

## LEGAL ANALYSIS OF THE DISCLAIMER CLAUSE IN THE TOKOPEDIA E-COMMERCE AGREEMENT AND ITS LEGAL IMPLICATIONS BASED ON THE CIVIL CODE

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### ABSTRACT

Advances in digital technology have driven significant changes in economic activity, particularly in the buying and selling practices through e-commerce platforms. Tokopedia, as one of the largest platforms in Indonesia, acts as an intermediary between sellers and buyers without being directly bound by a sales contract. In practice, business actors often include disclaimer clauses unilaterally in electronic agreements to limit or transfer legal responsibility. Such clauses may conflict with basic contractual principles, particularly the principle of freedom of contract, which must be applied in conjunction with the principle of good faith as stipulated in Article 1338 of the Civil Code. This study aims to examine the relationship between the fulfillment of the good-faith element in contracts and the validity of disclaimer clauses, and to provide recommendations for reformulating clauses to align with the principles of justice and consumer legal protection. The method used is normative juridical research, employing a statutory and doctrinal approach by reviewing legal principles, contract theory, and relevant regulations. The research results show that Tokopedia's disclaimer clauses tend to contain unilateral transfers of responsibility without any mechanism for agreement or negotiation, potentially violating the principle of contractual fairness. Therefore, electronic agreement clauses need to be reformulated better to reflect the balance of the parties' positions, uphold the principle of good faith, and provide adequate legal protection for service users.

**Keywords:** Disclaimer Clause, Agreement, e-commerce, Tokopedia, Civil Code

## INTRODUCTION

Recent technological advances have significantly impacted various aspects of people's lives, including the economy, particularly in buying and selling activities. One of the most striking developments is the emergence of e-commerce as a new form of business activity that can compete with and potentially dominate the market for consumer product sales. This phenomenon is evident in the shift in people's behavior, with people now tending to choose online platforms to meet their needs for goods and services. Electronic commerce (e-commerce) is a set of activities that include buying, selling, and marketing goods or services, using electronic media as the primary means. E-commerce systems are divided into several categories, such as classified ads (listings), online marketplaces, virtual shopping malls, online stores, stores through social media, and crowdsourcing and crowdfunding-based sites. The development of internet-based technology has brought fundamental changes to patterns of action, interaction, and relationships among people, especially in the context of business relationships and trade transactions.

The Tokopedia app offers various conveniences to its users, such as product purchasing features that let users select items directly in the app. This feature is accessible anytime, anywhere, as it operates 24/7. However, behind this convenience lie several legal issues that often harm consumers, particularly those related to Tokopedia's use of disclaimer clauses. These disclaimer clauses are generally drafted unilaterally and are part of the platform's terms and conditions of use, which must be agreed to by all users, both sellers and buyers. These clauses essentially limit or even eliminate Tokopedia's liability for various issues that may arise during a transaction, such as damaged goods, delayed delivery, and even account hacking. This provision is often used as a form of unilateral legal protection by businesses to avoid consumer lawsuits in the event of default or losses arising from the services provided.

In the context of contract law, parties are free to determine the content and form of an agreement, provided it does not conflict with applicable laws and regulations. This principle is known as the principle of freedom of contract. However, in practice, the need for efficiency in the business world has led to deviations from this principle through the use of standard contracts and agreements. These agreements generally do not involve a bargaining process and are drafted entirely by one party, which can create a legal imbalance between business actors and consumers.

The development of standard contracts that disregard the principle of freedom of contract has created a need to prioritize moral principles, namely, the principle of good faith. Article 1338 paragraph (3) of the Civil Code emphasizes that every agreement must be executed in good faith. Good faith has two dimensions: subjectively, it means honesty and good intentions on the part of the parties, while objectively, it refers to propriety and conformity with prevailing social norms. Therefore, the preparation and implementation of disclaimer clauses should still take these principles into account to avoid harming consumers. Tokopedia includes a disclaimer in the "Terms and Conditions" document that all users must agree to. In these provisions, Tokopedia states that it acts only as a web portal service provider under a Customer-to-Customer (C2C) model, and that transactions are entirely the responsibility of the users (sellers and buyers). Tokopedia also states that services are provided on an "as is" and "as available" basis, and users agree that use of the services is at their own risk. Furthermore, Tokopedia explicitly disclaims all liability for any loss or damage arising from the use of its services, including, but not limited to, service failures, technical disruptions, product quality issues, delivery delays, misuse of goods, intellectual property rights violations, and third-party hacking. By including this clause, Tokopedia positions itself as an entity that cannot be sued, even if consumers incur losses arising from its platform.

The existence of disclaimer clauses like this often creates inequality in the legal protection afforded to consumers. Businesses tend to use these provisions as a shield to avoid

liability for inappropriate or detrimental services, even though consumers have no bargaining power to agree to such terms. Several case examples demonstrate the actual losses consumers incur from transactions on Tokopedia. First, the case of Anita Feng, who purchased roof tiles worth Rp28.7 million but never received the ordered goods, even though the seller had received the funds, and Tokopedia provided no adequate solution. Second, the case of Muhammad Farhul, who purchased a laptop through the Tokopedia platform but received a product that did not match the description and was damaged by a virus, resulting in additional losses. Third, the Tokopedia data breach incident in April 2020, in which approximately 91 million user accounts and 7 million merchant accounts were hacked by a third party and sold on the dark web, was cited. However, Tokopedia claimed no responsibility under the disclaimer clause to which users had agreed.

These cases demonstrate that even when users have agreed to a disclaimer, its existence raises legal issues regarding business liability and consumer protection. Therefore, further evaluation and regulation of the enforceability of such clauses are necessary to ensure they do not deviate from the principles of justice, propriety, and good faith as mandated by Indonesian civil law.

## LITERATURE REVIEW

Discussions regarding agreements in law cannot be separated from the concept of obligations. The term "perikatan" is a translation of the Dutch word *verbintenis*, which generally refers to a legal relationship between two or more parties. Views on the meaning of *verbintenis* vary among experts. Subekti and Sudikno state that an obligation is a legal relationship that gives rise to obligations or reciprocal obligations between the parties. Meanwhile, Sri Soedewi argues that *verbintenis* conveys the meaning of debt, emphasizing the existence of a debtor and a creditor. Wiryono Prodjodikoro defines an obligation as an agreement (*overeenkomst*), namely an agreement that forms the basis of a legal relationship between the parties. (Sinta Indi Astuti, 2015) According to Munir Fuady, the term obligation in Indonesian law is an adoption of the Dutch legal system, referring to a legal relationship in which one party has the right to demand certain performance, and the other party is obliged to fulfill it. The law of obligations is comprehensively regulated in Book III of the Civil Code (KUH Perdata), and obligations can arise either from an agreement between the parties or from statutory provisions. (Soedharyo Soimin, 1999) which refers to a legal relationship in which one party has the right to demand certain performance, and the other party is obliged to fulfill it. The law of obligations is comprehensively regulated in Book III of the Civil Code (KUH Perdata), and obligations can arise either from an agreement between the parties or from statutory provisions. (R.Subekti, 2010) which refers to a legal relationship in which one party has the right to demand certain performance, and the other party is obliged to fulfill it. The law of obligations is comprehensively regulated in Book III of the Civil Code (KUH Perdata), and obligations can arise either from an agreement between the parties or from statutory provisions. (Wirjono Prodjodikoro, 2011)

An agreement is an arrangement between two or more parties to do something. Article 1313 of the Civil Code states that an agreement is a legal act in which one or more people bind themselves to one or more other people. Meanwhile, Article 1338 of the Civil Code emphasizes that all agreements are legally binding on the parties. Thus, it is important for the parties to an agreement to fulfill the applicable legal requirements so that the legal relationship formed is valid and binding. Tokopedia is part of PT Goto Gojek Tokopedia Tbk, a limited liability company. According to Soedjono Dirjosisworo, a Limited Liability Company (PT) is a legal entity formed by agreement, engages in business activities, has authorized capital divided into shares, and must comply with applicable legislation. E-commerce is the process of buying and selling goods and services through electronic transactions over a computer network or the

internet. More broadly, e-commerce can be defined as the use of information technology, communication, and digital data processing in business activities to create, change, and rebuild relationships between sellers and buyers. Meanwhile, Sutan Remy Sjahdeini defines good faith in general as a party's intention in an agreement not to harm the other party or the public interest. (Sutan Remy Sjahdeini, 1993)

## METHODOLOGY

This study aims to analyze the suitability of the application of the disclaimer clause in the Tokopedia e-commerce platform with the principle of good faith as regulated in Article 1338 paragraph (3) of the Civil Code, and to identify the ideal form of regulation in the inclusion of the clause so as not to harm consumers. Theoretically, this study is expected to contribute to academic research in contract law and consumer protection, particularly on the use of standard clauses in digital transactions. In practice, the results of this study are expected to serve as a source of information for the public, business actors, legal practitioners, and institutions authorized to supervise and formulate policies in the field of consumer protection. The research method used is a normative juridical approach, which focuses on the study of written legal norms (law in books) through the analysis of primary, secondary, and tertiary legal materials. Data collection is conducted through documentary studies of laws and regulations, terms and conditions on the Tokopedia platform, and relevant legal literature. Data are analyzed qualitatively using a descriptive-analytical approach, namely by describing and linking various legal sources to clarify the legal issues under study. The results of the analysis are expected to provide a comprehensive picture of the practice of disclaimer clauses in e-commerce and the urgency of reformulating them to align with the principles of justice and consumer protection.

## RESULTS

In civil law studies, discussions of agreements are inseparable from the concept of obligations. The term "obligation" comes from the Dutch word *verbintenis*, which refers to a legal relationship between two or more parties. Experts have varying understandings of the meaning of *verbintenis*. Subekti and Sudikno define it as a legal relationship that gives rise to reciprocal obligations, while Sri Soedewi emphasizes the debt-receivable aspect. Meanwhile, Wiryono Prodjodikoro defines *verbintenis* as an agreement that forms the basis for a legal relationship between parties.

Munir Fuady also emphasized that the concept of obligations was adopted from the Dutch legal system, in which one party has the right to demand something, and the other is obligated to fulfill it. The law of obligations is contained in Book III of the Civil Code, which governs obligations arising from agreements and statutory provisions. Although the Civil Code does not provide an explicit definition of obligations, experts such as Subekti explain that an obligation is a legal relationship in the area of property between two or more people that gives rise to reciprocal rights and obligations. A contract can arise from an agreement, which is essentially a mutual understanding between two or more parties to bind themselves to each other. An agreement contains a promise or statement of commitment expressed in a specific form. Thus, an agreement is one of the primary sources of a contract. The term "agreement" is a translation of the Dutch word *overeenkomst*, which is sometimes also used to refer to "agreement." According to Sudikno Mertokusumo, an agreement is a legal relationship that gives rise to rights and obligations regarding performance: one party has the right to have the performance, while the other is obliged to perform. The Civil Code, particularly Book III, adopts an open system that allows the parties to determine the content, form, and object of the agreement, provided it does not conflict with applicable law. Therefore, under the *Burgerlijk Wetboek*, an agreement forms the basis of a legal relationship in which the promise binds the

parties to perform the agreed-upon obligations. This is also emphasized in Article 1313 of the Civil Code, which states that an agreement is a legal act in which one party binds himself to another party. Article 1338 emphasizes that an agreement made legally binds the parties who make it.

The validity of an agreement under civil law is determined by the fulfillment of four conditions as stated in Article 1320 of the Civil Code: agreement of the parties, legal capacity, a specific object, and a lawful cause. An agreement implies that the parties involved agree voluntarily without any pressure, error, or fraud, and clearly understand the rights and obligations arising from the agreement. Capacity refers to a person's legal capacity to enter into agreements, as set out in Article 330 of the Civil Code, which provides that a person is considered an adult if they are 21 years old or married. For those who are not yet competent, legal action is taken by a parent or guardian. The element of "specific matter" means the object of the agreement must be clear, whether in the form of goods, services, or actions. Meanwhile, "lawful cause" means the purpose of the agreement must not conflict with the law, morality, or public order. Legally, if the subjective elements (agreement and capacity) are not met, the agreement can be canceled; while if the objective elements (lawful object and cause) are not met, the agreement is null and void. In the formation of an agreement, there are important elements that constitute its validity: the essentialia, naturalia, and accidental elements. The essential elements are the core components that must be present for the agreement to be considered valid and in existence. Naturalia are provisions automatically attached to certain types of agreements, such as a seller's obligation to guarantee the goods sold against hidden defects in a sales and purchase agreement. Meanwhile, accidental elements are complementary elements included at the parties' discretion, provided they do not conflict with law, propriety, or custom. Furthermore, in contract law, various fundamental principles are also recognized, including: the principle of freedom of contract which gives the parties the freedom to regulate the content and form of the agreement, as stated in Article 1338 paragraph (1) of the Civil Code; the principle of consensualism which states that an agreement is considered valid simply by the agreement of the parties; the principle of good faith in Article 1338 paragraph (3), which emphasizes the need for the implementation of the agreement honestly and in accordance with propriety, both in the subjective sense (honesty of intention) and objective (compliance with social norms); the principle of *pacta sunt servanda* which confirms that every valid agreement is binding like law on the parties; and the principle of personality, which states that an agreement only creates rights and obligations for the party making it, as stated in Articles 1315 and 1340 of the Civil Code, although Article 1317 provides space for agreements made for the benefit of third parties. Thus, the legal structure of agreements in Indonesia is built on principles that guarantee legal certainty, justice, and protection of the wishes and interests of the contracting parties.

Rapid technological developments in the modern era have become integral to human life, driving significant changes across various aspects, including access to information. Increasing public awareness of technology has also driven widespread internet use. Data from 2021 indicate that the number of internet users in Indonesia has exceeded 202 million. (Tifa Asifa Khoeriyah, 2023) This rapid growth has had direct implications for the development of various digital sectors, particularly in the business world, through the concept of electronic commerce (e-commerce). According to Laudon and Laudon, e-commerce refers to the process of buying and selling goods or services electronically between consumers and between companies through computerized systems.

Tokopedia is one of Indonesia's leading technology companies focused on e-commerce services. Founded on February 6, 2009, by William Tanuwijaya and Leontinus Alpha Edison, Tokopedia officially launched to the public on August 17, 2009, with the vision of "Building a Better Indonesia Through the Internet." Tokopedia adopts a consumer-to-consumer (C2C)

business model that enables direct interaction between sellers and buyers and provides broad access for small and medium-sized enterprises (SMEs) to manage their online stores independently. Throughout its journey, Tokopedia has continuously innovated by adding various features, such as digital products, electronic payments, logistics services, and instant delivery, further strengthening its position in the Indonesian market.

Along with this growth, Tokopedia has attracted several major investors, both local and international. Several strategic investors involved include Softbank, Sequoia Capital, and Alibaba Group, which provided significant funding in 2017 and 2018. Significant momentum emerged in 2021 when Tokopedia merged with Gojek to form a new entity called GoTo. This merger created the largest integrated digital ecosystem in Indonesia, encompassing transportation services, digital payments, and online commerce. Furthermore, Tokopedia was acquired by ByteDance through the TikTok platform for USD 1.5 billion. This integration expands the potential synergy between e-commerce and social media, particularly through features such as live shopping and creative video-based promotional content on TikTok. (Anindya Rahidhatulaysa Reihan, 2025)

Mergers and acquisitions like these generally aim to improve operational efficiency, expand market reach, access new technologies, and strengthen competitive positions in the digital industry. For all parties involved, Tokopedia, TikTok, and the Indonesian digital ecosystem, this process has significant strategic implications and marks a key milestone in the national and regional digital transformation landscape. The acquisition of Tokopedia by TikTok, through its parent company, ByteDance, has had a significant positive impact on all parties involved, both directly and indirectly. For Tokopedia and TikTok, this acquisition represents a strategic step to strengthen their market position, expand user reach, and integrate e-commerce services with creative content-based social media features. Furthermore, for Indonesia as a whole, this step marks significant progress in the national digital economy ecosystem and demonstrates the attractiveness of Indonesia's technology sector to global investors. Each entity involved in this acquisition has its own strategic interests, making this collaboration a significant milestone in the dynamics of Southeast Asia's digital industry.

Tokopedia, one of the largest e-commerce platforms in Indonesia, functions as a facilitator in e-commerce transactions between sellers and buyers. This platform adopts both Consumer-to-Consumer (C2C) and Business-to-Consumer (B2C) business models, enabling individuals and businesses to offer products directly to consumers through a structured digital system. Tokopedia's position as an intermediary clarifies its role as a bridge between various parties in the online trading ecosystem without acting as a direct seller.

Transactions on Tokopedia are conducted online through an integrated system that covers product selection, payment, and delivery. Consumers can select products on the official Tokopedia website or app and make payments via various methods, including bank transfer, credit card, QRIS, virtual account, and pay-later services through Gopaylater. Tokopedia implements an escrow system that holds buyers' funds until confirmation of receipt of the goods in good condition. This system aims to provide security and build consumer trust in electronic transactions.

Every Tokopedia user must agree to the terms and conditions of service, which govern the rights and obligations of each party. These terms include a disclaimer clause that limits Tokopedia's liability, emphasizing Tokopedia's role as a platform provider or mediator rather than as a seller directly responsible for the products sold. This clause is Tokopedia's effort to limit its legal liability for transaction risks while also emphasizing its role as the primary party in the buying-and-selling relationships that occur on its platform. E-commerce is closely linked to contract law because buying and selling activities via electronic media, particularly the internet, still involve legal relationships between the transacting parties, as in conventional

transactions. Therefore, contract law plays an important role in establishing the validity of legal relations arising from e-commerce transactions.

Every e-commerce transaction essentially fulfills the elements of an agreement as stipulated in Article 1313 of the Civil Code, namely, an agreement between two or more parties that gives rise to legal consequences, even when conducted electronically and without a face-to-face meeting. Electronic agreements, like conventional agreements, consist of an offer and acceptance, which must be explicitly agreed to by the other party. If there is no acceptance of an offer, a valid agreement cannot be formed. The process of forming an agreement in online transactions is efficient and practical: prospective buyers only need to access the e-commerce platform, agree to the applicable terms and conditions, and select the desired product to begin the transaction. This shows that even though it is conducted electronically, the structure of the agreement formation still follows the principles of civil law. (Alice Kalangi, 2015)

Agreements made through e-commerce platforms generally contain certain clauses, such as a disclaimer clause. The existence of this clause must be analyzed based on civil law provisions, particularly the principles of freedom of contract and the principle of good faith as stipulated in Article 1338 of the Civil Code. Reviewing the disclaimer clause is important to ensure that its contents remain reasonable and do not harm the weaker party, especially consumers. The term "disclaimer" is often found on various websites and serves to protect the site owner from legal liability arising from inaccurate or erroneous information. According to Black's Law Dictionary, a disclaimer is a statement indicating that someone is not responsible or not involved in an incident that causes harm to consumers. However, the government prohibits disclaimer clauses in agreements that contain an element of exoneration, namely the release of a particular party's legal responsibility, as regulated in Article 18, paragraph (1), letter a, of the Consumer Protection Law (UUPK). Mariam Darus Badruzaman, in her book *Various Business Laws*, explains that the disclaimer clause in a standard agreement has characteristics such as being determined unilaterally by the stronger party, not involving the weaker party in its preparation, and being drafted en masse. (Kinan Kalam Khalifa and Good Faith Principles, 2024)

According to Badruzaman, disclaimer clauses tend to be detrimental because they reflect an imbalance of power between business actors and consumers. Consumers are not involved in drafting the clause and do not have the right to determine its content, so this clause does not meet the requirements for a valid agreement under Article 1320 of the Civil Code. (K.Vitarani, 2024) Disclaimer clauses usually contain provisions such as release from liability in the event of default, limitations on the amount and method of compensation, and time limits for filing claims. (Muhammad Syaifuddin, 2012) According to Soedjono Dirdjosisworo, this clause aims to expedite transaction implementation through standardization. (Soedjono Dirdjosisworo, 2026)

On e-commerce platforms such as Tokopedia, disclaimer clauses are usually not displayed directly. Still, they are included in the terms and conditions and privacy policy, which can be accessed via a link at the bottom of the page. (Heni Pratiwi, 2020) This shows that the disclaimer clause is part of a standard electronic contract and is unilaterally drafted by the service provider, so users cannot negotiate its contents; the agreement is take-it-or-leave-it. However, the disclaimer clause remains legally binding as long as it meets the requirements for a valid agreement in Article 1320 of the Civil Code. The application of this limitation-of-liability clause could create legal problems if it places consumers in an unbalanced position. The principle of good faith in Article 1338, paragraph (3), of the Civil Code requires that agreements be implemented honestly and fairly, so that an absolute release of responsibility by business actors, without consumer protection, may violate the principle of justice. The practice of using similar disclaimer clauses is also found on other e-commerce platforms such as Shopee, Lazada, and Bukalapak, where these provisions are included in the Terms and

Conditions and Privacy Policy pages. This shows that disclaimer clauses are common practice in the e-commerce industry. Problems arise because not all users understand or are aware of the legal implications of these clauses, leaving consumers vulnerable to harm. Therefore, transparency and openness of information are very important when drafting a disclaimer clause to avoid undermining the principle of agreement, the main element in forming an agreement.

Disclaimer clauses are frequently found in standard agreements, particularly in e-commerce transactions. These clauses serve to limit or waive the service provider's liability for legal risks or losses that may arise during the transaction. Typically, these clauses are drafted unilaterally without equal negotiation and agreed to electronically, such as through a clickwrap agreement. From a civil law perspective, the existence of these clauses requires careful consideration, as they can conflict with key principles of contract law. Although formally, an agreement containing such a clause meets the requirements of Article 1320 of the Civil Code, namely, agreement, capacity, a specific object, and a lawful cause, the clause's content can still be questioned if it violates the principles of justice and fairness.

Article 1337 of the Civil Code states that an agreement must not conflict with law, public order, or moral norms. Furthermore, Article 1339 stipulates that the content of an agreement is not limited to what is explicitly written but also includes obligations arising from propriety, custom, and applicable regulations. An example of Tokopedia's limitation of liability clause can be found in the Terms and Conditions, specifically subsection R. There, Tokopedia states that it is not responsible for various types of losses, whether direct or indirect, such as data loss, system disruptions, pricing errors, or third-party actions. This clause also includes a waiver of liability for intellectual property rights violations, disputes between users, and cyberattacks or hacking.

Legally, this clause must be reviewed in light of the principle of good faith in Article 1338, paragraph (3), of the Civil Code, which requires agreements to be executed honestly, fairly, and without harm to other parties. If this clause is drafted unilaterally and places users in a weak position without adequate protection, it could be considered contrary to the principle of good faith. However, interviews with Tokopedia indicate that, in practice, Tokopedia still serves as a mediator in resolving disputes through its Resolution Center feature. This feature allows users to file complaints, upload evidence, and receive assistance in resolving problems. In addition, Tokopedia can also withhold seller funds until the dispute is resolved.

This demonstrates that although Tokopedia's disclaimer clause broadly waives liability, it still assumes certain responsibilities to maintain transaction security. Therefore, analysis of the disclaimer clause must consider its practical implementation. In the context of civil law, it is important to assess whether the form and implementation of the clause reflect the principles of proportionality, good faith, and fairness as stipulated in Articles 1338 and 1339 of the Civil Code. Substantively, Articles 1337 and 1339 of the Civil Code provide a material basis for assessing the validity of standard contracts containing disproportionate clauses that are detrimental to one of the parties. Article 1337 of the Civil Code expressly prohibits agreements that contain causes prohibited by law, are contrary to public order, or violate morality. (Jein Stevany Manumpil, 2016)

In e-commerce practice, disclaimer clauses are often used by businesses to absolve themselves from responsibility for certain risks. For example, Tokopedia, in its Terms and Conditions section under letter R, which covers Disclaimer of Warranties and Limitation of Liability, states that it is not responsible for any loss, whether direct or indirect. These losses include loss of money, reputation, profits, and other intangible losses resulting from various factors, such as user inability to access services, pricing and shipping errors, delays, service interruptions, user negligence, product quality, intellectual property infringement, disputes between users, defamation, misuse of goods, and payments to unauthorized accounts.

Furthermore, Tokopedia disclaims responsibility for hardware damage, virus attacks, system disruptions, third-party content, user account enforcement, and hacking.

According to Article 1313 of the Civil Code (KUHPperdata), an agreement is a legal relationship in which the parties mutually promise to bind themselves. (Jain Stevany Manumpil, 2016) In e-commerce, agreements between business actors and consumers are expressed as digital data that serves as a written agreement. An agreement is considered valid if it meets the four requirements set out in Article 1320 of the Civil Code: agreement, capacity, a specific object, and a lawful cause. A valid agreement binds the parties as stipulated in Article 1338 paragraph (1) of the Civil Code. However, in e-commerce practice, agreements typically take the form of standard clauses drafted unilaterally by the business actor, leaving consumers with no room for negotiation.

Indonesian law has regulated restrictions on the use of exoneration clauses in standard agreements to protect consumers from detrimental imbalances. The Consumer Protection Law considers exoneration clauses as part of standard clauses. Standard clauses themselves are defined in Law No. 8 of 1999, Article 1, Paragraph 10, as provisions made unilaterally by the business actor and binding on consumers. (Undang-Undang Republik Indonesia Nomor 8 Tahun 1999, n.d) In e-commerce, agreements between business actors and consumers are expressed as digital data that serves as a written agreement. An agreement is considered valid if it meets the four requirements set out in Article 1320 of the Civil Code: agreement, capacity, a specific object, and a lawful cause. A valid agreement binds the parties as stipulated in Article 1338 paragraph (1) of the Civil Code. However, in e-commerce practice, agreements typically take the form of standard clauses drafted unilaterally by the business actor, leaving consumers with no room for negotiation.

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To date, there are no regulations that specifically and in detail govern disclaimer clauses under Indonesian law, particularly the Civil Code (KUHPperdata). Existing regulations primarily address standard clauses in general terms without specifically addressing the forms of liability exclusions frequently used in electronic transactions. However, with the rapid advancement of information technology and the growth of e-commerce platforms like Tokopedia, disclaimer clauses have become a crucial aspect that directly affects the protection of parties' rights in electronic contracts.

In light of this situation, the author believes that Tokopedia needs to evaluate and revise the disclaimer clause in its terms and conditions of service. This revision is crucial to ensure that the clause used does not conflict with basic principles of civil law, such as balance, propriety, and good faith, as reflected in Articles 1320, 1337, 1338, and 1339 of the Civil Code. The clause should also not be a unilateral tool that shifts all responsibility to the user without providing adequate legal protection. Given the high frequency of digital transactions and the potential risks of service failures or errors, Tokopedia is encouraged to formulate a disclaimer clause that is more proportionate and transparent, and that provides space for user rights. This clause should not merely be a tool to absolve the company of legal liability. In addition to the company's internal responsibilities, Tokopedia's disclaimer clause must align with the principle of harmonization of the national legal system to avoid creating a normative vacuum and legal uncertainty. Therefore, reformulating the clause's content in terms of language, structure, and substance is a crucial step for Tokopedia to demonstrate its role in creating a fair and legally based e-commerce ecosystem.

As a major player in Indonesia's e-commerce sector, Tokopedia needs to conduct a thorough evaluation of the disclaimer clauses in its terms and conditions of service. From a civil law perspective, such clauses should not be used to shift all legal responsibility to another party, especially when created unilaterally without negotiation, as this can create an imbalance in the legal standing of e-contracts. Some of the things Tokopedia needs to consider include:

1. Reformulate the limitation of liability clause proportionately, leaving open the possibility of liability if losses are caused by system errors, lack of supervision of seller partners, or service failure on Tokopedia's part.
2. Avoid the use of absolute and comprehensive exoneration clauses, as this could violate the principles of propriety, justice, and good faith as stipulated in Articles 1337, 1338, and 1339 of the Civil Code.
3. Provide a fair and transparent dispute resolution mechanism in electronic contracts, such as opening internal mediation channels or providing reasonable compensation if losses are proven not to be due to user error.
4. Strive for contractual balance in standard clauses by drafting terms and conditions that not only protect the company's interests but also provide adequate legal protection to users.
5. Prioritize the principles of transparency and clarity of wording so that disclaimer clauses are easy to understand and do not lead to ambiguous or misleading interpretations.

With these steps, Tokopedia not only demonstrates its commitment to consumer protection in e-commerce but also ensures that its contracts align with the basic principles of agreements under Indonesian civil law.

Tokopedia is a key player in the Indonesian e-commerce ecosystem and has established legal terms and conditions for its users. All users, both consumers and sellers, must agree to these terms and conditions. One important element of these terms and conditions is the disclaimer clause. This provision expressly exempts Tokopedia from legal liability for losses arising from legal relationships between parties on the platform.

Tokopedia's disclaimer clause falls into the category of standard clauses, namely contract provisions created unilaterally by a business actor without prior negotiation with the user. This aligns with the definition of a standard clause under Article 1, number 10 of Law Number 8 of 1999 concerning Consumer Protection, which defines a standard clause as a rule unilaterally drafted by a business actor and set out in a document binding on consumers.

In practice, Tokopedia requires all users to agree to this clause when they first register on its app. This agreement is made through a clickwrap agreement, an electronic agreement in which users agree to the terms by clicking "I agree." While this mechanism is legally binding, users are not allowed to negotiate or change the clause's contents, creating an imbalance of rights and obligations between the parties to the contract.

Tokopedia's disclaimer covers a wide range of situations in which Tokopedia expressly disclaims responsibility for any loss or damage that users may experience. Some of the matters covered by Tokopedia's disclaimer include:

1. User's inability to access Tokopedia services
2. Errors related to pricing and shipping
3. Delays or service interruptions
4. User negligence
5. Product quality and delivery
6. Intellectual property infringement
7. Disputes between users
8. Defamation
9. Misuse of goods and losses resulting from payments to unauthorized bank accounts
10. Hardware damage, virus or malware attacks, and system disruptions
11. Third-party content or actions

## 12. User account enforcement

## 13. Third-party hacking of user accounts

As a concrete example, on April 17, 2020, Tokopedia suffered a massive hack by an international hacking group known as "Why So Dank." Personal user data, such as email addresses, passwords, and usernames, was stolen and sold on the dark web for approximately USD 5,000 (approximately 74 million rupiah). This hack affected approximately 91 million user accounts and 7 million merchant accounts. According to Tokopedia's disclaimer, the company is not responsible for any losses resulting from this third-party hacking attack. The clause explicitly states that Tokopedia, its parent company, directors, and employees are not responsible for any damage or loss resulting from the incident.

The implementation of these clauses demonstrates Tokopedia's active efforts to protect itself against legal risks arising from platform operations and user actions. In the context of contract law, this is a common form of limitation of liability found in electronic-based digital transactions. This case illustrates how disclaimer clauses serve as a legal instrument for Tokopedia to limit its liability, particularly regarding cybersecurity risks that can cause significant losses to users. These limitations of liability must adhere to the basic principles of civil law, particularly the principle of freedom of contract as stipulated in Article 1338 of the Civil Code. This principle affirms that every legally agreed-upon agreement is binding as long as it is made and executed in good faith. Therefore, disclaimer clauses drafted unilaterally, without any room for consumer negotiation, require further analysis from the perspective of contractual fairness and consumer rights protection.

This is particularly relevant given the imbalanced bargaining power between businesses and consumers in the e-commerce ecosystem, where consumers often have no option but to accept all proposed terms. This situation has the potential to create injustice and to contradict the principle of good faith, the basis for the implementation of contracts in civil law. Therefore, the author believes that Tokopedia's unilateral disclaimer clause should be re-evaluated in light of the principle of good faith in civil law. This evaluation is crucial to ensure that consumer rights remain protected and are not solely benefited by business actors. The drafting of terms and conditions must balance Tokopedia's interests as a service provider with consumer protection, ensuring that the agreement does not disadvantage either party, particularly consumers in vulnerable positions.

The rapid development of information technology, particularly in digital commerce, has changed the way parties enter into legal relationships, particularly through electronic contracts. One common element in these contracts is the disclaimer clause, which limits or excludes one party's liability for risk of loss arising during the implementation of the agreement. Although this clause gives the parties the right to regulate the contract's contents, its application must still comply with the principles of contract law. Disclaimer clauses may not be applied arbitrarily, especially if they could disproportionately harm one of the parties. In this case, the principles of freedom of contract, good faith, consensualism, and *pacta sunt servanda* serve as important benchmarks for assessing the clause's validity and fairness. Article 1338, paragraph (1), of the Civil Code states that every legally made agreement has the force of law for the parties who make it. However, this freedom of contract must be subject to the condition that the agreement's contents do not conflict with the law, public order, or morality. Therefore, a limitation-of-liability clause drafted unilaterally and disproportionately may conflict with the contract's legal principles and be deemed invalid. The explanation is as follows:

**Compliance of the disclaimer clause with the principle of freedom of contract**

Agreements create interrelated rights and obligations between parties. The principle of freedom of contract is a key principle in Indonesian contract law, reflecting the equality of parties in civil legal relationships, in contrast to hierarchical public legal relationships. While important, this principle does not stand alone and must be combined with the principles of

propriety, balance, and proportionality. Every individual is free to agree, provided it meets the law's subjective and objective requirements. The Indonesian civil law system adheres to the principle of an open contract system, which permits agreements as long as they do not conflict with applicable law. Disclaimer clauses are a manifestation of freedom of contract, allowing for the limitation of liability for certain risks. However, this freedom is not absolute, as agreements must be made freely without coercion or deception and must not disproportionately harm either party. If a disclaimer clause is drafted unilaterally by a dominant party, such as a business actor on an e-commerce platform, this can create inequality and obscure the essence of freedom of contract. Therefore, a disclaimer clause is only valid if it is drafted with the free consent of both parties and does not conflict with general legal principles.

### **Compliance of the disclaimer clause with the principle of *pacta sunt servanda***

The principle of *pacta sunt servanda*, meaning "a promise must be kept," affirms the obligation of the parties to carry out the contents of the agreement as agreed. This principle is regulated in Article 1338 paragraphs (1) and (2) of the Civil Code, stating that a valid agreement applies as law for the parties and can only be canceled for valid reasons or mutual agreement. Therefore, parties bound by the agreement are obliged to fulfill their obligations. A legally agreed disclaimer clause must comply with this principle, provided it does not conflict with law, morality, or public order, and meets the requirements for a valid agreement. This clause has binding legal force and must be complied with. However, in e-commerce practice, disclaimer clauses are often drafted unilaterally, leaving consumers with little room for negotiation. If such a clause completely relieves the business actor and creates an unbalanced burden for consumers, then even if it has been agreed, its validity must be reviewed from the perspective of the substance of justice.

### **Compliance of the disclaimer clause with the principle of consensualism**

The principle of consensualism, derived from the Latin word "consensus" (agreement), emphasizes that the formation of an agreement depends on the parties' mutual consent. According to Article 1320 of the Civil Code, the validity of an agreement is determined by the parties' consent. Therefore, consensus is a primary requirement for the formation of a valid and binding agreement. In this context, an agreement born of free will is a crucial element. However, the practice of electronic agreements, such as that implemented by Tokopedia, shows that disclaimer clauses are drafted entirely by service providers without any negotiation with users. Tokopedia includes these clauses in its terms and conditions, which users must accept to access the service. Tokopedia's dominant position allows unilateral stipulation of terms through standard clauses, so users can only accept or reject all provisions, leaving no room for negotiation and creating a legal imbalance. In this case, the disclaimer clause is more like a unilateral notice than a reciprocal agreement between equals. This situation raises questions about the applicability of the principle of consensualism in electronic transactions. Formal user consent does not necessarily reflect equal understanding. Therefore, Tokopedia's disclaimer clause needs to be reexamined in light of the principle of consensualism to determine whether the agreement truly arose from free will or merely from unilateral domination that reduces legal protection for consumers.

The development of information and communication technology has brought about significant changes in the way people conduct their daily activities. While many activities were previously carried out physically and conventionally, many have now shifted to being based on integrated information and communication technology systems. This technology is no longer an option; it has become a vital part of various fields, including economics, education, government, and social culture. (Abdul Hamid Tome Rafni Suryaningsih Harun, Weny A. Dunga, 2018) The role of information and communication technology is highly strategic in the era of globalization because it can erase geographical, time, and spatial boundaries, creating a borderless world where interaction and information exchange can occur in real time across

the globe. This increases efficiency and productivity and accelerates innovation in various aspects of life. (Abdul Hamid Tome Rafni Suryaningsih Harun, Weny A. Dunga, 2018)

The business world has also made significant progress, particularly with the advent of e-commerce, which simplifies online transactions. According to Galih Yoga Megandari, e-commerce now functions not only as a place for buying and selling, but also encompasses marketing, product development, customer service, and payment systems. The internet has become the primary medium for e-commerce, widely adopted by businesses due to its efficiency and ease of access. With the growth of e-commerce and the legal interaction between businesses and consumers online, the need for regulations that protect the rights of both parties has emerged. One important aspect to consider is the disclaimer clause, often found in the terms and conditions of digital platforms such as Tokopedia, which limits the service provider's liability.

Tokopedia, as a digital platform provider, connects sellers and buyers in an integrated electronic system. They stipulate various provisions that users, both businesses and consumers, must agree to in their Terms & Conditions. A key part of this disclaimer clause is the limitation or release of Tokopedia's liability for risks and losses arising from the use of the platform. This clause covers non-responsibility for misinformation, third-party actions, violations of rights, system failures, and losses beyond Tokopedia's operational control. Based on internal research, this clause exists and was systematically drafted through legal assessments and coordination among company units, not created haphazardly.

Because this clause was drafted unilaterally by Tokopedia without active user participation, civil law issues arise, particularly under contract law. This clause constitutes a unilateral electronic agreement, under which users can accept or reject it in its entirety, with no opportunity for negotiation. In civil contract law, this is a standard clause drafted predominantly by one party, thereby creating an imbalance in the legal relationship. This imbalance undermines the principle of freedom of contract as stipulated in Articles 1320 and 1338 of the Civil Code, as it becomes illusory when one party lacks the opportunity to express their wishes equally.

Furthermore, this unilaterally drafted disclaimer clause must also be criticized from the perspective of the principle of good faith as stipulated in Article 1338, paragraph (3), of the Civil Code, which requires agreements to be executed honestly and to ensure balance, justice, and fairness. When a limitation-of-liability clause is imposed without any opportunity for discussion, it contradicts the principle of good faith. Tokopedia's clickwrap agreement system, in which users are deemed to agree to the terms simply by clicking "agree," reinforces Tokopedia's dominant position. However, under civil law, an agreement must involve a meeting of the minds, which is not satisfied when users can only accept or reject it in its entirety. This suggests that the agreement is formal in appearance but lacking in substance.

The clause exempting Tokopedia from liability for misuse of personal data and account security issues, including losses arising from hacking or unauthorized access, demonstrates an attempt to limit liability broadly. This creates an imbalance of rights and obligations, as users continue to bear the potential risks arising from weaknesses in Tokopedia's own system. The principle of good faith requires that each party execute an agreement honestly and avoid actions that harm the other party. This provision is expressly outlined in Article 1338, paragraph (3), of the Civil Code and must be upheld throughout the agreement. Sutan Remy Sjahdeini explained that this principle imposes an obligation on the parties to the agreement not to harm the other party or the public interest.

The principle of good faith is crucial when assessing disclaimer clauses in electronic agreements on platforms like Tokopedia. Although legally valid, clauses limiting or disclaiming liability should not be applied arbitrarily, as this can create an imbalance between consumers and businesses and run counter to the spirit of fairness and honesty. Tokopedia, as

a service provider, is responsible for drafting provisions that are not only formally valid but also substantively fair. If the disclaimer clause tends to absolve Tokopedia of almost all liability, it raises the question of whether the clause truly reflects good faith, which requires reasonable consideration of users' rights and interests, particularly consumers in a weak bargaining position.

Furthermore, the principle of good faith is not merely a moral principle, but a binding legal principle that serves as a benchmark for assessing the validity of an agreement. The application of this principle to Tokopedia's disclaimer clause serves as a benchmark for whether the provision fairly respects the rights and interests of each party. If the clause shifts all risk to the weaker party without assigning proportionate responsibility to Tokopedia, its enforceability is questionable on good-faith grounds. Clauses drafted with the principle of good faith in mind must prioritize transparency, a balance of rights and obligations, and honesty. Therefore, Tokopedia needs to formulate its disclaimer clause proportionately to avoid unilateral losses. Thus, the agreement that arises is not only formally valid but also fair and sustainable in substance, according to Article 1338, paragraph (3), of the Civil Code. Therefore, in the practice of electronic contracts such as this, it is important to assess the extent to which the contents of the agreement, especially the limitation-of-liability clause, reflect principles of justice and balance. The principle of good faith, as stated in Article 1338, paragraph (3), of the Civil Code, is a fundamental basis for this evaluation, requiring that the agreement be not only formally valid but also executed with honest and fair intentions, without causing excessive harm to either party.

## CONCLUSIONS

Based on research on the application of the disclaimer clause on the Tokopedia e-commerce platform, it can be concluded that the clause is a form of exoneration clause drafted unilaterally by the business actor, without user participation in the drafting process. The application of this clause via the clickwrap agreement method creates an imbalance in legal standing, as users are given only the option to agree to the entire agreement, with no opportunity to negotiate. This condition illustrates the imbalance between the parties' rights and obligations in a contractual relationship. Although this clause meets the formal requirements for a valid agreement under Article 1320 of the Civil Code, its substance must be further tested in light of the principle of good faith as set out in Article 1338, paragraph (3), of the Civil Code. The clause that releases Tokopedia from almost all responsibilities, including risks that should still be under the company's control, is contrary to the principles of justice, balance, and fairness in the agreement. Therefore, the validity of this clause must be critically examined to ensure fair and proportional legal protection for all parties involved. As a recommendation, Tokopedia is encouraged to review how it drafts its disclaimer clauses, prioritizing the principles of balance and good faith in the context of civil law. Clauses that limit liability absolutely without considering the possibility of error or negligence on Tokopedia's part can create legal inequality in contractual relationships. Therefore, clause drafting must consider not only formal aspects but also substantial fairness to avoid harming users. Furthermore, Tokopedia needs to regularly review the terms of its electronic agreements, particularly the limitation-of-liability clauses, to ensure they remain aligned with the principles of justice and fairness under civil law. By consistently applying the principle of contractual fairness, Tokopedia can create more equal legal relationships and reduce the potential for disputes resulting from unilateral dominance in the drafting of agreements.

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