COUNTRY REPORT

LEGAL FRAMEWORKS AND E-COMMERCE TRAINING PROGRAM

(INDONESIA)

By

Sunu Purbanti A. Rini

Indonesian APEC Study Center

CONTENTS

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PART I

INTRODUCTION

Up to this date, there is no law or government regulation directly concern with electronic commerce in Indonesia. For the past four years, Indonesian government has been concentrating on how to live each day and how to find the right leader to set Indonesia free from the magnitude political and economic crisis. Prices on basic-needs and other goods have been increasing, causing the gap between the rich and the poor growing more and more; increasing the total amount of the poor and amazingly, increasing the total amount of the rich. Nowadays, in Indonesia, electronic information technology has become a very expensive issue to be developed. Considering the country's condition, it is very difficult for the government to give special attention on the development of electronic information. In spite of that condition, the pace of changes in information technology, the emergence of global network and especially the

development in electronic transaction forced the government to join the world, whether she wants to or not.

Although Indonesia does not have any regulation directly concern with e-commerce, but effort has always been made in developing a fiber-optic-based infrastructure. We have at least some basic telecommunication infrastructure regulations; If Singapore has IT2000 and Malaysia has Multimedia Super Corridor, Indonesia has Information and Network Nusantara 21. Nusantara 21 is a reflection of Indonesia's vision of entering information era as an important part of the global community. In the year of 2000 the President of the Republic of Indonesia appointed a presidential team namely the Indonesian Telematics Coordination Team with the responsibility to coordinating the mobilization of necessary resources and the implementation of Nusantara 21 and its telematics application.[1] The current situation was that the President issued a regulation relating to information technology: the Presidential Instruction No. 1 of 2001 dated 21 February 2001 concerning Information Center for Informatics Technology Based at Kemayoran Fairground. (*Pusat Informasi Berbasis Teknologi Informatika di Komplek Kemayoran*). The most current condition is that there is an effort from the government to appoint a team to work on a draft of cyber law, led by Prof. Dr. Sutan Remy Sjahdeini, SH; a part from at least two academic drafts

Internet is a borderless medium.; there is no geographic line, which use as a guidance to limit a certain area to include in a certain jurisdiction. Through internet people may interact with others, such as chatting virtually without exactly

knows the physical existence of others; or browsing or even signing a contract (for example in buying a book from Amazon). The problem of jurisdiction is very important in doing e-commerce. Therefore it is very important to have guidance for such activities.

In most private sectors, there are a lot of e-commerce activities done by people or internet users. Moreover, several government institutions acknowledge the usage of electronic mechanism to make contract or other related activities; for example, the *Bank Indonesia* – the Indonesian Central Bank – and the Directorate General Immigration and Custom. People will not wait for e-commerce regulation to be issued by the government; and this is always happened to a lot of regulations if they have to keep up with the pace of technology development.

Considering this situation, one should be aware of legal aspects in conducting electronic communication and information. Some legal aspects to be considered among others are: copyright, trademark, consumer protection, privacy, electronic contracts and digital signatures. Since, up to this date there is no law which directly regulate e-commerce in Indonesia, it is important to make interpretation from the existing laws and regulations in relation to electronic communication and information activities. The related laws and regulations required to be considered are: the Indonesian Civil Codes, the Indonesian intellectual property laws (Copyright Law No. 12of 1997; the Trademark Law No. 14 of 1997; the Patent Law No. 13 of 1997), the Consumer Protection Law No. 8 of 1999; and the Telecommunication Law No. 36 of 1999. The followings are

[1] The Presidential Decree No. 50 of 2000

general elaboration of some related laws and regulations in e-commerce or other electronic communication and information activities.

PART II

A. CONTRACT ACCORDING TO THE INDONESIAN CIVIL CODE

1. BACKGROUND

Indonesian commercial legal system is basically influenced by Continental European civil law traditions that are the Dutch civil law for Indonesian Civil Codes (= Kitab Undang-undang Hukum Perdata) and customary (adat) law. Both legal systems have been used long before the independence of the Republic of Indonesia. During the Dutch colonial, the population in Indonesia was divided into three groups (Europeans, foreign oriental and natives); each group had its own legal system, separate regulations administered by separate government officials and enforced in separate codes of law.[2] Moreover, for most of Moslem family law, people tend to use Islamic law. Thus, up to now there is no uniform law; there is pluralism of law existed for centuries in Indonesia.

Preceded by its predecessor electronic data interchange (EDI) and electronic funds transfer (EFT) technology, electronic commerce initially was known from the use of credit cards, automated teller machines and telephone banking since 1980's. Since then, there is no law or regulation has been issued to regulate all those activities. However, legal aspects concerning contract made

[2] Article 163 IS (Indische Staatsregeling) regulates the division of groups population (defines who belongs to what group) and article 131 IS regulates the law in force for each group (the three legal systems for different group of population).

through electronic can be interpreted from the Indonesian Civil Code (hereinafter the ICC); since, in fact the contract made through 'virtual world' is basically no different with other contract made in "real world'. It has the same parties and subject matter, e-commerce merchant and e-commerce consumer and there are goods/services to be traded by the undertakings; the only difference is that the media used for such activities. There are some basic principles in the law of contract based on the ICC that can be used as guidance to contracting in e-commerce.

2. ELEMENTS OF CONTRACT

According to article 1313 of the ICC, which stated that, an agreement is an act by which one or more people bind(s) him/herself to another; as a general rule no formalities need be observed to make binding agreement. Moreover, concerning the validity of a contract formation, there are four pre-requisites:[3]

a. the consent of the parties (free will);
b. legal capacity of the parties;
c. a certain definite subject matter; and
d. the subject matter must be legal (a lawful purpose).

THE CONSENT OF THE PARTIES (FREE WILL)

The first pre-requisite element of a contract is the consent of the parties to the contract. This is the so-called consensual principle, which forms the basis of contract law under the ICC Book III. Therefore if a contract made by parties

under duress, by means of fraud or mistake, there is no valid contract. “Duress” involves some illegal mental threat, thus the threat of physical violence then no duress exists. If the threat is legal, such as a lawsuit, then no duress exists. Also, blackmail and undue influence over a person in a weakened mental state constitute a form of duress. “Mistakes” are of two types, one concerning the identity of the other party to the contract and one concerning the subject matter of the contract. If neither party to the contract knows of the mistake or misapprehension, then the contract is not voidable. “Fraud” is an overt act performed by one of the parties prior to the formation of the agreement with the intention to deceive the other party and induce him/her into concluding a contract, which he/she would not otherwise have concluded. A false statement by itself is not fraud; it must be accompanied by a deceitful act. Therefore, the four elements of fraud [4] are as follows:

1. an overt act (this does not include, for example, a failure to inform about a hidden defect);
2. before formation of the contract;
3. with the intent of causing the other party to make the contract;
4. which he/she would not have done but for the overt act.

Where these elements exist, there is no true meeting of the minds.

LEGAL CAPACITY

[3] Article 1320 of the ICC.
[4] Article 1328 of the ICC

The second important element for the validity of a contract is the legal competence of the parties. As a general rule, all persons are legally capable of entering contracts, except for the following persons which are considered incompetent to enter into a contract; for example: a minor (a person under 21 years of age, except if he/she is married- article 330 of the ICC); person under official custody (article 433 of the ICC).[5]

DEFINITE SUBJECT MATTER

The third element is definite subject matter. Without definite object for a contract, it would be impossible to determine the obligations of the parties. The amount of the thing for which the contract is drawn need not be determined as long as it is countable, nor must it exist at the time the contract is drawn. For example, the sale of an acre of cotton in the harvest time of year 2001 for USD 1.00/kg considered sufficient to fulfill this definite object. Compare to a sale of cotton at USD 1.00/kg, then this sale unacceptable. As a general rule, anything that is commonly used in business transactions can become the object of a contract.

LAWFUL PURPOSE

The last pre-requisite for the validity of a contract is that it must have a lawful "*causa"* which is the same as contract purpose. For example: a contract to kill someone has an object but an unlawful purpose, and is therefore not valid. If the

[5] Article 1329 and 1330 of the ICC

object of the contract is unlawful, or if it is contrary to the existing laws and regulations, good morals or public policy, then the contract is void.[6]

3. CONTRACT FORMATION

A contract is said to exist at the moment when the parties reach mutual agreement (article 1313 of the ICC). In practice, a contract is created at the moment a legitimate offer has been accepted. The offer and acceptance can be explicit or tacit.

4. FORMALITIES

As a general rule, no formal requirements (in writing, or registration) needed to make a contract binding. Mutual consent of the parties is sufficient, and this mutual consent, is evidence when one party offers to make a contract and the other accepts. However, the ICC make some exceptions, for example certain contracts must be in writing and executed in the form an authentic deed drawn by a notary or other authorized public official. Some contracts such as mortgage, licensing of patent, trademark and trade secret must be registered. However, starting this year for some contracts especially registration of contracts in establishing limited liability companies have been using a computer network connection from the Department of Justice and all public notaries in the country.

[6] Article 1337 of the ICC

5. PERFORMANCE

A contract legally concluded becomes binding as law on the parties and cannot be terminated without the consent of both parties or based on reasons authorized by law. This *pacta sunt servanda* principle, as a general rule, binds only the parties to a contract. A contract cannot impose liability on a third person, and a third person cannot acquire rights under a contract to which he/she is not a party. However, there are exceptions on some contracts, it is possible to execute a contract for the benefit of a third person;[7] for example in insurance contracts, the third party to be bound is the beneficiary.

A contract must be performed in good faith.[8] Based on article 1338 (3) ICC, a judge in a civil case has a power to supervise the implementation of a contract in order to follow reasonableness and justice principles. For that reason, the judge may deviate from the explicit contract provisions if he/she feels that it is necessary to do so in order to keep the application of good faith in the contract.

B. PROTECTING TRADEMARKS AND ADMINISTERING DOMAIN NAMES (LAW NO. 14 OF 1997 CONCERNING TRADE MARK)

The function of domain name initially was for an address in the internet showing location of a website. Then the function was changed as a consequence of commercializing domain name; such domain name has a very important economic value. Almost all undertakings or companies realize the economic potential of internet as a global media; they use domain name as their trademark

[7] Article 1317 the ICC.

or their trademark is used as domain name. There is no entity or special body, which has authority to regulate internet. However, in order to have a domain name it will be needed to have registration for such domain name. In the US, the registration body is Network Solutions, Inc. – NSI, Germany is German Network Information Centers – DENIC, for France is NIC France and Indonesia is IDNIC; they use the same mechanism: first come first serve base of registration. Domain name may be used as a trademark by registering it to the trademark office and this is possible under Law No. 14 of 1997; unless if such mark has a similarity in its essential part or in its entirety with a mark owned by another person which has previously been registered for the same kind of goods or services; or with a well known mark.[9] Also in international level, the US Patent and Trademark Office have accepted registration of a domain name as a trademark. The creation of a domain name into a trademark through registration is not an issue to be worried about, since the trademark regulation required substantive examination[10] to protect trademark, which has previously been registered.

C. LAW NO. 36 OF 1999 CONCERNING TELECOMMUNICATION

The Law No. 36 of 1999 concerning Telecommunication has been issued on September 8 of 1999 (hereinafter the Law No. 36/1999). This law is meant to

[8] Article 1338 (3) the ICC.
[9] Article 6 of Law No. 14 of 1997 concerning Trade Mark.
[10] Article 25 of Law No. 14 of 1997.

replace the old law No. 3 of 1989 on Telecommunication. The purposes of the issuance of this law among others are for:

- accommodating the needs for telecommunication in national and international levels; which in turn have an implication on
- increasing economic activities;
- assisting in state defense and security; and
- supporting government institutions in entering global trade system as a consequence on the ratification of GATS (the General Agreement on Trade and Services) – Law No. 7 of 1994.

According to its consideration of the Law No. 36 of 1999 it is said that telecommunication has a strategic meaning in supporting the nation unity, accelerating government activities, supporting the purpose to evenly distribute development around the country and supporting international relations. Moreover, it is said that there is a fundamental changes in providing and way of observing telecommunication. For that reason it is necessary to restructure and deregulate the implementation of national telecommunication.

In general, this Law does not regulate e-commerce or other specific receiving or sending information through internet. However, from the definition of telecommunication one can see that information telecommunication through internet is covered in the Law but not specifically mentioned. Definition of Telecommunication according to the Law No. 36/99 covers any broadcasting, sending and or receiving from any information in the form of sign, code, word,

picture, sound, and tone through cable system, fiber optic system, radio, or other electromagnetic system.[11]

There are other related provisions mentioned in the Law No. 36/1999, such as: the state has authority on telecommunication and the government has power to its development.[12] Considering that the telecommunication is one of a very important and strategic national branch of production, it is necessary, in the opinion of the government, to own telecommunication, which in turn will be exploited for the benefit of all Indonesians. There is no elucidation concerning the ownership of telecommunication in the state's hand.

Article 15 of Law No. 36/1999 regulates the liability of telecommunication provider due to his/her fault or negligent which causes a loss to user or other party unless he/she can prove otherwise.[13]

D. LAW NO. 5 OF 1999 CONCERNING ANTI MONOPLY AND UNFAIR TRADE PRACTICES

For quite a long time the government gives license only for three telecommunication operators: PT. TELKOM for domestic services (a state owned company); PT. INDOSAT (a state owned company) and PT. SATELINDO (a subsidiary of PT. INDOSAT) for international long distance services. By the

[11] Article 1 (1) of Law No. 36/1999.
[12] Article 4 (1) of Law No. 36/1999.
[13] Article 15 (1) of Law No. 36/1999: "Upon the wrongful act and or negligent of telecommunication provider which cause loss, the party which suffer loss have a right to claim for damage to the telecommunication provider." In the elucidation of this article the party who suffer loss could be the user and or the whole society.

issuance of Law No. 36/1999 it is said that it will vanish barriers to market entry and create a fair level playing-field. The exclusivity given on the three-telecommunication operators will be ended on the year of 2002 and 2003. Thus, up to that time this duopoly and exclusivity will still exist and this is allowed under Law No. 5 of 1999. It is stated on the Law No. 5 of 1999 that:[14]

> ”Monopoly and or centralized activity which relates to production and or marketing of goods and or services for the nationals benefit and branches of production important for the state will be regulated by laws and executed by state owned companies and or body or institution appointed by the government.”

E. LAW NO. 8 OF 1999 CONCERNING CONSUMER PROTECTION

The Law no. 5 of 1999 and the Law No. 8 of 1999 are both have the same purpose that is the national economic development is for achieving the most benefit for all nationals in the globalization era. In achieving such goal the undertakings on e-commerce should pay attention on some basic rights of consumer protection such as: the rights to have information on the products consumed; the rights for claim damages on the products consumed which is not appropriate with the producer’s information; the rights to receive to be fairly and equally treated. Recent development in e-consumer, there is a new private website called pintuNet.com to accommodate protection for consumer.

F. LAW NO. 36 OF 1999 CONCERNING TELECOMMUNICATION

[14] Article 51 of Law No. 5 of 1999 concerning Anti Monopoly and Unfair Trade Practices.

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- increasing economic activities;
- assisting in state defense and security; and
- supporting government institutions in entering global trade system as a consequence on the ratification of GATS (the General Agreement on Trade and Services) – Law No. 7 of 1994.

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PART III

RECENT DEVELOPMENT ON

BASIC TELECOMMUNICATIONS INFRASTRUCTURE REGULATION

Technologies have certainly created superhighways of information on which all people can travel. For quite a long time people in Indonesia are used to the traditional separation of services, telecommunications services have been

[15] Article 1 (1) of Law No. 36/1999.
[16] Article 4 (1) of Law No. 36/1999.
[17] Article 15 (1) of Law No. 36/1999: "Upon the wrongful act and or negligent of telecommunication provider which cause loss, the party which suffer loss have a right to claim for

provided by state monopolistic companies, broadcasting by government organizations and computers by the private sector. The current situation in operating environment of telecommunications is now must be change. New services are being built in such a way to join all those services, such as multi-media, internet, cd-rom, which are being offered on a global scale.

In facing a new era – the Global Information Society (GIS) - as mentioned before on the Introduction there are some recent development on basic telecommunications infrastructure regulations following the development in technologies (computer, telecommunications, and broadcasting).

1. NUSANTARA 21[18]

Indonesia is a mega diversity with a large population over 200 million people; there are issue of unity, cohesiveness, equity of development and equity of learning and opportunity to access information. Nusantara 21 was based on three main infrastructures: Archiepelagic Super Highway, Multimedia Cities and Nusantara Multimedia Community Access Center.

The vision of NUSANTARA 21 expects that early in the 21st century the whole archipelagic country will have access to wideband information infrastructure and systems from anywhere at any time, so that the Indonesian people will be empowered and their lives enriched, ready to face the new era of the competitive GIS. NUSANTARA 21 networks will consist of satellite networks

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damage to the telecommunication provider." In the elucidation of this article the party who suffer loss could be the user and or the whole society.

[18] Summarized from L. Parapak, Jonathan."Global Information Infrastructure. The Indonesian Perspective," http://www.connect-world.com/docs/articles. 3/11/01

(Palapa-first launched was in August 1976; PT. Telkom and Multimedia Asia), optical submarine cables, terrestrial networks of optical fiber and digital microwaves.

Action plans have been formulated for the development of various applications, such as the government on line, electronic commerce, health care, education, tourism, telecommuting, banking and financial services. Local research and development programs, soft and hardware industries and accelerated human resources development will support these initiatives. The government of Indonesia realizes that co-operation is the key instrument for visualizing the vision. For Nusantara 21 to really empower the people, the country needs excellent co-operation between the government and the private sector.

However, the development of Nusantara 21 has been facing some challenges such as technology, management expertise, supporting legal and regulatory systems, human resources development, preparing the society and the ultimate challenge is capital, especially during the crisis.

2. Presidential Decree No. 50 of 2000 concerning Indonesian Telematics Coordination Team (the "ITCT")

The Indonesian government appointed a team on telematics consisting of a number of cabinet ministers with the responsibility of co-coordinating the mobilization of necessary resources and the implementation of Nusantara 21 and its telematics application. This team has produced a blueprint for Telematics

Implementation in Indonesia, which includes network development, application development and the mobilization of the necessary resources. The development of Telematics Indonesia is expected to improve the efficiency and productivity of the government and commerce, enhance competitiveness and empower the people of Indonesia to face the GIS.

3. Presidential Instruction No. 1 of 2001 dated 21 February 2001 concerning Information Center for Informatics Technology Base at Kemayoran Fairground

The President instructs the Minister of Transportation and Telecommunication, State Minister of Research and Technology, Minister of Finance and the Head of National Development Plan Body to :

- investigate, prepare and develop information center for informatics technology base at Kemayoran Fairground;
- carry on fund raising for funding the above activities, either from domestic or off shore sources;
- co-ordinate with the Indonesian Telematics Coordination Team and the Kemayoran Fairground Management Body.

4. Presidential Instruction No. 6 of 2001 dated 24 April 2001 concerning Telematics Development and Productivity in Indonesia

The President gives instruction to: the Minister; the Head of Non Department of Government Institutions; the Head of the Indonesian National Army and other head of government institutions, to:

- implement the telematics development and productivity according to the Framework of Telematics Development and Productivity Policy in Indonesia attached to this Presidential Instruction;
- co-ordinate with private sector to join in the telematics development and productivity;
- co-ordinate with the Indonesian Telematics Coordination Team; and
- perform this Presidential Instruction with full responsibilities and report any implementation activity to the President.

5. Recent development in e-Government

The Indonesian Telematics Coordination Team has been selecting six government portals, which will be used as e-government. By using this e-government system the government expects to increase efficiency and decrease the cost for public services. There is three main elements include in e-government portals: information, communication and transaction. The most important element is the element of transaction, since this element could create legal relationship between government-to-government, government to business and government to citizen. For this reason the Indonesian Telematics Coordination Team is preparing legal framework to regulate such transaction.

The Department of Justice and Human Rights has an on line services for legalization of establishment of a limited liability company. This services connecting the Department with all public notaries in the country.

The Minister of State together with Department of Internal Affairs, the Police Department, population and Immigration will create a standard card for Indonesian nationals, which will be valid for ten years. Starting 2001, this system will give every Indonesian adult to have one main population number; and thus there will be no one who has more than one identification card. And for people who needs to extent his/her identification card may do that through internet.

6. INTERNATIONAL COMMITMENTS

Prior to the implementation of AFTA (ASEAN Free Trade Area) in the year of 2003, the information and communication technology (ICT) in the ASEAN region should be implemented as soon as possible after the signing of e-ASEAN Framework Agreement, November 1999 in Singapore. This agreement was signed by ten of the head of states of ASEAN member countries. The purpose of the signing of this Agreement together with formation of the ASEAN Information Infrastructure (AII) is to increasing the ASEAN competitiveness in global market and to decreasing digital divide among ASEAN member countries. This effort includes developing e-commerce, liberalization of trade in ICT goods and or services, developing e-society and capacity building among ASEAN member countries. The liberalization of trade in ICT goods and or services among ASEAN member countries will be implemented by vanishing tariff and non-tariff barriers into three steps: starting 1 January of 2003, 2004 and 2005. Meanwhile for

Cambodia, Laos, Myanmar and Vietnam the steps will be started in 2008, 2009 and 2010.

The important thing in e-ASEAN was the Mutual Recognition Arrangement to facilitating trade of ICT's products among ASEAN member countries to adjust national standard of ICT's products with relevant international standard. This could harm Indonesia if Indonesia is not prepared by the time of implementation of AFTA. For example, in examination of ICT's products; a product that has been examined abroad will not need to be examined if this product enters Indonesia, since Indonesia does not have the facility to examine such product.

Development of ICT, nowadays, has been done through several ways, such as e-ASEAN and the cooperation of G-15, also through WTO with its Information Technology Agreement to make use of e-commerce. In the APEC level, there was also agreement on paperless trading or e-commerce and customs, public key infrastructure and aspect of network protection.

PART IV

CONCLUSION

1. Information technology in many countries has been proved in increasing the people welfare. However, in a very efficient market condition such as in Indonesia this technology will not be distributed evenly and fairly to all society groups. It could create digital divide between people in big cities and people in the rural area. Efforts have been made to improve this condition, among others by driving small and medium enterprises to

provide telephone and internet kiosks around the country and through this facilities government could expand telephone and internet services.

2. Indonesia does not have yet any laws specifically regulated e-commerce. However, government has practically deregulated the telecommunications and information sectors to the extent that the sector is almost liberalized and mainly dependent on cooperation with private sector either through their initiatives and or their investment.

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