



ELECTRONIC TRANSACTIONS IN INDONESIA RELATED TO USE THE THEORY OF “LEX INFORMATICA” AND THE CONCEPT OF “SELF REGULATION”

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ABSTRACT

The basis of electronic transaction is the free will from everyone who bind himself to others, without coercion from any party, and without the necessity to meet directly. This requires regulations other than the existing law as guidelines for the perpetrators. The agreement is made under *lex Informatica*, particularly the rules made and agreed upon by the parties in electronic transaction. This article is written to discuss the use of *lex Informatica* concerning the *self-regulation* approach carried out along with its examples of electronic transaction in Indonesia. The focus of the discussing is about the benefits of using *lex Informatica* in electronic transaction and the relation between *lex Informatica* and *self-regulation* as theory and approach in electronic transaction. This study using juridical normative research methods, and descriptive-analytical specifications, through library research and field studies. The results obtained indicate that *lex Informatica* as a foundation law in internet can underlying an agreement between the parties regarding matters that are not regulated in statutory regulations and *self-regulation* relating to *lex Informatica* can be as a regulatory model that provides an opportunity for parties to regulates electronic transaction activities.

Keywords: Electronic Transaction; *Lex Informatica*; *Self-Regulation*

I. INTRODUCTION

Globalization is a necessity that cannot be avoided by any nation and country because of the fast flow of information that covers a very wide and unlimited area.¹ This development was created in line with human needs, namely to make life easier than before.² Information technology has changed the way of doing transactions and opened up new opportunities in business transactions.³ One form of business as a result of the development of information technology is electronic transactions as a part of e-commerce⁴ The development of electronic transactions in various parts of the world including in Indonesia, cannot be separated from the growth rate of the internet. Electronic transaction is an engagement or agreement or legal relationship that is carried out electronically by combining 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.⁵ Electronic transaction as a part of e-commerce is a modern business model that is non-face-to-face (does not represent business people physically) and

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¹ E. Saefullah Wiradipradja, “Dampak Negatif Globalisasi Terhadap Persatuan Dan Kesatuan Bangsa Indonesia Dan Strategi Menghadapinya” on An An Chandrawulan *et al*, *Kompilasi Hukum Bisnis Dalam Rangka Purnabakti Prof. Dr. H. Man Sastrawidjaja. S.H., S.U.*, CV Keni, Bandung: 2012, p. 55

² Hikmahanto Juwana, *Bunga Rampai Hukum Ekonomi Dan Hukum Internasional*, Tangerang: Lentera Hati, 2002, p. 23

³ Haris Faulidi Asnawi, *Transaksi Bisnis E-Commerce Perspektif Islam*, Yogyakarta: Magistra Insania Press, 2004, p. 42

⁴ In the UNCITRAL Model Law made by United Nations , *e-commerce* is briefly defined as any trade activity carried out by exchanging information provided, transmitted, received or stored through electronic services, optic or other similar devises including, but not limited to Electronic data Interchange (EDI) *e-mail*, telegram, telex, or telecopy. See Article 1 and 2 of the UNCITRAL Model Law

⁵ Satriawan, Dewa Gede, *Hukum Transaksi E-Commerce Di Indonesia*, Surabaya: CV Jakad Publishing, 2019, p. 1

non-sign (does not use the original signature).⁶ The presence of e-commerce allows the creation of healthy competition between small, medium, and large businesses in seizing market share.⁷ Approval to buy goods in e-commerce system by clicking approval on the transaction is a form of acceptance that states approval in an electronic transaction agreement. Transactions in e-commerce are the same as conventional ones, the difference is only in the media used, in e-commerce the media used is internet which do not used in conventional commerce. The agreement or contract in e-commerce is created through online.

Regulatory provisions regarding electronic transaction in Indonesia are generally regulated in Law Number 11 of 2008 concerning Electronic Information and Transaction and Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 Concerning Electronic Information and Transactions (hereinafter referred to UU ITE). In Article 1 point 2 of the Law, it is stated that Electronic Transactions are "legal acts committed by using computers, computer networks, and/or other electronic media". Referring to the provisions of Article 17 paragraph (1) of the ITE Law which states that "Electronic Transactions can be carried out in a public or private sphere", then further in Article 17 paragraph (3), it is stated that the provisions regarding the implementation of Electronic Transactions, one of which is regarding the agreements formed by the parties involved in it are regulated in Government Regulation Number 71 of 2019 concerning the Implementation of Electronic Systems and Transactions (PP PSTE). Hence, transaction buying and selling in e-commerce according to the ITE Law and PP PSTE above is a form of electronic transaction that can be accounted for and is an electronic contract.

Sellers in e-commerce transactions does not have to meet directly with buyers or consumers⁸, transaction in e-commerce can be done by email, messages and others. Data messages containing the agreement and/or contractual agreement can be conveyed by one of the parties concerned to the other party (the recipient, addressee) directly or through the mediator through electronic services such as the internet, extranet, email, and others.⁹ These things are the advantages of using e-commerce transactions in the business world so that transactions become more effective and efficient.

The nature of e-commerce practice is based on the free will of everyone, without coercion from any party, and is carried out without the need to meet *face-to-face* and is carried out across the borders of a country. E-commerce activities raise other legal issues, including those related to the authentication of legal subjects who make transactions via the internet, legally binding power, objects of traded transactions, mechanisms for transferring rights, legal relationships and accountability of parties involved in e-commerce transactions, legality electronic record documents and digital signatures as evidence.¹⁰

E-commerce transactions contain many legal aspects that must be considered, for example regarding the validity of the sale and purchase agreements made electronically, regarding legal protection for disadvantaged consumers. As a result of these activities, it is not uncommon for consumers to experience losses in shopping and making transactions online. Cases in e-commerce transactions often contain elements of fraud as experienced by a consumer who purchases a hard disk at an e-commerce company Tokopedia with a seller named "PC seller". The consumer bought the hard

⁶ Suparni, Niniek, *Masalah Cyberspace Problematika Hukum dan Antisipasi Pengaturannya* Jakarta: Fortun Mandiri Karya, 2001, hlm. 33

⁷ Kamal, Farizal F., *Cyber business*, cet. 3 Jakarta: Elex Media Komputindo, 1999, p. 1

⁸ M. Arsyad Sanusi, "Transaksi Bisnis dalam Electronic Commerce (E-Commerce): Studi tentang Permasalahan Hukum dan Solusinya" *Jurnal Hukum*. No. 16 Vol. 8. Maret 2001, p. 11

⁹ *Ibid*

¹⁰ Satriawan, Dewa Gede, *Op. Cit.*, p. 5

disk product for Rp450 thousand, but he was deceived because the consumer only received a paper with an external hard disk with a capacity of 1 Terra Byte (TB), not the physical form of the hard disk that was expected.¹¹ The cases above are only a handful of the many cases of e-commerce transactions between business actors and consumers in Indonesia. Then, with the nature of e-commerce transactions which are a form of self-regulation, namely the free will of every person, without coercion from any party, and carried out without the need to meet face to face and cross the territorial boundaries of a country, how is the settlement from the problem of the agreement made by the parties?

The ITE Law and PP PTSE are regulations established by the Government in the framework of the procedures for implementing electronic transactions between business actors and consumers along with the conditions accompanying the formation of such electronic contracts. However, the content or content in the electronic contract is determined by the agreement formed between business actors and consumers. The ITE Law in Article 17 paragraph (2) only regulates that parties conducting electronic transactions are obliged to have good faith,¹² and Article 18 paragraph (1) electronic transactions that are outlined in electronic contracts bind the parties. As a result of the agreement made by the two parties, it is necessary to specifically regulate various legal aspects related to e-commerce and can be used as a guide for the perpetrators.¹³

The parties consist of business actors offering products, potential customers, payment service providers, expeditions, communicating online, based on an agreement agreed by each party. The arrangement in the agreement is under the definition of *lex Informatica*, which according to Joel R. Reidenberg is defined as “the set of rules for information flows imposed by technology and communication networks”.¹⁴

Lex Informatica is the result of thinking that the internet as the result of technology "is not just a tool", based on the argument that the internet presents a new space called cyberspace.¹⁵ Those who see that there are rules in cyberspace and try to dig up what rules are there. Joel R. Reidenberg suggested that the rule used to regulate cyberspace is *lex Informatica*.¹⁶ Therefore, this argument recognizes the existence of law in cyberspace, namely self-regulation, and views on the need to explore legal rules following the uniqueness of cyberspace.¹⁷

The agreement formed between the two parties in e-commerce transactions is one of the forms regulated in *lex Informatica*. However, how to implement the use of *lex Informatica* associated with the self-regulation approach carried out in Indonesia based on the above cases. A further question is what are the benefits of using *lex Informatica* in e-commerce? and how is the relationship between *lex Informatica* and self-regulation in e-commerce?

¹¹Rivki, “Kasus Jual-Beli Online Gambar Hard Disk, Ahli Hukum: Ada Unsur Menipu”, on <https://news.detik.com/berita/d-4302473/kaus-jual-beli-online-gambar-hard-disk-ahli-hukum-ada-unsur-menipu>. Accessed on 15th of October 2019

¹²Pasal 17 ayat (2) Undang-Undang Nomor 11 Tahun 2008 Tentang Informasi dan Transaksi Elektronik menyebutkan bahwa “Para pihak yang melakukan Transaksi Elektronik sebagaimana dimaksud pada ayat (1) wajib beriktikad baik dalam melakukan interaksi dan/atau pertukaran Informasi Elektronik dan/atau Dokumen Elektronik selama transaksi berlangsung.”

¹³Pasal 18 ayat (1) Undang-Undang Nomor 11 Tahun 2008 Tentang Informasi dan Transaksi Elektronik menyebutkan bahwa “Transaksi Elektronik yang dituangkan ke dalam Kontrak Elektronik mengikat para pihak.”

¹⁴Joel R. Reidenberg, “Lex Informatica: The Formulation of Information Policy Rules Through Technology” *Texas Law Review*, Vol. 76 No. 3, February 1998, p. 553, on <https://pdfs.semanticscholar.org/7f22/c171859ac1885ae9afa3afc3373f197aa133.pdf>. Accessed on 11th of October 2019

¹⁵Agus Rahardjo, *Model Hibrida Hukum Cyberspace (Studi Tentang Model Pengaturan Aktivitas Manusia Di Cyberspace dan Pilihan Terhadap Model Pengaturan Di Indonesia)*, Semarang: Universitas Diponegoro, 2008, p. 16

¹⁶*Ibid.*, p.17

¹⁷*Ibid*

II. RESEARCH METHODS

The writing of this article was carried out using the support of normative juridical research methods carried out against the norms embodied in the relevant laws and regulations, including Law Number 11 of 2008 concerning Electronic Information and Transactions, Government Regulation Number 82 of 2012 concerning System Operation. and Electronic Transactions, and others. Writing is also done using descriptive-analytical specifications, which are supported by information obtained from literature books, newspapers, and online media, as well as the work of experts related to this research. These data are collected through library research (library research) and search through internet media (internet research). The authors also conducted field studies related to the problems that the authors raised. Finally, data analysis was carried out through qualitative normative analysis. The data analysis method is used to conclude from the collected research results.

III. DISCUSSION AND RESULTS

Benefits of Using Lex Informatica in E-commerce Transactions in Indonesia

We must first understand what is meant by Lex Informatica as a principle, habit, and norm that regulates cyberspace and grows in the practice space and is generally recognized.¹⁸ The development of lex Informatica is a development of lex mercatoria, which is the general custom and propriety of the business community which is applied in the practice of trade law in various countries and is often used when there is a legal vacuum so that it becomes rechtsvinding.¹⁹

In the beginning, lex mercatoria grew and developed from regulations established by business actors (self-regulation) in the form of customary commercial law rules free from state interference. Lex Informatica was introduced by Joel R. Reidenberg to refer to a new instrument in legislation.²⁰ The basis is that technology can be used to define certain rights and obligations. The advantage of this legislative instrument is that it forces users to perform certain actions. So, rights and obligations can be implemented immediately. This is different from traditional legal instruments that we are familiar with because what can and cannot be done is programmed in advance. Lex Informatica deals with legal arrangements for internet use as a result of globalization around the world.

Antonis Patrikios mentioned that Lex Informatica is:²¹

“the body of transnational rules of law and trade usages applicable to cross-border e-business transactions, created by and for the participants in crossborder e-business and applied by arbitrators to settle disputes based on the intention of the parties and functional comparative law analysis taking into account the current state of play in e-business. Lex Informatica is defined by its sources. It is the product of private decentralized law-making emerging mainly from the discourses of actors in cross-border e-business transactions and information technology networks, and not from the political centers of the nation-state and international institutions. Lex Informatica is an expansive concept encompassing several specific variations depending on the e-business sector it derives from and to which it applies.”

¹⁸ Ahmad M. Ramli, *Cyberlaw dan Haki Dalam Sistem Hukum Indonesia*, Bandung: Refika Aditama, 2004, p. 21

¹⁹ Ign. Sumarsono Raharjo, “Lex Informatica Sebagai Sarana Harmonisasi Hukum Dalam Electronic Commerce Untuk Memperlancar Transaksi ME-ASEAN,” dalam Prosiding Seminar Nasional, *Kesiapan Indonesia: Harmonisasi Hukum Negara-Negara Asean Menuju Komunitas ASEAN 2015*, Surakarta; Universitas Muhammadiyah Press, 2015, p. 200

²⁰ Joel R. Reidenberg, *Op.Cit.*, p. 554

²¹ *Ibid.*, sebagaimana dikutip dari Antonis Patrikios, “Resolution of Cross-border E-Business Disputes by Arbitration Tribunals on the Basis of Transnational Substantive Rules of Law and E-Business Usages: The Emergence of the Lex Informatica”, 21st BILETA Conference: *Globalisation and Harmonisation in Technology Law*, Malta: April 2006, p. 5-6

This opinion shows that *lex Informatica* originated in e-commerce transactions and originated from the internet network that developed along with the rapid development of information technology, so that it developed and did not come from regulatory policies made by a country and international institutions. On that basis, habits and appropriateness that develop in information technology and are adhered to and carried out in e-commerce transactions will become law for the parties and bind each other as agreed in the electronic contract.

Lex Informatica has a specific set of characteristics that can flexibly advance the objectives of an information management policy.²² The formulation of *lex Informatica* as an arrangement has avoided many difficulties with the significance of the conflict and the uncertainty inherent in its legal settlement.²³ *Lex Informatica* offers a new way to deal with difficult problems faced by a legal regime.²⁴ So, it can be said that e-commerce transactions as a business method have the potential to create legal norms and standards in cyberlaw, which here is *lex Informatica*.

Lex Informatica has 3 (three) forms of special characteristics for establishing information management policies and drafting of regulations in the information society, namely:²⁵

1. *Lex Informatica* as a technology regulation does not depend on national territorial boundaries
2. *Lex Informatica* allows customization of regulations with a wide variety of technicalities and
3. *Lex Informatica* as a technology regulation benefits from the integration of self-enforcement and monitoring of internal compliance.

Cyberspace can be likened to a place that is limited only by screens and passwords²⁶ and has radically changed the relationship between legally significant (online) phenomena and physical locations.²⁷ Based on these characteristics, regulation and law enforcement in cyberspace in various ways, one of which is related to e-commerce transactions, of course, cannot use traditional methods, such as the enactment of the laws of a certain country. This shows the importance of *lex Informatica* management.

Lex Informatica is very supportive of e-commerce transactions because of the electronic contracts formed by business actors and consumers based on the agreement on the contents of the contract as well as the trust formed by the two parties who did not meet face to face when forming the electronic contract. The electronic contract is the will of the parties so that it becomes binding law for both parties. This is similar to the principle of freedom of contract which frees each person to decide whether he or she agrees or not, the parties' freedom to choose with whom to agree, the freedom of the parties to determine the form of the agreement, the freedom of the parties to determine the contents of the agreement, and the freedom of the parties to determine how the agreement is made, including in the standard agreement, the method of agreeing has been determined by one of the parties.²⁸ This freedom of contract provision is regulated in Article 1338 of the Civil Code.

²²Budhijanto, Danrivanto, *Cyberlaw*, Bandung: Logoz Publishing, 2019, p. 3

²³*Ibid*

²⁴*Ibid*

²⁵*Ibid*

²⁶Johnson, David R. and David Post, *Law and Borders: The Rise of Law in Cyberspace*, Tanpa Kota: Stanford Law Review, 1996, p. 1357

²⁷*Ibid.*, p. 1370

²⁸Johannes Gunawan, "Penggunaan Perjanjian Standard dan Implikasinya Pada Asas Kebebasan Berkontrak", *Padjajaran Majalah Ilmu Hukum Dan Pengetahuan Masyarakat* No. 3-4, Jilid XVII, Bandung: Alumni, 1987, p. 55

The ITE Law and PP PTSE as legal regulations established by the government do not regulate the content and provisions contained in electronic contracts formed by business actors and consumers because these matters are given entirely to both parties forming the agreement. This is where the role of Lex Informatica offers a solution where the law as a legal regime does not regulate in detail about an agreement. Then the agreement of the parties is enforced if the contents of the agreement are not against the law. Agreement is one of the important elements in the formation of an agreement as stated in Article 1320 of the Civil Code. Taking the example of the case previously described the solution to the problem can be resolved using the principles, habits, and norms of lex Informatica.

The agreement that is violated by the business actor in the case of e-commerce transactions above where there is an element of fraud from the business actor to the consumer because the consumer only gets paper with a hard disk image, not the physical form of the hard disk which is expected to show that there is no good faith for the agreement formed. by both parties. E-commerce transactions require vigilance, accuracy must be owned by consumers of the business actor's offer so that consumers must be careful in buying the desired item. Lex Informatica emphasizes the existence of agreement and conviction which creates a state of trust between the two parties. This is not fulfilled in the case described earlier.

The substantive norms and flexibility that lex Informatica provides provide useful and new public policy tools. E-commerce transactions using online media are cross-territorial, cross-time, place, and the parties involved in it. Lex Informatica makes e-commerce transactions more trustworthy because of an agreement that is obeyed by each party and there is confidence and a state of mutual trust between the parties who carry out the e-commerce transaction. The parties who make and they also must comply with the electronic contract. So, the use of lex Informatica provides benefits and as a solution that can be used in managing the relationship between the parties in e-commerce transactions based on the agreement made by the parties.

The Relationship Between Lex Informatica and Self-Regulation in E-commerce Transactions

Initially, many believed that the internet or cyberspace was a world that was beyond the reach of regulations established by the government because it was not limited by place and time. But in the current era, this has changed because the internet presents a new space called cyberspace, not only as a tool. Lex Informatica as explained is the rule used to regulate cyberspace. Besides, there is also self-regulation as a rule. Self-regulation is a form or type of regulatory model which is a middle way between orders and a supervisory system carried out by the state which is later defined as state regulation, with market-driven regulation in an economic activity that contains the executives from regulators about certainty in the process of forming regulations, certainty of the contents of the rules, and the enforcement and implementation of formal regulations.²⁹ In industries that use the internet, self-regulation is based on the code of practice prepared by industry parties.³⁰ Self-regulation originates and grows from an old tradition and an age when national regulations did not apply among long-distance traders at the time of the lex mercatoria in the Mediterranean region.³¹

Self-regulation means that regulations are not made by the government, but by industry or professional circles. However, the industry does not need to take over the three components contained

²⁹ Bonnici, Jeanne Mifsud, *Self-Regulation on Cyberspace*, The Hague: TMC Asser Press, 2008, p. 24.

³⁰ Hans J Kleinstaub, "Self-regulation, Co-regulation, state regulation, The internet between regulation and Governance, Organization for security and Co-operation in Europe (OSCE) Conference Amsterdam", *Guaranteeing Median Freedom On The Internet*, 2004.

³¹ *Ibid*

in an arrangement. In self-regulation, it is the industry that makes the rules and determines the objectives of the formation of regulations.³² This is different from Government regulation in which the formation of rules that determine the purpose of making rules and implementing regulations is the official (government).³³ Self-regulation can be seen in various forms and there is no comprehensive understanding that can be interpreted correctly. One way to understand it is to distinguish several important things, namely:³⁴

1. Distinction between individual self-regulation in which a group of people regulates their provisions which they must comply with independently (without interference from other parties) and self-regulation by groups, where self-regulation can be accepted as provisions made by private parties and regulations created by a professional community and business networks. This can be understood as a rule-making process whereby an organization at the industry level (as opposed to the “governmental or firm-level”) manages companies in the industrial sector. This definition implies that industry self-regulation requires cooperation between companies in the industrial sector with each other
2. Differentiation from “economic self-regulation” where the regulation or control is in the market or the part that determines the economic life, and social self-regulation which aims to protect the community or the environment resulting from industrialization
3. Differences in the meaning of self-regulation based on the level of government intervention. Rees³⁵ identifies 3 forms of self-regulation, namely:
 - a. voluntary self-regulation in which the making and implementation of regulations is carried out by companies or the industry itself independently of outside government interference
 - b. mandated full self-regulation, where the making of regulations and their implementation is carried out by the private sector (not by the company or the industry itself) in this case, the government supervises the implementation of these regulations and if necessary, actions can be taken to implement more effectively the regulations made the
 - c. mandated of privately written rules and governmentally mandated internal enforcement of publicly written rules where there are restrictions on the making of regulations by the private sector, but it can also be carried out by the government.

The explanation of self-regulation above is proof that *lex Informatica* as a principle, norm, and rule in cyberspace has a relationship with one another in e-commerce transactions. It has been previously explained that the agreement formed between the parties, in this case, the business actor and the consumer listed in the electronic contract, is a legal regulation that binds the parties as appropriate by law. The agreement that was formed gave birth to a sense of confidence and mutual trust between the two parties in e-commerce transactions because the two parties did not meet and meet face to face before and only communicated via internet media. That is what is called *lex Informatica*.

Self-regulation as a regulation formed at the will of the public in an industry is a matter related to *lex Informatica* and supports the formation of *lex Informatica*, where both parties have agreed to carry out the e-commerce transaction. Because the agreement has been formed, the electronic contract containing the rights and obligations of each party must be carried out by both parties. This means that there is a relationship between *lex Informatica* and self-regulation as a regulation established by the

³² Angela J Campbell, “Self-regulation and the Media” *Federal Communication Law Journal*, 1999, p. 10.

³³ *Ibid*

³⁴ Neil Gunningham & Joseph Rees, “Industry Self-Regulation: An Institutional Perspective”, *LAW & POLICY*, Vol. 1,9 No. 4, Oktober 1997, page 364-365.

³⁵ *Ibid*, page 364.

industry, in this case, business actors and consumers who are connected and connected to an internet network.

Associated with the case example as described above, where the agreement formed between the two parties is not carried out properly by the business actor because it does not provide goods as desired by the consumer is a form of violation or default of the agreement formed between the two parties. Because the contract binds both parties as a law, some consequences will be accepted by the business actor for selling goods that are not in accordance with what was offered. The legal consequence is under what is stated in the contract agreed upon by the two parties. For example, refunds for the value of goods that have been paid by consumers, or business actors are required to send back the goods that were promised. This is an example of self-regulation formed by the parties which is carried out by the two parties forming the contract.

Lex Informatica and self-regulation are two things that are related to each other. Therefore, the parties who have agreed to form such an agreement should obey their rights and obligations in carrying out e-commerce transactions.

IV. CONCLUSIONS

Lex Informatica is very supportive of e-commerce transactions because of the electronic contracts formed by business actors and consumers based on the agreement on the contents of the contract as well as the trust formed by the two parties who did not meet face to face when forming the electronic contract. The electronic contract is the will of the parties so that it becomes binding law for both parties. E-commerce transactions using online media are cross-territorial, cross-time, place, and the parties involved in it. Lex Informatica makes e-commerce transactions more trustworthy because of an agreement that is obeyed by each party and there is confidence and a state of mutual trust between the parties who carry out the e-commerce transaction.

Lex Informatica and self-regulation in e-commerce transactions are closely related to one another. As regulations are formed at the will of the public in an industry, self-regulation plays an important role in the creation of an electronic contract agreement that is formed between the two parties. Because the agreement has been formed, the electronic contract containing the rights and obligations of each party must be carried out by both parties. The agreement creates confidence and mutual trust between the two parties who carry out e-commerce transactions and this is what is important from Lex Informatica.

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