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The nature of fairness in contracts: An electronic contract perspective

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Abstract

Introduction to the Problem: The development of information technology has given rise to various types of electronic contracts in the form of adhesion contracts. Unfair legal issues surround the contract formation process and the content of new electronic contract models, such as browser wrap agreements and sign-in wrap agreements. In several cases that have been decided by the Court, the panel of judges has its own standards for deciding disputes based on a fair electronic contract.
Purpose/Study Objectives: This paper aims to elaborate on the nature of contractual fairness from an electronic contract perspective.
Design/Methodology/Approach: This study employed the statute approach and the case approach. This research examines various regulations relating to agreements, electronic contracts, the doctrine of unconscionability and examizing a number of decisions pertaining to electronic contracts from courts in Indonesia as well as various other nations.
Findings: The findings of the study demonstrate that the fairness of electronic contracts can be evaluated through two key criteria: the contract formation process and the substantive clauses within the agreement. Procedural unfairness arises when the disadvantaged party is unaware or does not fully comprehend their contractual obligations. Conversely, substantive unfairness occurs when contractual terms impose disproportionate burdens on the weaker party. Beyond the doctrine of unconscionability, ensuring equity in electronic contracts necessitates adherence to the principles of transparency, the duty to read, and reasonable expectations. To safeguard consumers from inequitable agreements, these principles should be codified within the regulatory framework of Indonesia's Electronic Information and Transactions Law.
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Introduction

The question of what "fairness" is is a question that is often heard, but the correct understanding is complicated and even abstract, especially when it is linked to various complex interests (Eisenberg, 2018). The issue of contract fairness continues to be debated by academics and legal practitioners. Along with technological developments, theories and studies regarding the values of fairness in contracts continue to develop (Gardner, 2021). This condition is in line with the increasing importance of strengthening consumer protection, especially in adhesion contracts (Loos, 2016; McCall, 2020; Wiwoho et al, 2023). Most recently, the case of Heller vs. Uber in 2020, which was decided by the Supreme Court of Canada (SCC), could be a representation of the meaning of contractual fairness (Harvard Law Review, 2021a).

The Heller vs. Uber case became a turning point for judges to interpret the terms and conditions in electronic contracts (Gardner, 2021). The clause in the electronic contract between Heller and Uber stating that the agreement between Heller (driver partner) and Uber is exclusively governed by Dutch law and the clause in the contract stating that any disputes must be resolved by arbitration in the Netherlands (arbitration clause) have been annulled by the SCC. The SCC stated that the clause was unconscionable for Heller (Harvard Law Review, 2021a). The panel of judges raised the issue of accessibility which justified the deviation from the general rules of arbitration. The court determined that the settlement of the case could not be resolved through arbitration due to consideration of the lack of access, both in terms of distance, costs and Heller's capabilities. The judge used the unconscionability doctrine as an indicator to decide the case (Harvard Law Review, 2021b).

In contrast to Heller versus Grab, in the 2022 *Darajat versus Grab* case which was decided by the Indonesian Supreme Court, the panel of judges had different considerations. Darajat is a driver partner who is bound by an agreement with Grab Indonesia and PT TPI (Teknologi Pengangkutan Indonesia). Darajat participated in the "Gold Captain" program, which is a car ownership program for Grab drivers for 5 years. Darajat is obliged to pay a deposit of Rp. 5,000,000 (five million rupiah) while Grab and PT TPI provided a Daihatsu Sigra car to Darajat. Darajat took issue with the service provisions in the Gold Captain program which were often changed unilaterally by Grab. The changes questioned by Darajat are schemes for limiting working hours and canceling orders which could reduce Darajat's performance. As a result of this scheme change, Darajat's performance dropped from Level II to Level I, making it impossible for Darajat to complete the Gold Captain program for 5 years (Mahkamah Agung Republik Indonesia, 2022).

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In its considerations, the panel of judges stated that the Terms of Service were binding as an Agreement between Darajat and Grab. Darajat agreed to the agreement because if he did not agree then Darajat should not have used the Grab Application. The panel of judges used classic contract theory where agreements can be implemented according to the agreed terms without paying attention to fairness (the process of forming the agreement and the substance of the agreement). The judge who decided the case did not assess Darajat's abilities. Darajat had difficulty taking legal action through arbitration in the City of Jakarta because it was on a different island and the distance between Medan City (where Darajat lived) and Jakarta City was far. Apart from that, arbitration fees in Jakarta are expensive and unfair because Darajat earns little as a driver. The language for solving cases which must use English is difficult for Darajat because of his low education (Mahkamah Agung Republik Indonesia, 2022).

On the one hand, most of the electronic contracts that exist today are contracts with standard forms (Canino, 2017; McCall, 2020). Standard form contracts are still a problem because they are weak in providing protection to weak parties (Loos, 2016). Along with technological developments, electronic contracts have evolved from various models (Gamarello, 2015; McCall, 2020). Contractual fairness in electronic contracts gives rise to legal questions about both the contract's content and formation procedure. (Canino, 2017; Gardner, 2021). In connection with this issue, this paper aims to elaborate on the nature of contract fairness from an electronic contract perspective. This paper will also identify the characteristics of electronic contracts that reflect procedural unfairness and substantive unfairness.

Methodology

This study employed the statute approach and the case approach as its two research methodologies. This research examines various regulations relating to agreements, electronic contracts, and the doctrine of unconscionability. The analyzed legal materials consist of the Indonesian Civil Code (KUHPerdata), the Indonesian Consumer Protection Act 1999 (ICPA 1999), the Indonesian Information Transaction Act 2008 as amended in 2024 (ITE Act 2024), the Indonesian Personal Data Protection Act 2022 (IPDPA 2022), the Nieuw Burgerlijk Wetboek (New Netherlands Civil Code - NBW), and the (new) French Civil Code.

Apart from the statutory approach, this research also uses a case approach. In this study, a number of decisions pertaining to electronic contracts from courts in Indonesia as well as various other nations will be examined. Some of the cases analyzed include:

1. Darajat Hutagalung vs. Grab in Indonesia. Medan District Court Decision No. 191/Pdt.G/2020/PN-Mdn, Medan High Court Decision Number 104/Pdt/2021/PT MDN, and Indonesian Supreme Court Decision Number 1370 K/Pid/2022.
2. Heller vs. Uber in Canada. Recent Case: 2020 SCC 16, 447 D.L.R. 4th 179 (Can.) Uber Technologies Inc. v. Heller

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Results and Discussion

The Nature of Fairness in Contracts: An Electronic Contract Perspective

Since Aristotle's thinking, philosophers have recognized that exchange transactions are necessary for the development of society, but philosophers have also argued that fairness requires that the things exchanged have the same value (McCall, 2020). Aristotle stated: "But in dealings of exchange justice is such that it includes reciprocation according to proportionality but not according to equality". It seems clear that exchanging a pair of shoes for a house would be an unfair exchange. The shoe owner will gain a large increase in wealth in exchange for his pair of shoes. By proportionality, Aristotle means that proportional equality of values must be maintained (Kharisma, 2024).

Aristotle did not provide a complete explanation for the practical calculation of value and for correcting unfair exchanges. However, Aristotle suggested that one of the functions of law (in the form of fairness imposed by judges) is to correct the redistribution of wealth caused by unfair exchanges, whether voluntary or involuntary (McCall, 2020). Aristotle's idea of fairness is the basis for the doctrine of unconscionability (McCall, 2020). Judges utilize the concept of unconscionability as a tool to enforce agreements and protect against unfairness (White et al, 2022). Therefore, the aim of the unconscionability doctrine is to prevent unfair contract clauses (Gamarello, 2015).

The meaning of the doctrine of unconscionability is that an unfair contract cannot be implemented (Trakic, 2016). The concept of unconscionability restricts the parties' right to freedom of contract to prevent the abuse of unrestricted authority and unequal bargaining power. The unconscionability doctrine uses two indicators to test whether the contract is fair or not. These two indicators include: procedural unconscionability and substantive unconscionability (Eisenberg, 2018).

Procedural unconscionability is defined as follows: If there is a flaw in the contracting procedure that prevents one party from entering into the agreement freely and consciously, the contract is procedurally unconscionable (Eisenberg, 2018). In this indicator, contractual unfairness is seen in the contract formation process. The relative negotiating power of the parties and whether the weaker party is free and able to negotiate are important elements in procedural unconscionability (Boliek, 2022). For example, in a standard contract form, is the weak party free and able to negotiate changes to the terms offered (Eisenberg, 2018).

Substantive unconscionability is related to the content of the agreement. Substantive unconscionability tests whether the contents of the agreement impose an unreasonable burden on one of the parties. According to Leff, substantive unconscionability in contracts contains conditions that are very one-sided or unfair. The court stated that if the clauses of a contract go against societal norms of justice, the agreement is substantively unjust. Two important aspects of substantive

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unconscionability include: whether the requirements are one-sided and whether they have a serious impact on the injured party so that the clauses are unconscionable and/or unfair (Boliek, 2022).

The theory of justice according to Amartya Sen can also be used to discover the nature of fairness in contracts. Sen uses the "Capability Approach" which focuses on the relationship between the resources that humans have and what they can do with these resources (Sen, 2009). Through the capability approach, Sen classifies differences that can affect human welfare. According to Sen, this difference is called a "Focal Variable" which is the starting point for understanding social justice. These focal variables include personal characteristics such as gender, age, health and mental condition; and external differences such as the living environment, social conditions, and the presence or absence of natural resources in that environment (Sen, 2009).

The focal variable is used to see whether equality or fairness is possible. This is because the various focal variables possessed by humans will influence the individual in his efforts to achieve well-being. According to Sen, what is measured is not only identifying a person's "functionings", namely what he does to achieve his goals, but also identifying whether a person has the freedom to carry out those actions (Sen, 2009).

The idea of "capability" according to Sen refers to a combination of alternative "functionings" that are feasible for a person to achieve. He further asserts that capabilities are essentially “substantive freedoms” because they enable or entitle individuals to achieve various lifestyles (Sen, 2000). The aim of the “capability” approach to contractual fairness is not only to identify a person's “functionings”, but also to note the degree of individual freedom, and to create conditions under which all individuals can increase their freedom and enjoy equality of capabilities. Sen's focus is on a person's abilities rather than on the goal of achieving “functionings”. By focusing on abilities, a person will be able to gain more insight into the options and options available to that person, more so than if one focuses only on the “functionings” that are achieved (Sen, 2000).

The procedure of creating the contract and its contents must be taken into consideration when interpreting and evaluating the fairness of electronic contracts. Procedural electronic contracts must not contain an element of no free will in the contract formation process which causes one of the parties not to enter into an agreement consciously and freely. Even though changes in electronic contract clauses are adhesion, they must always be informed to the user or consumer. Consumers are also given the choice to continue the contract or not as a form of consideration for contract changes (Eisenberg, 2018).

From the substantive aspect, the nature of fairness in electronic contracts is the substance of the contract which places an unreasonable burden on one of the parties and does not contain conditions that are so one-sided. An electronic contract is

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substantively fair if the burden placed on the weaker party does not conflict with the values of public order and the terms do not conflict with general fairness that applies in society (Eisenberg, 2018).

The nature of fairness in electronic contracts which is measured from the process of contract formation and the substance of the contract is in line with the theory of justice according to Amartya Sen (Eisenberg, 2018). According to Sen, justice is not just having goods or rights and obligations, but also having freedom in contractual relationships and having the ability to create fair consensus (procedural justice) and the ability to fulfill obligations in accordance with the substance of the agreement (substantive justice) (Sen, 2009).

Unfairness of Electronic Contracts

1. Procedurally Unfair Electronic Contracts

In contract law, it is an axiom that for a contract to have binding power, there needs to be a meeting of minds as a form of consensus between both parties that they want to enter a contractual relationship with each other with certain conditions. This reflects the principle of consensualism and the principle of freedom of contract, although sometimes agreement can be implied, for example through the actions of the parties and not through words, this agreement is a fundamental requirement in forming a contract (Eisenberg, 2018).

In electronic contracts it is difficult to identify when the user (consumer) implicitly agrees to enter a contractual relationship with a digital service provider (electronic system operator) with certain conditions, which is one of the disadvantages of the indirect nature of online communication between the parties (Permana, 2021; Kharisma & Diakaza, 2024). In contrast, it would be easier for digital service providers to provide services to users, without obtaining the user's explicit consent to such actions. This is one of the reasons for the introduction of specific disclosure obligations in relation to long-distance contracts for digital service providers, which will cause consumers to explicitly acknowledge and agree to orders with an obligation to pay. However, this provision will not protect consumers in situations where digital services are provided free of charge, because currently the regulations governing electronic contracts do not recognize other means of payment, for example payment with personal data.

One form of new electronic contract is a browsewraps agreement. In this form, it does not require users to express consensus on the terms and conditions explicitly. The user instead gives his consent just by using the website. In fact, what often happens is that digital service users do not need to read the terms of service. The browsewraps agreement does not fulfill the consensus element due to minimal notification so that not all users know that the user and the digital service provider are bound by an agreement. The consensus element regulated in Article 1320 of the Indonesian Civil Code is not fulfilled because there is a possibility that the user is not aware of the

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existence of an agreement and does not know the contents of the agreement so that legal issues arise as to how he can agree on the contents of the agreement.

In a conventional contract, the two parties face each other directly, so every time an agreement is drawn up there is an opportunity for both parties to negotiate even though the agreement is in the form of a standard agreement (Suryadi & Rahayu, 2023). In the form of a standard agreement, there are still basic things that can still be negotiated, for example in a credit agreement, the debtor still has the opportunity to negotiate interest and credit limits. However, unlike a sign-in wrap agreement, the user has absolutely no opportunity to negotiate. This condition is of course detrimental for digital service users because in modern electronic contracts the parties have inequality of bargaining power, so they are vulnerable to clauses in the agreement that are unfair and one-sided (Suryadi & Rahayu, 2023).

Inequality of bargaining power is a characteristic of procedurally unfair contracts (Kharisma, 2024). In modern electronic contracts, the user will ultimately accept any contract presented to him without any negotiation process. By clicking or browsing, and because most social media websites are free to consumers, digital service providers can easily leverage their superior bargaining power to arrange clauses in agreements that are highly profitable for themselves (Suryadi & Rahayu, 2023).

2. Substantively Unfair Electronic Contracts

Analysis of whether a provision in an electronic contract significantly unbalances the parties' rights and responsibilities, goes against good faith, and hurts the weaker party is necessary to determine whether a contract is substantially unfair (Eisenberg, 2018). Therefore, finding a clause that is detrimental is an important element as an indicator in the unfairness test because the clause will be the basis for the court's assessment (Nation III, 2005). Substantively unfair electronic contracts can be seen from several clauses and conditions in digital services as follows:

a. Personal Data and Targeted Advertising

Personal data is an asset that has high value in the digital economy era. In digital services, personal data can be commercialized, for example for targeted advertising (Wiwoho et al, 2023). In addition to having economic value, the specific nature of personal data is vulnerable to misuse in fraudulent practices and financial crimes. In fact, some of them are misused for practical political purposes (Gerodimos & Justinussen, 2015). The clause regarding personal data on Facebook (Loos, & Luzak, 2021) can be an example to discuss this: “We use your personal data to help determine which personalized ads to show you” (Meta, 2022).

Based on this clause, the terms and conditions in Facebook's electronic contract which refer to providing free social media services can be misleading and unfair (Loos, & Luzak, 2021). Facebook users' personal data is commercialized for advertising, so it can be said that these digital services are not provided for free. The clause also allows

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Facebook to freely use users' personal data and allows Facebook to commercialize data originating from consumers to third parties.

Based on IPDPA 2022, consent is a requirement for personal data to be processed by the owner of the personal data. When processing personal data, data controllers must notify the owner of the data about the reasons behind the processing, the kind and importance of the data to be processed, how long documents containing the data must be kept on file, and specifics of the information gathered. However, this is different if the clause is not specifically conveyed to consumers in a form that is understandable and easy to access, using clear and straightforward language, because in this case user consent is not given (Kharisma, 2024).

b. Release of Liability

In electronic contracts in the field of digital services, disclaimer clauses are often found which essentially exclude or absolve the digital service provider of responsibility from user claims for all possible risks (Kelly, 2017; Loos, & Luzak, 2021). This clause's aims are to ensure that digital service providers do not make any guarantees in relation to the supply of digital services and to release them from obligation for any risks and disruptions in the availability or dependability of services (Kharisma, 2024). The clause that releases the responsibility of digital service providers can be seen in the WhatsApp application disclaimer clause (Whatsapp LLC, 2021).

This clause frees Whatsapp from responsibility for all risks including computer virus attacks, phishing and hacking actions that cause financial and non-financial losses whether caused by Whatsapp's errors or negligence. This clause is substantively unfair because there is no indication of receipt of consent from digital service users.

c. Limitation of Legal Remedies, Choice of Forum, and Applicable Law

In many cases, the terms and conditions of digital service providers aim to prevent and limit digital service users from taking legal action, choosing dispute resolution forums and applicable legal laws. The first form is restrictions on taking legal action. For example, the clauses and conditions in the Fortnite online game service agreement state (Loos, & Luzak, 2021; Epic Games, 2022): *"You and Epic agree to resolve disputes between us in individual arbitration (not in court)"*.

The electronic contract contains terms of service that state that consumers as online game users waive their right to act in court individually or as part of a class action because these provisions prevent consumers' rights to file cases in court. This provision of course harms consumers' rights to take other legal remedies because consumers can only submit legal remedies through individual arbitration.

Then, substantive unfairness is also contained in the forum choice clause. Choice of forum clauses (or jurisdiction clauses) may deprive consumers of their right to go to court in the country where they reside. For example, if a Facebook application user is

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an Indonesian who lives in Indonesia, if he wants to file a lawsuit, the user must file a lawsuit in the United States District Court of California. However, if Facebook wants to sue a consumer, Facebook is allowed to file a lawsuit at the consumer's residence. This clause or provision of course disadvantages consumers from jurisdiction provisions because it eliminates consumers' rights to file claims in court in the country where they are domiciled. Facebook's electronic contract clause states the following (Meta, 2022):

> *"In all other cases, and for any claim, cause of action, or dispute that Meta files against you, you and Meta agree that any such claim, cause of action or dispute must be resolved exclusively in the U.S. District Court for the Northern District of California, or a state court located in San Mateo County"*

A clause that is unfair and has the potential to eliminate consumers' legal rights is to determine the applicable legal clause. In practice, the law determined by digital service providers is a different law from that of users or consumers. This condition is detrimental to consumers because consumers do not have legal knowledge other than where they live. An example is Microsoft's licensing agreement. Irish law is the law that applies for resolving disputes. As a uniform legal framework for international trade, the United Nations Convention on Contracts for the International Sale of Goods (CISG) actually cannot be used to settle disputes. The agreement clauses are as follows (Microsoft, 2023):

> *"Applicable law. This Agreement will be governed by and construed in accordance with the laws of Ireland. The 1980 United Nations Convention on Contracts for the International Sale of Goods and its related instruments will not apply to this Agreement".*

Legal Construction of the Normative Doctrine of Unconscionability in Electronic Contracts in Indonesia

Article 1171 of the New French Civil Code, which has been recently revised, can be an example of the normative doctrine of unconscionability in the civil law system. The article aims to create balance and create fair contracts in business contracts. Article 1171 of the New French Civil Code reads as follows: *Dans un contract d'adhésion, toute clause non-negotiable, determinable à l'avance par l'une des parties, qui cree un déséquilibre significant entre les droits et obligations des parties au contract est réputée non écrite* (In a contract of adhesion, any non-negotiable clause, determined in advance by one of the parties, which creates a significant imbalance between the rights and obligations of the parties in the contract is considered unwritten). The norm empowers the judge to delete any additional clause in a standard contract that creates a significant imbalance in the rights and obligations of the parties.

In the Netherlands, Article 6:233 of the *Nieuwe Burgerlijk Wetboek* (NBW) provides that the general terms and conditions in a contract of adhesion may be set aside if there is a clause that is unreasonably burdensome to the other party. Article 6:233 of the NBW states as follows: (a) *Een beding in algemene voorwaarden is vernietigbaar indien het, gelet op de aard en de overige inhoud van de overeenkomst, de wijze waarop*

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de voorwaarden zijn tot stand gekomen, de wederzijds kenbare belangen van partijen en de overige omstandigheden van het geval, onredelijk bezwarend is voor de wederpartij; of (b) indien de gebruiker aan de wederpartij niet een redelijke mogelijkheid heeft geboden om van de algemene voorwaarden kennis te nemen. A provision in the general terms and conditions is void: a. if, considering the nature and other content of the agreement, the way in which the conditions have been established, the mutually identifiable interests of the parties and the other circumstances of the case, it is unreasonably burdensome to the other party; or b. if the user has not offered the other party a reasonable opportunity to become acquainted with the general terms and conditions.

Dutch law recognizes that general terms and conditions in electronic transactions can lead to unfairness. An important cause of this may not be the dominant economic position of the business actor over the consumer, but the lack of information on the part of the consumer. Consumers do not read the general terms and conditions and even if they do read the terms, they may not be able to fully understand what the terms are intended to do due to lack of (legal) knowledge. Such conditions need to be protected by law (Loos, 2016).

In Indonesia, the Second Amendment to the ITE Act in 2024 did bring new changes in the protection of digital service users. In the context of electronic contracts, the addition of Article 18 A contains at least two main points, including: (1) affirmation of the applicable law in electronic contracts that electronic contracts are subject to and regulated by Indonesian law; and (2) electronic contracts must use simple, clear, and easy-to-understand language, and uphold the principles of good faith and transparency.

However, both the Indonesian Civil Code and the ITE Act have not regulated additional clauses/terms and conditions/terms of service/terms of use in electronic contracts, especially those regulating standard clauses (boilerplate clauses) in electronic contracts. In relation to this problem, the doctrine of unconscionability needs to be formulated in the legal norms of contracts in Indonesia.

The proposed norm of the doctrine of unconscionability is procedurally constructed in electronic contracts as follows:

Article xxx

Electronic system organizers must provide reasonable opportunities for users of digital services to pay attention to the general terms and conditions.

Article xxx

Electronic system organizers must ensure that the terms and conditions can be easily accessed by users of digital services (other parties).

Article xxx

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> *Electronic contracts must be written in simple and easy-to-understand language. If there are differences in interpretation regarding the meaning of a term, the interpretation that is most beneficial to the user of the digital service will apply.*

The proposed norm of the doctrine of unconscionability is substantively constructed in electronic contracts as follows:

> Article xxx
>
> *In electronic contracts, any clause that is not negotiable and determined in advance by one of the parties that creates a significant imbalance between the rights and obligations of the parties is considered unwritten.*
>
> Article xxx
>
> *The assessment of significant imbalances between the rights and obligations of the parties does not cover the main essence of the agreement but only applies to additional terms in the agreement used by the parties in the electronic contract.*

Principles and Doctrine of Legal Protection in Fairness Electronic Contracts

1. Transparency Principle

The idea of the principle of transparency in contracts was born from information asymmetry in business transactions. The rapid development of the digital economy has increasingly exacerbated the information asymmetry that often occurs between parties to electronic contracts (Luzak et al, 2023). Customers may overlook important information because they don't grasp confusing boilerplate clauses. People do not know or understand the contract's terms and conditions. Worse, consumers in digital services do not know that they are bound by an electronic contract (Kharisma, 2024).

Information asymmetry in electronic contracts is caused because the consumer is the weaker party in the transaction. Consumers often have fewer resources than platform organizers, and they are also incumbents in the market (Helleringer & Sibony, 2017). Customers may make poor choices when they lack relevant transactional information, which may result in inefficiencies in the market.

The main goal of the transparency principle is to guarantee that customers are provided with information of a particular quality. This principle of transparency obligation assists consumers to make the proper decisions, whether in making a contract, canceling a contract, or exercising their other rights, consumers must not only receive this information but also be able to read and understand it (Helleringer & Sibony, 2017).

According to Loos, the principle of transparency in electronic contracts covers at least three aspects, including: presentation of information, comprehensibility of information and language of information (Loos, 2016). In the Netherlands, the principle of transparency is normed in Article 6:233 Nieuw Burgerlijk Wetboek - New Netherlands Civil Code (NBW). Under NBW, even if such terms have been legally included in an electronic contract, consumers can circumvent such terms because

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they have not been properly informed. Likewise, if the language of the contract is a foreign language it must be drafted in the local Dutch language. Then, if a digital service provider operates in the Dutch market area and communicates in Dutch with potential users of digital services, standard contract provisions drawn up in a foreign language other than Dutch are considered to violate the requirements of the principle of transparency (Loos, 2016).

2. The Duty to Read Doctrine

The duty to read doctrine is an important foundation in US contract law (Ayres & Schwartz, 2014). The duty to read doctrine has important implications for adhesion contracts (Benoliel & Becher, 2019). On the one hand, digital service users including leading law professors, legal academics, judges and law enforcers never read the contract because it is difficult to access, the length and number of pages and the practicality factor in using digital technology (Koenig & Rustad 2015; Sovern, 2018).

According to the duty to read doctrine, parties to a contract must read it carefully before accepting its terms and conditions (Benoliel & Becher, 2019). The duty to read in the context of electronic contracts is typically justified by fairness and economic considerations. Mandatory reading is seen to have several advantages from an economic perspective. First, in an electronic contract, the duty to read doctrine may make it more likely that customers will read the clauses before agreeing to them (Kharisma, 2024). Without these obligations and their legal implications, weak parties will reject unfavourable contract terms they read. Even if they haven't read the contract, the parties are nonetheless legally obligated to abide by its terms under the duty to read. As a result, the parties have more responsibility to read the contract compared to a regime without an obligation to read (Benoliel & Becher, 2019). Therefore, the requirement to read can also lessen the likelihood of expensive conflicts resulting from misreading electronic contracts. Overall, mandatory reading has several economic benefits and has the potential to encourage efficient reliance on contracts (Benoliel & Becher, 2019). Another justification for adopting the duty to read doctrine in contract law is fairness considerations. The reading requirement backs the idea that decisions should be made responsibly for the purpose of fairness, including whether to accept a contract without reading it (Ayres & Schwartz, 2014).

3. Reasonable Expectations Doctrine

One of the basic principles of contracts law is the reasonable expectations doctrine (Kharisma, 2024). Reasonable expectations doctrine is one solution to strengthen the doctrine of unconscionability (Calleros, 2016). To complement the doctrine of unconscionability, the reasonable expectations doctrine functions to exclude oppressive provisions in long standard forms of contracts so that parties who do not make a contract are not expected to read and bargain (Calleros, 2017). The solution to the boilerplate clause dilemma that covers most cases of unfair contracts is a

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general recognition of the concept of reasonable expectations (Kharisma, 2024). Therefore, it is necessary for courts to determine reasonable expectations. To determine the reasonable expectations of the parties in each and every contract they enter into, courts must consider substantive fairness. The duty to read doctrine must be supported by the reasonable expectations doctrine to state exceptions that the rule does not apply with respect to standard provisions that are ignored by a reasonable party (Murray, 2014).

The meaning of the reasonable expectations doctrine in electronic contracts is that a party that expresses its consent in a contract will only be bound by all provisions that are within a reasonable range for the contract but will not be bound by unconscionable or oppressive provisions that are beyond the limits of reasonable expectations. Even a very surprising provision can be brought within the range of reasonable expectations if the party who drafted the provision gives specific notice of the provision to the party who did not draft the provision such as indicating and explaining the term and requiring special approval via a sign next to the term or through separate clicks on websites (Calleros, 2016). In the reasonable expectations doctrine, reasonable standards are the standards of someone who is aware of the moral values, customs, habits and usage that are currently accepted by society in general and not standards that are abstract and foreign to current society (Kuklin, 2001).

Conclusion

The nature of fairness in electronic contracts must be interpreted and measured from the process of contract formation (procedural justice) and the substance of the contract (substantive justice). Procedurally, electronic contracts must not contain an element of no free will in the process of contract formation which causes one party not to enter into an agreement knowingly and freely. In substance, the nature of fairness in electronic contracts is that the substance of the contract must not contain unilateral requirements and impose unreasonable burdens. An electronic contract is substantively fair if the burden placed on the weaker party does not conflict with the values of public order and the terms do not conflict with general fairness that applies in society. Apart from implementing the doctrine of unconscionability, to realize contractual fairness it is necessary to support the transparency principle, the duty to read doctrine, and the reasonable expectation doctrine. These principles need to be formulated into the norms of the Indonesian Information Transaction Act to protect consumers from unfair contracts. The proposed norms should regulate procedurally and substantively electronic contracts. Indonesia can adopt Article 1171 of the New French Civil Code and Article 6:233 of the NBW which regulate unfair contracts both from procedural and substantive aspects.

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