

Application of the Shifting Burden of Proof Principle in Settlement of Consumer Disputes at the District Court in West Sumatra

Misnar Syam^a, Yussy Adelina Mannas^b, Rembrandt^c, ^{a,b,c}Lecturer in the Law Faculty of Andalas University, email: ^amisnarsyam@gmail.com, ^byussymannas@yahoo.com, ^crembrandtbuan@yahoo.com

Proof in the settlement of consumer disputes uses the reversed burden of proof principle, as stipulated in articles 19, 22 and 28 of the Consumer Protection Act. The application of this principle is carried out with the consideration that consumers have difficulty proving the mistakes of business actors due to not knowing the ins and outs of the production and distribution of goods and/or services that are consumed and used. It also requires expensive costs, so that protection for consumers is not effective. The application of this principle of in settlement of consumer disputes in the District Court in West Sumatra is not implemented as stipulated in Consumer Protection Act. This is due to the examination of submission of objection to the Consumer Dispute Settlement Board's verdict. It is *judex juris*, so it does not require a proof process. Consumer disputes to be tried by the court, the burden of proof in accordance with the principle of *actio incumbit probation* (who postulate something he who had to prove it), as stipulated in article 163 HIR/283 RBG. This is different from what is stipulated in the Consumer Protection Act. Therein it is stated that businesses must prove the loss of consumers who are disadvantaged is through no fault of business. However, the consumer must still prove the presence or absence of losses. So, it remains unclear if the application regulating the burden of proof should be done by consumers and businesses.

Key Words: *Proof Principle, Consumer Disputes, Consumer Protection, Law*

Introduction

Each year in West Sumatra, the number of consumer disputes has increased. It can be seen in the number of consumer disputes that were presented to Consumer Dispute Settlement Board (BPSK) from 2010 to February of 2017. It can also be seen in the settlements of the judiciary Class 1A Padang District Court from 2013 until May 2017, in as many as 34 cases. Of the 34 cases, 3 were declared unacceptable and 2 were successfully reconciled. 29 cases were decided. Out of 29 cases, more than 50% (16) were won by business actors. Consumer disputes that occur involve leasing, banking and insurance. This shows the position of business actors is not balanced with consumers. The consumers are in a weak position. In West Sumatra, 11 Consumer Dispute Settlement Boards are found in almost all districts and cities. Of the 11 Consumer Dispute Settlement Boards in West Sumatra, 10 courts submitted their objection efforts to the district court. The number of cases from 2016-2018 totalled 76 cases.

The three ways of dispute settlement that require verification or proof process are arbitration; dispute settlement through the court or litigation in the civil field that can be carried out with individual lawsuits; and group lawsuits and non-governmental organisation. In addition, if the business actors are not satisfied with the Consumer Dispute Settlement Board's decision, they can submit an objection to the District Court. The dispute settlement process is done through Consumer Dispute Settlement Board. The district court uses proof or evidence.

Proof is a process of presenting evidence before a court of law with the aim of giving the judge confidence in the truth of an event. Bachtiar Effendi, et al argued proof is the presentation of legal evidence according to the law by the litigant to the judge in the trial. The aim is to strengthen the truth of the argument about the legal facts that are the subject of the dispute, so that the judge obtains certainty that is to be the basis for his decision (Lilik, 1999). According to Subekti, proving is convincing the judge of the truth of the arguments presented in a dispute (Subekti, 1989).

The presenting of evidence in the present of the judge will certainly be carried out by the parties in the dispute. In resolving consumer disputes, the parties are consumers and business actors. According to Article 1, number (2) of the Consumer Protection Act, consumers are 'every user of goods and/or services available in the community, whether for the benefit of themselves, their families, other people or other living things and not for trade.' the consumers referred to in the Consumer Protection Act are end consumers. According to Article 1, number (3) of the Consumer Protection Act, business actors are 'every individual or business entity in the form of a legal entity or not a legal entity established and domiciled or carrying out activities within the jurisdiction of the Republic of Indonesia, both

individually and jointly together through agreements to hold business activities in various fields of economics.’

In carrying out the evidence, it is known that there is a burden of proof (bewijslast/burden of proof). There is the obligation to prove something before the trial. According to Article 163 HIR/283, Rbg states ‘Whoever claims to have a right, or mentions an event to confirm that right or to dispute the rights of others, must prove the existence of that right or the existence of that event.’ This article states whoever postulates something has the obligation to prove.

The Consumer Protection Act embraces the shifting of the burden of proof. This is different from Article 163 HIR/283 Rbg. This is regulated in Article 19, paragraph (5) of the Consumer Protection Act, which states ‘The provisions referred to in paragraph (1) and paragraph (2) do not apply if the business actor can prove that the loss is a consumer fault.’ The purpose of this Article is to state that the responsibility of business actors to pay compensation to consumers can be lost if the business actor can prove that the loss suffered by consumers is not their fault. Article 22 of the Minister of Industry and Trade Regulation No. 350/MPP/Kep/12/2001 states that ‘proof in the process of resolving consumer disputes is a burden on the responsibility of business actors.’

The reason for applying the principle of shifting the burden of proof in the Consumer Protection Act is that business actors are more aware of the ins and outs of the material, the production process and the provisions of the distribution. To prove this requires a fee. The principle of inverse verification is imposed on business actors aiming to make legal protection of consumers more effective.

Settlement of consumer disputes, regulated in the Minister of Industry and Trade Regulation No. 350/MPP/Kep/12/2001, does not regulate clearly and in detail the application of the principle of shifting the burden of proof. In the HIR/RBg, it does not adhere to this principle. This can create confusion for judges in applying this principle, so that judges apply it according to their respective understandings.

Problem

Based on the background above, the problem to be investigated is: how principle of the shifting burden of proof should apply to the in the settlement of consumer disputes at District Court in West Sumatra?

Discussion

Human life is a gift from God Almighty that must be lived by every human being based on rules commonly called norms (Ilhami, 2012). A fact of life is that humans are not alone. Humans live side by side, even in groups, and often have relationships among themselves (Abdoel Djamali, 1984). Social life is a survival mode for humans, meaning that by living in a society, people can carry out their lives (Peter, 2008). In a place where there are people, there must be a civilisation that describes the state of a society. These places will potentially cause a conflict (Agus, 2012). According to Ali Ahmad, a dispute is between two or more parties that originate from different perceptions of an interest or property which may give rise to legal consequences for both (Takdir, 2010). The Consumer Protection Act does not provide limitations on what is meant by consumer disputes (Yusuf, 2012).

This consumer dispute can be either a civil suit or criminal prosecution of those who feel aggrieved. Consumer dispute settlement can be done through two processes. The process of settlement of disputes through the courts (litigation) and out of court (non-litigation). In order for human interests to be protected, the law must be implemented and upheld. Through law enforcement, this law becomes a reality (Sudikno, 1993). In carrying out its importance in society, the law has functions. These include policing arrangements and dispute settlement so as to accompany the growing community (Soedjono, 2008). Consumer dispute settlement, under Article 45 to Article 48 of the Consumer Protection Act, can be done in two ways: (1) the settlement of disputes through the courts and (2) the settlement of disputes out of court. Settlement of disputes through the court can be done by filing a civil suit with individual suit procedures, class action/claims, non-governmental organisations' claims or claims by the government or related institutions. Settlement of disputes outside the court can be carried out in a peaceful manner between the parties to the dispute without involving a third party. It can also be done through the Consumer Dispute Resolution Board by conciliation, mediation and arbitration.

The decision of the Consumer Dispute Settlement Board is final and binding. This is in accordance with what is stipulated in Article 54, paragraph (3) of the Consumer Protection Act. If the parties are not satisfied with the decision of the Consumer Dispute Settlement Board, they can submit an objection to the district court. Article 56, paragraph (2) of the Consumer Protection Act states that: 'The parties can submit an objection to the district court no later than 14 working days after receiving notification of the decision.' This is also stipulated in Article 41, paragraph (3) of the Decree of the Minister of Trade and Industry No. 350/2001, which states 'Consumers and business operators who reject the decision of the Consumer Dispute Settlement Board can file an objection to the District Court no later than 14 working days from the decision notification.'

The submission of objections to the decision of the Consumer Dispute Settlement Board has not been regulated in statutory regulations in Indonesia. To not prevent the district court from conducting an examination of this objection, facilitate the examination and fill the legal vacuum, the Supreme Court issued a Supreme Court Regulation Number 01 of 2006 concerning procedures for filing objections against the Consumer Dispute Settlement Board's decisions (hereinafter referred to as Supreme Court Regulation Number 1 of 2006). According to Article 1, number (3) of the Supreme Court Regulation Number 1 of 2006, 'objection is an effort for businesses or consumers who do not accept the decision of the Consumer Dispute Resolution Board.' The submission of objections to the Consumer Dispute Settlement Board decision of the district court can only be done against the arbitration decision (Aulia, 2018). This is in accordance with Article 2 of Supreme Court Regulation No. 1 of 2006, which states that 'objections can only be submitted against arbitration decisions issued by the Consumer Dispute Settlement Board.'

The process of a district court examining objections to the decision of the Consumer Dispute Settlement Board is regulated in Article 6 of the Supreme Court Regulation No. 1 of 2006, as follows:

1. Case examination is conducted by a panel appointed by the competent district court chair.
2. Examination of the objection is carried out only on the basis of the decision of the Consumer Dispute Settlement Board and case file.
3. Objection can only be filed
 - a. if letters or documents submitted during examination after the verdict handed down is recognised as being false or found to be false;
 - b. after the Consumer Dispute Settlement Board arbitration award is taken and found decisive in documents that are hidden by the opposing party; or
 - c. if Decisions are made as a result of deception carried out by one of the parties in the examination of disputes.
4. If it meets the above reasons, the panel can cancel the Consumer Dispute Settlement Board's decision.

In the case of filing an objection to the arbitration decision of the Consumer Dispute Resolution Board, there are other provisions that provide more opportunities for the parties who file it. Article 6, paragraph (5) of the Supreme Court Regulation Number 1 of 2006 states that the objecting party can submit the claim for other reasons beyond the reasons stated in Article 6, paragraph (3) of the same regulation. This reasoning can be in the form of any reason underlying the complainants causing the filing of a claim to cancel the decision of the Consumer Dispute Settlement Board to the district court. This includes the reason that there has been an error in the consideration of the Consumer Dispute Settlement Board assembly. This is based on the decision regarding evidence that is not in accordance with the principle of the shifting burden of proof, as regulated in Article 28 of the Consumer Protection Act (Susanti, 2017). The provision shows that the juridical implementation of a decision of the Consumer Dispute Settlement Board, which is decided without regard to the

principle of shifting burden of proof as stipulated in Article 28 of the Consumer Protection Act, is the cancellation of the decision through the submission of an objection to the district court (Susanti, 2017).

In practice, there are times when the examination of the submission of objection efforts against the decision of the Consumer Dispute Settlement Board in a district court is subject to material examination by a panel of judges. This is because (Haswandi, 2018)

1. There is no statutory regulation that regulates, explicitly and in detail, the process of examining consumer dispute settlements in court.
2. Meeting the procedural principle is simple, fast and inexpensive. This is so that the parties can settle their cases efficiently and so that they do not have to file a lawsuit back to the district court.
3. The purposes of the law is to provide justice and legal certainty and to be useful to the litigants.

The examination of the submission of objection efforts against the decision of the Consumer Dispute Settlement Board can be tried by the judges of the District Court in accordance with Article 6, paragraph (5) of the Supreme Court Regulation No. 1 of 2001 which states that (referred to in paragraph (3), 'The panel of judges may adjudicate the relevant consumer dispute themselves.'

Examination of consumer disputes, which are tried by the judges themselves in the proceedings, are based on applicable civil procedural law. This is in accordance with Article 8 of the Supreme Court Regulation No. 1 of 2001, which reads 'Unless otherwise stipulated in this Supreme Court Regulation, applicable civil procedural law also applies to objections to the consumer dispute resolution arbitration award.' From this article, it can be interpreted that in the examination of consumer disputes, the civil procedural law used is HIR/RBg.

Proof is the presentation of legal evidences, according to law, to the judge who examine a case in order to provide certainty about the truth of the incident stated (Riduan, 2000). Provisions on the burden of proof in civil procedural law is a very important aspect. They determine whether or not a civil claim (lawsuit) is granted. The imposition of wrong proof by a judge can result in someone who should win the case becoming the losing party just because he or she is unable to prove something which is actually right. The basis for the burden of proof in civil procedural law in Indonesia applies to the general principle of the burden of proof, contained in Article 163 HIR/283 RBg/1865 of the Civil Code (Ahmadi, 2013). In dividing the burden of proof, the judge must be really fair. If not, then it means that the judge a priori plunges the party who receives the burden of proof, which is too heavy, to the brink of defeat (Subekti, 1977).

In the civil case examination, as regulated in the HIR/RBg, the provisions regarding the burden of proof are regulated in Article 163 HIR/283RBg and Article 1865 of the Civil Code. It states that for each party who postulates something, it is he or she who must prove the rights or events. In this case, if the consumer feels aggrieved by the producer, the consumer must be able to prove that (Gunawan and Ahmad, 2000): (1) consumers have actually experienced a loss; (2) the loss occurs as a result of the improper use, utilisation, or use of certain goods and/or services which are the responsibility of the business actor (3) consumers do not contribute either directly or indirectly for the losses they suffer.

If the general principle of the burden of proof above is applied in cases of consumer losses due to the use of the product, it means that both producers and consumers are burdened with proof. Based on Article 1365 of the Civil Code, to prove the existence of consumer rights, the consumer must prove the existence of producer error, which results in losses. In other words, consumers must prove

1. there are mistakes/actions violating the law of the producer,
2. the existence of consumer losses, and
3. there is a causal relationship between producer's mistakes and consumer losses (Ahmadi, 2013).

This is different from Article 28 of the Consumer Protection Act, where the evidentiary obligation is shifted to the burden and responsibility of the business actor. In procedural law, this is known as the shifting burden of proof. The provisions of Article 28 of the UUPK emphasise that the existence of an element of error is the burden and responsibility of the business actor. That is, civil liability still requires an element of error.

The reverse burden of proof is important to apply the Consumer Protection Act on the basis of considerations that (1) a socio-economically weak consumer position is compared to the position of employers/companies. (2) In dealing with consumer lawsuits, employers find it easier to get a lawyer to defend their interests, including in proving their arguments through the expertise of experts in various fields (in accordance with the products they produce). (3) For consumers, it is difficult to prove the element of error/negligence of the entrepreneur/producers in the process of production, distribution and sale of goods or services that have been consumed by consumers.

In the shifting burden of proof system, the business actor must prove the absence of an element of error. This is if consumers are still burdened with proof while the loss suffered by consumers is due to consuming goods and/or services produced or traded. So, the burden and responsibility of business actors is to prove the absence of an element of error, not the absence of an element of loss to consumers (Susanti, 2006).

The shifting burden of proof is only limited to the proof of element of error. In fact, legal liability (civil) also includes causal links. It is necessary to prove the loss borne by consumers because it is caused by goods or services produced by business actors in addition to the element of error. This is not to mention the existence of contradictions regarding the shifting burden of proof. The reverse burden of proof is sufficiently well accommodated in the provisions of Article 22 of the Consumer Protection Act. However, Article 27 the Consumer Protection Act states that 'business actors producing goods are exempted from liability for consumer losses, if (a) the goods are proven to not be distributed; (b) defects in goods arise in the future; (c) defects arise due to non-compliance with provisions regarding the qualifications of goods; (d) negligence is caused by consumers; (e) there is a lapse of the claim period of 4 years from the time the item was purchased or when the agreed period began. There is also still a gap in the evidence if a criminal case is carried out by the prosecutor, who indirectly proves the burden of proof to the consumer. This will cause new problems in law enforcement. An example is the abuse of authority by law enforcement officials when implementing the shifting burden of proof related to consumer protection.

In the shifting of proof, the business actor is always held responsible (principle of liability), until he or she can prove he or she is innocent. So, the burden of proof is on the business actor. The basic theory of the shifting burden of proof is that a person is considered innocent until the person concerned can prove otherwise (Andi, 2011). In the case of consumer protection, if a product is produced by a defective business actor, the consumer is sufficient to prove that the product he is consuming is indeed defective and results in losses. It is the responsibility of the business actor to prove whether there is negligence or errors in the production process of goods and services (the shifting burden of proof) (Andi, 2011).

Under the Consumer Protection Act, there are several things that producers must prove to be free from responsibility. The producer will only be free from liability for losses suffered by consumers if (Ahmadi, 2013)

- a. the goods are proven not to be distributed or intended to be distributed;
- b. defects of goods arise in the future,
- c. defects arise from compliance with provisions regarding the qualifications of goods,
- d. negligence is caused by consumers, and
- e. the lapse of the prosecution period is 4 years since the item was purchased or the agreed period has passed.

According to the above explanation, it can be said that the application of the shifting burden of proof in the settlement of consumer disputes in district courts is applied depending on each case. In addition, the shifting burden of proof is only done by business actors to prove the



element of error is committed by business actors. Consumers are still burdened with proof whether there is a loss or not. This means that businesses and consumers remain burdened with proof. Even though the Consumer Protection Act adheres to the principle of the shifting burden of proof in settling consumer disputes, it does not make it easier for consumers when filing lawsuits against business actors in the context of seeking justice. The application of the principle of the shifting burden of proof in the settlement of consumer disputes has not fully been able to provide maximum legal protection to consumers.

Conclusion

Based on the above explanation, it can be concluded that the application of the shifting burden of proof principle in the settlement of consumer disputes in the District Court in West Sumatra has not been implemented as stipulated in Articles 19, 22 and 28 of the Consumer Protection Act. This is due to the examination of complaints against the Consumer Dispute Settlement Board's decisions being *Yudex Yuris*. They do not require proof of process. Consumer disputes, which are tried by the district court for the burden of proof regarding whether there is no error, are given to the business actor. However, the consumer is also obliged to prove whether there is no loss experienced by the consumer. Hence, both the business actor and the consumer remain burdened with proof. The application is still unclear when regulating the burden of proof. It must be done by consumers and business actors.

REFERENCES

- Abdoel Djamali, R. (1984). m S.H., *Introduction to Indonesian Law*. PT. RajaGrafindo Persada, Jakarta.
- Agus, S. (2012). *Law, Morals & Justice*, Prenada Media Group, Jakarta.
- Ahmadi, M. (2013). Second Ed, *Principles of Legal Protection for Consumers in Indonesia*, Raja Grafindo Persada, Jakarta.
- Andi, H. (2011). *Legal Protection for Consumers Against Misleading Information on Goods and Services*. Journal of Law, Faculty of Law, University of Jember, Jember.
- Aulia, M. (2018). *Consumer Protection Law Dimensions of Positive Law and Sharia Economics*, Pustaka Baru Press, Yogyakarta
- Gunawan, W. dan Ahmad, Y. (2000). *Consumer Protection Law*, PT Gramedia Pustaka Utama, Jakarta.
- Haswandi, SH.MH. (2018). Chairman of the General Courts of Supreme Court on October 1, 2018
- Ilhami, B. (2012). *Indonesian Legal System*, PT. RajaGrafindo Persada, Jakarta.
- Kausarian, H., Sri Sumantyo, J. T., Kuze, H., Aminuddin, J., & Waqar, M. M. (2017). Analysis of polarimetric decomposition, backscattering coefficient, and sample properties for identification and layer thickness estimation of silica sand distribution using L-band synthetic aperture radar. *Canadian Journal of Remote Sensing*, 43(2), 95-108.
- Kausarian, H., Sumantyo, J. T. S., Kuze, H., Karya, D., & Panggabean, G. F. (2016). Silica Sand Identification using ALOS PALSAR Full Polarimetry on The Northern Coastline of Rupert Island, Indonesia. *International Journal on Advanced Science, Engineering and Information Technology*, 6(5), 568-573.
- Kausarian, H., Lei, S., Goh, T. L., & Cui, Y. (2019). A new geological map for formation distribution on southern part of south China sea: West Kalimantan, Indonesia. *International Journal of GEOMATE*, 17(63), 249-254.
- Lilik, M. (1999). *Civil Procedure Law According to Indonesian Judicial Theory and Practice*, Djambatan, Jakarta.
- Peter, M. M. (2008). *Introduction to Legal Studies*, Kencana Prenada Media Group, Jakarta.

Regulation of the Minister of Industry and Trade of the Republic of Indonesia Number 350 / MPP / Kep / 12/2001 concerning the Implementation of the Duties and Authorities of the Consumer Dispute Settlement Board

Republic of Indonesia Law No. 8/1999 concerning Consumer Protection

Republic of Indonesia Supreme Court Regulation Number 1 of 2006 concerning Procedures for Filing Objections Against Consumer Dispute Settlement Decisions.

Riduan, S. (2000). *Book of Basic Material for Civil Procedure Law*, Citra Aditya Bakti, Bandung.

Shera, A. S. (2017). *Implementation of Shifting Burden Proof Principle in Consumer Dispute Settlement at BPSK*, Jurnal of Dialogia Iuridika, Vol 9 Number 1 Year 2017, portal garuda.org/article.php?article=501248&val= Implementation of *Shifting Burden Proof Principles in Consumer Dispute Settlement at Consumer Dispute Settlement Board*.

Soedjono, D. (2008). *Introduction to Legal Studies*, PT. RajaGrafindo Persada, Jakarta.

Subekti, (1977). *Civil Procedure Law*, Binacipta, Jakarta.

Subekti, (1989). *Civil Procedure Law*, Badan Pembinaan Hukum Nasional, Jakarta.

Sudikno, M. (1993). *Chapters on Legal Invention*, Citra Aditya Bakti, Bandung.

Susanti, A. N. (2006). *The Process of Consumer Dispute Settlement Judging From the Procedure Law And Its Implementation Constraints*, Kencana Prenada Media Group, Jakarta.

Susanti, A. N. (2017). Loc-cit, quoted from Shera Aulia Simatupang, Implementation of Reversed Burden Proof Principle in Consumer Dispute Settlement at Consumer Dispute Settlement Board, Jurnal of Dialogia Iuridika, Vol 9 Number 1 Tahun 2017, portal garuda.org/article.php?article=501248&val= Implementation of Reversed Burden Proof Principles in Consumer Dispute Settlement at Consumer Dispute Settlement Board, page 54 , accessed on November 14, 2018 at 12.25 wib.

Takdir, R. (2010). *Mediation of Dispute Settlement through Consensus Approach*, Rajawali Pers, Jakarta.

Yusuf, S. (2012). *Settlement of Consumer Disputes According to the Consumer Protection Act, Theory and Practice of Law Enforcement*, Citra Aditya Bakti, Bandung.