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Review Of Good Faith And Honesty (Goodfaith And Fair Dealing) In Business Contracts Based On Indonesia Legal Principles And International Law In Legal Reform National Contract

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Abstract

The implementation of good faith in civil law and common law systems, including Indonesia and other ASEAN countries, still leaves a phenomenon in society where violations still occur. In practice, even though according to the teachings of natural law, doing good is a command of the creator, because according to reason, humans must act in good faith. The research method used in this research is descriptive analytical, describing the facts and primary, secondary and tertiary legal materials, namely statutory regulations, international conventions, both CISG and UNIDROIT, the approach used is normative juridical through grammatical, authentic and systematic interpretation as well as legal construction relating to the object researched. With a comparative approach between countries in civil law and common law systems especially ASEAN countries. Field research was carried out through interviews. Technique Data collection was carried out by document study, related to good faith. Data analysis in this research is qualitative juridical. The research results show that implementation is good faith and honesty in business contracts based on the principles of Indonesian law and international law have not been implemented, it is proven that a civil case has been brought to court on the basis of breach of contract and/or acts of contravention law. According to natural law, doing good is commanded by the Creator. Efforts of each country does not provide limitations to this principle, it is reasonable, because it is transcendental/metaphysical in nature. Study results compared with ASEAN countries, both civil law systems and common law systems, this principle interpreted as not conflicting with the law, good morals, customs, equality, voluntarism, good will, cooperation, honesty, fairness and justice. Meanwhile in Indonesia it means propriety, honesty, no harm, no violation of other people's rights. As a concept of good faith in implementation of a business contract, the parties act on the basis of good faith having three ideas, important, namely the obligation of the parties to cooperate according to the objectives of the contract, compliance with standards of behavior honesty, compliance with reasonable behavior in the interests of the parties. It is a moral obligation from humans to carry out promises. Regarding the renewal of national contract law, BPHN carried out amendments to Book III of the Civil Code, Part 2 concerning obligations arising from agreements, can accommodate modern contracts in both CISG and UNIDROIT.

Keywords: Good faith, in business contracts, Indonesian law and international law.

A. INTRODUCTION

Humans from birth to death live among other people, that is, live with other humans. Humans are members of society as Aristotle said that humans are "Zoon Politicon", humans are social creatures who need each other. Cicero's famous slogan "Ubi Societas ibi ius" (where there is society there is law).

The regulation of good faith in Article 1338 paragraph (3) of the Civil Code states that agreements must be carried out in good faith (*contractus bona fide*), meaning that the agreement is carried out according to propriety and justice. Recognition and obligation to implement the principles of good faith are recognized in the contract principles according to UNIDROIT (The UNIDROIT Principles of International Commercial Contracts). Article 1.7. UNIDROIT states:

- 1) Each party must act in accordance with good faith and fair dealing in international trade.
- 2) The Parties may not exclude or limit this duty.¹

It also often happens that, when the implementation of an agreement is underway, circumstances change in such a way that was not previously taken into account. Here there is a legal vacuum, because there has been a change in facts from non-existence to existence.

The presence of UNIDROIT as a principle of international commercial law, the substance of which can be an accommodation to the disparities/differences that occur in the international community, both from the traditions of the Civil Law System and the Common Law System

B. RESEARCH METHOD

This research is descriptive analytical, namely describing facts in the form of data and primary legal materials

(legislation), secondary legal materials (leading expert opinions), tertiary legal materials (law dictionaries). The normative juridical approach method is used using grammatical and authentic interpretation, as well as systematic, which is used to look at the implementation of agreements. Legal construction is carried out on various laws and jurisprudence related to the object under study. In this research there are two research stages, namely the library research stage, to obtain secondary data, and field research to support secondary data. Data collection techniques, document study is carried out, taken from the provisions of good faith in the implementation of agreements, both national and international law. The data analysis used in this research was qualitative, without using statistical formulas.

1 Taryana Soenandar, UNIDROIT principle Sinar Grafika, Jakarta, 2004, hlm, 39.

C. DISCUSSION

1. Implementation of Good Faith and Honesty (good faith and fair dealing) in the Implementation of Business Contracts, Both Based on Indonesian Legal Principles and International Contract Law (CISG and UNIDROIT)

The philosophical basis of good faith is that the concept of good faith comes from the teachings of natural law that in principle humans must carry out their actions in good faith. That actions with good intentions are something ordered by the creator. Examined from Ratio, the legal formulation is covered by legal principles regarding what is the will (intention) desired by common sense and good faith. This means that whether or not it is stated in the contract, this principle is considered to always exist. In the German Civil Code it is in Article 157 and Article 242 BGB. In Article 157 BGB regulates the interpretation of contracts, that agreements must be interpreted in good faith by taking into account customs as in Section 157 Interpretation of Contract “Contract are to be interpreted as required by good faith, taking customary practice into consideration”

The obligation if this good faith principle is written in the Convention on The International Sale of Goods CISG Article 7 section (1) In the interpretation of this Convention, regardis to be had to itsinternational character and to the need to promote uniformity in its application and the observance of good faith in international trade

The good faith regulation in Article 1.7 of the UNIDROIT principles places on the parties two obligations that must exist in every agreement:

- 1) The parties are obliged to act in accordance with (the principles of) good faith and honest efforts in international trade.
- 2) The parties may not exclude or limit this obligation.

Article 1.7 UNIDROIT Principles stated:

- 1) Each party must act in accordance with good faith ang fair dealing in international trade.
- 2) The parties may not exclude or limit this duty (The parties cannot exclude or limit UNIDROIT's duty to provide illustrations of actions that are classified as actions that are contrary to the principle of good faith.

R. Subekti andProdjodikoro distinguishes good faith in two meanings, namely:

a. Good faith in a subjective sense.

Good faith in this sense means honesty, namely a person's inner attitude at the start of a legal relationship in the form of an estimate that the conditions necessary for a legal relationship to occur have been fulfilled.

b. Good faith in an objective sense.

Good faith in this sense means propriety, namely that the actions of the parties in implementing the agreement do not harm the opposing party. According to Wery P.L, what is meant by implementation in good faith is: "That both parties must treat each other politely, without deceit, without trickery, without cheating, using tricks, without disturbing the other party, not only looking at their own interests, but also looking at the interests of others."

Based on the description of various views regarding the obligation of good faith above, in the author's opinion there are still violations in the implementation of good faith, both in Indonesian law and international law.

In Indonesian law, as the author conducted field research at the Bandung District Court, it was found that there are still many violations of good faith in implementing agreements under Article 1338 paragraph (3) of the Civil Code. Civil disputes at the Bandung District Court in the last 3 years from 2018 to March 2020, as in the following table:

Civil Case Data at Bandung District Court 2018 - March 2020.

No	Cases	Year			Amount
		2018	2019	2020	
1	Cessi	2	1	-	3
2	Against the law	229	220	61	510
3	Compensation	1	9	3	13

4	Child Custody	3	3	4	10
5	Join Property	4	4	-	8
6	Merchant	3	4	-	7
7	Object of Dispute	1	-	-	1
8	Land	192	201	46	439
9	Divorce	-	1	-	1

1.R. Subekti, Legal Agreement P.T Intermasa, Jakarta, 1987, hlm 41.

2.Wirjono Prodjodikoro, Civil Law Principles, Ninth edition, Sumur Bandung, Bandung, hlm, 56.

3.Wery P.L, Development of Law Concerning Good Faith in the Netherlands (Lecture celebrating Lustrum II Notarial Specialist Study Program Faculty of Notarial Law, Unair, Surabaya, 1990, hlm. 8-9.

10	Mortgage	11	8	2	21
11	Land selling	3	2	2	7
12	Inheritance	66	87	31	184
13	Breach of contract	-	1	-	1
14	Arbitration cancelation	10	-	6	16
	Else				
	Amount	515	550	155	1.220

Source: Bandung's District Court 2018-2020

Based on the table data, it can be seen that the number of violations due to breach of contract and/or unlawful acts is quite high compared to other civil cases.

Judges must apply this article systematically, because Article 1338 paragraph (3) of the Civil Code cannot stand alone, but is bound and connected to other articles, namely both Article 1339 and Article 1347 of the Civil Code. This is understood because law is a system, namely a unity consisting of various elements that are related to each other.

Based on field research, the judge's decision regarding good faith in implementing this agreement found that:

- That the casuistic application of Article 1338 paragraph (3) of the Civil Code has experienced many developments.
- In deciding cases based on intentions, judges must be able to find the laws that exist in society.
- The judge's decision based on good faith is everything that is seen objectively, namely what is considered appropriate by society.

Thus, author's opinion, implementing an agreement is a requirement of morality. According to Huala Adolf, that the principle of good faith requires that it be present during negotiations, contract implementation, and resolving disputes, Article 7 paragraph (1) CISG is also in UNIDROIT Article 1.7 which states that "each party must act in accordance with good faith and fair dealing in international trade" (each party must have good faith and honesty in carrying out international trade).

Author's opinion, the existence of a legal vacuum, good faith in pre-contractual matters has now been answered, both in the civil law system and the common law system, this is in response to the contract law doctrine adopted by modern contract law, that it is time for the rights of the parties involved. aggrieved because they have placed their trust in the defendant, are given the right to compensation for losses that the plaintiff has actually received.

Thus pre-contractual good faith can directly function as a new constraint on freedom of contract. The precontractual good faith doctrine can be a basis for the development of good faith in future practice.

2. The concept of good faith and honesty (good faith and fair dealing) in the implementation of business contracts, both based on Indonesian legal principles and international contract law in the renewal of national contract law.

The concept of good faith and honesty (good faith and fair dealing) in implementing agreements based on Indonesian contract law and international law is an obligation that must be implemented, because whether or not this principle is included in the contract is always considered to exist, where the ratio iuris is a legal formulation that has been established. wrapped in legal principles regarding what one wishes to do, required by common sense. Gustav Radbruch in his book *Sudikno Mertokusumo* states that in enforcing the law 3 elements must be met, namely, justice, expediency and legal certainty, all three of which must be in compromise.

Thomas Aquinas brought the concept of good faith into the natural law paradigm. The philosophy of Thomas Aquinas relates good faith as a rule of natural law. The latest concept of good faith in the English common law system was put forward by Sir Anthony Mason in a lecture at Cambridge University in 1993 who stated that ¹⁰ The concept of good faith includes three doctrines relating to:

1. An obligation for the parties to cooperate in achieving the objectives of the contract. (honesty towards the promise itself).
2. Fulfillment of standards of honorable behavior; And
3. Fulfillment of reasonable standards of contract relating to the interests of the parties.

As explained in the CISG convention, Article 7 paragraph (1), one of the desired interpretations is regarding the observance of good faith in international trade. Meanwhile, the principle of good faith in UNIDROIT as Article 1.7 places on parties two obligations that must exist in every agreement. Based on the results of comparative studies with ASEAN countries, the implementation of good faith and honesty (good faith and fair dealing) is classified in civil law system and common law system countries, good faith is defined as carrying out contracts with voluntariness, equality, honesty, fairness, good morals, good intentions, and not in conflict with the law.

In Indonesian law, good faith is defined as propriety, not harming others, not violating other people's rights, not prioritizing their interests itself, acting in balance, this shows that the principle of good faith is interpreted differently for each country. According to Zeller in Huala Adolf, 11 that firstly the difficulty of understanding this is not surprising, because this principle is metaphysical in nature, therefore understanding this principle depends on the structure and formulation of the legal system that applies it. Important milestones in the history of contract law in Indonesia, such as the provisions that have been adopted by CISG (United Nations Conventions on International Sale of Goods) and UNIDROIT (Principles of International Commercial Contract) can safely follow current contract developments.

D. CONCLUSION

- a. The implementation of good faith and honesty (good faith and fair dealing) in the implementation of business contracts based on Indonesian legal principles and international contract law (CISG and UNIDROIT) still contains violations where there are still many civil cases that enter court, filed on the basis of breach of contract and/or unlawful acts.
- b. The concept of good faith and honesty (good faith and fair dealing) in the implementation of business contracts based on Indonesian law and international law in the renewal of national contract law according to the results of comparative studies with ASEAN countries, both those incorporated in the civil law and common law systems, found that The obligation of good faith is defined as not conflicting with the law, good morals, customs, public interest, equality, voluntarism, good will, cooperation, honesty and fairness. Meanwhile, according to Indonesian law, good faith is defined as propriety, not harming other people, not violating other people's rights, not prioritizing one's own interests.

Suggestion

- a. The implementation of good faith and honesty in implementing agreements in business contracts based on the principles of Indonesian law and international law still occurs, so understanding is needed from the public, because having good faith is a moral obligation that must be carried out, and that is the order of the Creator.
- b. The concept of good faith and honesty in the implementation of business contracts based on Indonesian law and international law in the renewal of national contract law varies in various countries, both civil law legal systems and common law systems, because this good faith is transcendent/metaphysical in nature, according to the Creator's orders, then Book III of the Civil Code, especially Part 2 concerning obligations arising from agreements, follows adjustments to the needs of international contracts. following developments in CISG and UNIDROIT.

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D. Conventions

CISG = (United Nations Convention on Contract for the International Sale of Good)

UNIDROIT = (Principles of International Commercial Contracts.