaning, namely a type of mistake by the perpetrator of a crime that is not as serious as intentional which is caused by lack of caution so that unintended consequences occur. Culpa is divided into two namely culpa levissima and culpa lata. Culpa levissima, is mild negligence. Meanwhile, culpa lata is gross negligence. According to legal experts, culpa levissima is found in types of crimes, because of its mild nature. But it can also be found in violations from book III of the Criminal Code* [10]. On the other hand, there is a view that the law does not pay attention to culpa levissima, so that it is not subject to criminal penalties. Whereas for culpa lata it is seen as a crime due to negligence.

3 CONCLUSION

Based on the description previously presented, it can be concluded that the exoneration clause cannot limit business actors or digital businesses in Indonesia from absolutely criminal liability. Even though business actors or digital businesses are given the flexibility to make agreements, including with standard clauses. However, that does not mean that when a criminal liability release is written and approved by the consumer, it will automatically apply. The characteristics of criminal responsibility, especially in the presence of errors, as long as the elements are fulfilled, they can still be subject to criminal penalties.

RECOMMENDATIONS

The precautionary principle must still be prioritized by consumers in an electronic transaction, so that it does not cause a detrimental impact. In addition, for business actors, making agreements with details and standards also does not protect themselves and escape punishment. Therefore good faith must always be fulfilled, providing the best service for consumers.

REFERENCES

- [1] D. Tapscott, *The digital economy : promise and peril in the age of networked intelligence*. New York McGraw-Hill.
- [2] D. Rizqy Oktora, Andriyani Syakilah, *Statistik eCommerce 2022*. Jakarta: Badan Pusat Statistik, 2022.
- [3] K. N. Hanugrahayu, "Indonesia Duduki Posisi 4, Ini 10 Negara dengan Penduduk Terbanyak di Dunia 2023," *tribunnews.com*, 2023. .
- [4] Natasya Qorri, "ASEAN as The New Kingdom of Digital Economy : Pertumbuhan Pesat Ekonomi Digital Asia Tenggara," *Pusat Studi Sosial Asia Tenggara Universitas Gadjah Mada*, 2022. .
- [5] A. Y. Hernoko, *Hukum Perjanjian Asas Proporsionalitas Dalam Kontrak Komersial*. Jakarta: Prenadamedia Group, 2010.
- [6] R. Syafriana, "Perlindungan Konsumen Dalam Transaksi Elektronik," *Lega Lata*, vol. 1, p. 437, 2016.
- [7] A. W. Hertanto, "Pencantuman Batasan Tanggung Jawab Pemilik/Pengelola Situs Dalam Transaksi Jual Beli Secara Online dan Dampaknya Bagi Konsumen," *J. Huk. dan Pembang.*, vol. 45, p. 109, 2015.
- [8] Simorangkir, "Tindak Pidana Penipuan Terkait Dengan Iklan Penjualan Barang Yang Merugikan Konsumen," *USU Law J.*, vol. 4, p. 12, 2016.
- [9] Tongat, *Pidana Seumur Hidup dalam Sistem Hukum Pidana di Indonesia*. Malang: UMM Press.
- [10] S. Roeslan, *Stelsel Pidana Indonesia*. Jakarta: Aksara Baru, 1983.