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The application of good Faith principle of precontract in common law and civil law contry

A aplicação do princípio de boa fé do pré-contrato no país de direito consuetudinário e civil

La aplicación del principio de buena fe del precontrato en el país de derecho consuetudinario y civil

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Abstract
In Indonesia, development of application of good faith principle in legal agreement focuses on the application of Civil Code (KUHPerdata) where scope is still placed on the implementation of agreement. It is as if Civil Code has not recognized the existence of good faith principle at pre-contract stage. In comparison, according to modern agreement theory that parties who suffer losses in pre-agreement/contract stage or at negotiation stage, their rights also deserve to be protected. Thus, pre-agreement/contract promises will have legal implications for those who violate them. This will be seen in countries that have common law and civil law systems. An important issue in this case relates to the principle of good faith at the pre-contract stage which creates a gap with the provisions in the legislation. To analyze these problems, legal research was conducted with the black-letter law paradigm. Technique of collecting legal materials in this research used library research. Legal materials are analyzed deductively and utilize the method of interpretation (hermeneutics). Results showed that the application of the principle of good faith at the pre-contract stage in Common Law and Civil Law countries had differences. In the Civil Law system, good faith is highly emphasized in the stage of contractual negotiation. Whereas in the Common Law system, it prioritizes efforts to restore rights of aggrieved party in pre-contract stage. Parties who do not have good faith at the pre-contract stage have legal consequences for cancellation of the agreement.
Keywords: Good faith principle; Common law and civil law; Precontract.

Resumo
Na Indonésia, o desenvolvimento da aplicação do princípio da boa fé em acordos legais se concentra na aplicação do Código Civil (KUHPerdata), onde o escopo ainda é colocado na implementação do acordo. É como se o Código Civil não tivesse reconhecido a existência do princípio da boa fé na fase pré-contratual. Em comparação, de acordo com a moderna teoria do acordo de que as partes que sofrem perdas na fase de pré-acordo / contrato ou na fase de negociação, seus direitos também merecem ser protegidos. Assim, as promessas de pré-acordo / contrato terão implicações legais para aqueles que as violarem. Isso será visto em países que possuem sistemas de common law e civil law. Uma questão importante neste caso diz respeito ao princípio da boa fé na fase de pré-contrato, que cria uma lacuna com as disposições da legislação. Para analisar esses problemas, uma pesquisa jurídica foi conduzida com o paradigma da letra preta. A técnica de coleta de materiais jurídicos nesta pesquisa utilizou a pesquisa em biblioteca. Os materiais jurídicos são analisados dedutivamente e utilizam o método de interpretação (hermenêutica). Os resultados mostraram que a aplicação do princípio da boa fé na fase pré-contratual em países de Common Law e Civil Law apresentou diferenças. No sistema Civil Law, a boa fé é altamente enfatizada na fase de negociação contratual. Já no sistema de direito consuetudinário, ele prioriza os esforços para restaurar os direitos da parte prejudicada na fase de pré-contrato. As partes que não tiverem boa fé na fase de pré-contrato têm consequências jurídicas para o cancelamento do acordo.
Palavras-chave: Princípio da boa fé; Direito comum e direito civil; Pré-contrato.

Resumen
En Indonesia, el desarrollo de la aplicación del principio de buena fe en los acuerdos legales se centra en la aplicación del Código Civil (KUHPerdata), donde todavía se da alcance a la implementación del acuerdo. Es como si el Código Civil no hubiera reconocido la existencia del principio de buena fe en la etapa previa al contrato. En comparación, de acuerdo con la teoría moderna del acuerdo de que las partes que sufren pérdidas en la etapa de preacuerdo / contrato o en la etapa de negociación, sus derechos también merecen ser protegidos. Por lo tanto, las promesas previas al acuerdo / contrato tendrán implicaciones legales para quienes las violen. Esto se verá en países que tienen sistemas de derecho consuetudinario y de derecho civil. Una cuestión importante en este caso se relaciona con el principio de buena fe en la etapa previa al contrato, que crea una brecha con las disposiciones de la legislación. Para analizar estos problemas, se llevó a cabo una investigación jurídica con el paradigma de la ley de letra negra. La técnica de recopilación de materiales legales en esta investigación utilizó la investigación bibliotecaria. Los materiales legales se analizan deductivamente y utilizan el método de interpretación (hermenéutica). Los resultados mostraron que la aplicación del principio de buena fe en la etapa previa al contrato en los países de derecho consuetudinario y de derecho civil presentaba diferencias. En el sistema de Derecho Civil, la buena fe se enfatiza mucho en la etapa de negociación contractual. Mientras que en el sistema de Common Law, prioriza los esfuerzos para restaurar los derechos de la parte agraviada en la etapa precontractual. Las partes que no tengan buena fe en la etapa previa al contrato tienen consecuencias legales por la cancelación del acuerdo.
Palabras clave: Principio de buena fe; Derecho consuetudinario y derecho civil; Precontrato.

1. Introduction

The contract practice (covenant) is currently more complex. The parties who will enter into an agreement, especially in large-scale business contracts, usually negotiate pre-contracts or preliminary contracts. In principle, Preliminary contract negotiations aim to explore various possibilities for the plan to enter into an agreement between the parties. In this stage, covenant from one party to another often appear or are conveyed in the expectation that the other party agrees to enter into an agreement as a follow-up to the negotiations. The other party who was given covenant puts expectation in the agreement marked by a willingness to take several legal actions (rechtshandeling), for example, handing over money or goods as a sign of completion.

Before a business transaction takes place and before a contract is made, preliminary negotiations are usually conducted. According to Oxford Dictionary: ”Negotiation is a dialogue between two or more people or parties, intended to reach an understanding”. (Homby A.S, 1984)

Based on the author's free translation, negotiation means a conversation between two or more people with a view to reach a compromise or agreement. Other terms that are often used in this process are as follow: bargaining, dealing, discussing, brokering, or bartering. Negotiation is a process of trying to reach an agreement with other parties.

According to Erman Rajagukguk, A contract is basically a written document that contains the wishes of the parties to achieve their commercial goals and how the parties benefit, protect or limit their responsibilities in achieving the goals (Erman Rajagukguk, 1994).

As previously stated, in preliminary contract negotiations, it is very possible for covenants made by one party to cause the other party to put their trust and hope that the covenant will be agreed and signed in the future. In terms of placing trust, one of the parties may deposit a certain amount of money, for example as a "signature" or perform an act in which the act involves various capital and/or assets as a preparation if a contract has been signed at some point.

Problems arise when one of the parties who put their trust and has submitted a certain amount of money, for example as a prerequisite for entering into an agreement, then turns out to not obtain the expected rights as promised by the other party in the negotiation. Hence, the question arises "Can the aggrieved party ask for compensation against the party who breaks his promise while between them there is no contract or agreement signed?"

The classical legal doctrine emphasizes that the good faith principle can only be applied in situations where the covenant has fulfilled certain conditions. The implication is that this teaching does not protect the parties who suffer losses in

the prelimeary contract stage or the negotiation stage because at this stage, the agreement has not fulfilled the "certain things" requirements. According to Suharnoko, the provisions regarding good faith in the Civil Code should be an entry point in applying the promissory estoppels doctrine to protect the interests of the parties who are harmed due to promises that are not carried out by other parties (Suharnoko, 2008).

Good faith is a classic principle in legal agreement that is also contained in the Civil Code. This principle is derived from the concept of bona fides in Roman covenant law. Modern legal law theory that puts forward the principle of good faith that the implementation of the principle of good faith does not only begin to be implemented after signing the agreement and implementing the agreement, but must have been implemented (existed) since the negotiation stage (pre-agreement/contract). This modern legal agreement theory has been applied in countries that adhere to the "Civil Law" legal system such as France, the Netherlands and Germany. We all know that the French Civil Code affected the Dutch Burgelijk Wetboek and subsequently based on the principle of concordance, the Dutch Burgelijk Wetboek was adopted in the Indonesian Civil Code (KUHPerdata).

In Indonesia, the development of the application of good faith principle in legal agreement focuses on the application of Article 1338 paragraph (3) of the Civil Code where the scope is still placed on the implementation of the agreement, and it is as if the Civil Code has not recognized the existence of good faith at the preliminary contract stage. In comparison, according to the modern agreement theory that the party who suffers losses in the pre-agreement/contract stage or at the negotiation stage, their rights also deserve to be protected. Thus, the pre-contract/contract of covenant will have legal implications for those who violate them.

In countries that adhere to the "Common Law" legal system, such as United State and England, have also taken precautions so that an individual does not withdraw his/her promise, with a legal theory known as law "doktrin promissory estoppel" (Paul Latimer, 1998). It explains that legal theory of "doktrin promissory estoppel" is a legal doctrine that prevents an idividual (promisor) from withdrawing his/her promise, in the event that the party who receives the promise (promisee) because of his/her belief in the promise has done something or has not done something, Thus, he/she (promise) will suffer a loss if (promisor) i.e. the party giving the promise is allowed to withdraw the promise. Actually, in other countries, both adherents of the Civil Law system and Common Law, good faith studies actually provide space for judges to explore and weigh the concepts of propriety and justice at the preliminary contract stage and ultimately recognize the teaching of good faith at the pre-contract stage.

We can all know that this fact ultimately creates a gap between pre-contract practices and the provisions in the legislation that represent legal principles and norms. The practice of making commercial contracts is generally preceded by a pre-contract in order to explore various possibilities that are very likely to make covenant from one or both parties. Thus, it is very possible to break a promise in a pre-contract that cannot be held accountable.

In various laws and regulations, we do not find provisions that specifically regulate the MoU. The MoU is actually not known in conventional law in Indonesia, especially in the field of contract law in Indonesia, but with the development of the business world in Indonesia, business cooperation is established not only between fellow domestic business actors but also between domestic business actors and foreign parties. In this cooperation relationship, it is possible to have differences in the legal system adopted by both parties where there is a meeting between the Common Law legal system and the Civil Law legal system that affects the Civil Law legal system, one of which is the making of MoU which are often practiced by imitating what is practiced internationally. As a document that is agreed upon by both parties, the MoU usually contains the agreements of the parties aimed at the interests of the parties involved in it (Zayanti Mandasari, 2013). MoU also usually look similar to contracts due to some characteristics that also resemble contracts (Gunawan Widjaja, Vol. 13). Theoretically, the use of the MoU is not legally binding, because in order to be legally binding it must be followed up with an agreement (Surya Darma, 2016).

Based on the explanation above, this article discusses issues regarding the application of the principle of good faith at the preliminary contract stage in Common Law and Civil Law countries and regarding the legal consequences of parties who do not have good faith at the preliminary contract stage.

2. Methodology

This article is compiled from the results of legal research (doctrinal research). The research used prescriptive research. This research approach used a qualitative research approach with the data sources used were library materials in the field of law, namely primary legal materials, secondary legal materials and tertiary legal materials. The data collection technique in this research used an inventory of legal materials through library research. Legal materials were analyzed deductively and using interpretation methods (hermeneutics).

3. Results and Discussion

3.1 Application of Good Faith Principle in the preliminary Stage of Good Faith Principle Implementation Common Law and Civil Law Country

Good faith in a covenant must exist since a new covenant will be agreed. It means good faith exists during pre-agreement negotiations. Ridwan Khairandy (1999) stated that good faith must exist since the pre-contract stage where the parties start negotiating until they meet an agreement and the contract implementation phase.

Good faith also can't be separated from the elements of propriety and custom as well as the law. Article 1339 of the Civil Code states that agreements are not only binding on things that are expressly stated in them, but also for everything which, according to the nature of the agreement, is required by propriety, custom, or law (Agus Yudho Hernoko, 2010).

As stated earlier, pre-contract is a stage that precedes the formation of a contract. In both common law and civil law systems, contract law has developed by giving a greater portion of attention to pre-contract as a stage that is no less important than the contractual and post-contractual stages. In fact, pre-contracts are often considered as the soul of the contract made by the parties at a later date.

Common law and civil law countries with different approaches, place good faith as the epicenter of pre-contracts. Good faith must underlie the will of the parties in negotiating at the preliminary contract stage, even with statements of conviants offered to other parties.

The principle of good faith (the good faith, te goeder trouw) in the Indonesian civil law system is the basis for the parties to make and implement contracts, as affirmed in Article 1338 paragraph (3) of the Civil Code.

Countries that adhere to Civil Law do not provide a definition of good faith. Hoge Raad in his decision "Hengsten Vereniging v. Orderlinge Paarden en Vee Assurantie" stated that the interpretation of the terms of the contract is conducted with or according to common sense and proper in Dutch "volgens de Eisen van redelijkheid en billijkheid." In other words, the formulation "redelijkheid en billijkheid" includes all things captured by the mind (intellectual) and feelings).

This doctrine means that the behavior of the parties in carrying out the agreement must be tested on the basis of written objective norms. These norms do not only refer to the assumptions of the parties, but must refer to behavior that is in accordance with the general view of the good faith.

The principle of good faith in countries that adhere to the civil law system is heavily influenced by the Roman and canonical legal traditions. However, the formulation of the obligation of good faith is very different from one country to another. In a lot of literature on the application of good faith (Emily M. Weitzenbock, 2002), there are different concepts in the civil law and common law traditions. In the civil law system, good faith is highly emphasized in the stage of contractual

negotiation. Meanwhile, in the common law system, the nomenclature of good faith is not introduced (there is no general rule to negotiate in good faith), but common law bridges this with the concept of piecemeal solutions to problems of unfairness.

Common law countries put forward efforts to restore the rights of the aggrieved party in the preliminary contract stage with the principle that a covenant made that is subsequently not kept and causes harm to the other party creates an obligation for the party concerned to recover the rights of the aggrieved party. This concept is well-known as promissory estoppel. It is a prohibition for an individual to withdraw a covenant that has been made and cause harm to others. Estoppel is taken from the word estop which the Oxford Dictionary calls stop up.

According to Paul Latimer, the legal theory "promissory estoppel doctrine" is a legal doctrine that prevents an individual (promisor) from withdrawing his/her pledge, in the event that the party who receives the promise (promisee) because of his belief in the promise has done something or has not done something. Thus, he (promise) will suffer a loss if the (promisor) that is the party giving the promise is allowed to withdraw his promise.

There are several elements for an individual to be able to use this estoppel promissory doctrine, as follow (Robert Sidauruk, 2012):

1. Things that are considered agreed upon;

2. The existence of trust or basing trust in the promise and it is carried out fairly (reasonably);

3. Losses suffered due to trust in the promise.

The difference between civil law and common law traditions regarding the meaning and application of good faith is more of a terminology difference but identical in terms of substance. This is because the essence of the two concepts is basically the same. It is the obligation of the parties to have good faith in pre-contractual negotiations and the existence of accountability that can be asked for parties who violate the pre-contractual liability.

3.2 Legal Consequences for Parties who do not have Good Faith at the Pre-Contract Stage

In general, to conduct a contract properly, several stages are needed from preparation to implementation of the contents of the contract. This stage is especially important for very high value or high-risk contracts. As for simple contracts, these stages are not so important to pay attention to. However, all these stages must be carried out in good faith from the parties who made them. These stages are as follow;

1. The pre-contractual stage, where the parties will bind themselves in the contract, generally carry out a bargaining process. One of the parties makes an offer while the other party will give acceptance when he accepts the terms proposed by the first party. This process is also commonly referred to as the negotiation process towards the creation of mutual consent (JH. Niewenhuis, 1985).

2. Contractual stage is the conformity of the statement of will between the parties. At this stage, there is also a legal obligation for good faith to be signed that is commonly referred to as “the obligation to exercise due diligence” (Kartini Muljadi, 1994).

3. The Implementation Contract Stage, the implementation of the agreement.

The principle of good faith is a principle in universal legal agreement. The existence of the principle of good faith is well known in countries that adhere to the Civil Law/Continental European Legal System, as well as countries that adhere to the Common Law/Anglo Saxon Legal System.

Indonesia as a country that adheres to the Civil Law Legal System also regulates the existence of the principle of good faith in its contract law. The principle of good faith in legal agreement in Indonesia is reflected in the provisions of Article 1338 paragraph (3) of the Civil Code, which reads: "Agreements must be carried out in good faith.”

The application of the principle of good faith contained in Article 1338 paragraph (1) of the Civil Code must be carried out by the parties either in the pre-contractual, contractual and post-contractual stages. Thus, at every stage in the agreement the parties who make the agreement must always carry out the principle or principle of good faith.

The pre-contractual stage is before the signing of an agreement. In this stage, the parties who will make a letter of agreement can take preparatory actions before making an agreement. Things or actions that can be taken by the parties at the pre-contractual stage include:

1. Negotiating
2. Conducting legal audits
3. Creating a Memorandum of Understanding
4. Requesting for a legal opinion from an advocate
5. Conducting assessments from a business, social, technical perspective, ETC.

The number of activities in the pre-contractual stage highly depend on the urgency of these activities for the agreement that will be made later.

In presenting things or actions in the pre-contractual stage, even though the parties have not made or signed an agreement, the parties must still uphold good faith. If one of the parties does not uphold good faith in the pre-contractual stage, it is very likely that it will cause harm to the other party.

An example of the application of the principle of good faith at the pre-contractual stage is when the parties are negotiating. The contents of the agreement are basically the result of the agreement of the parties who made it. The agreement can be generated between through the negotiation process. Thus, the aim of carrying out negotiations is basically to reach an agreement between the parties on a matter that will be stated in the agreement.

In the negotiation process, the parties should uphold the principle of good faith. One form of applying the principle of good faith in negotiating, for example, is that one party does not impose his/her will on the party to reach an agreement. The coercive action carried out by one of the parties is because the position of one party is "higher" than the other party, for example in a work relationship the position between the employer is considered higher than the workforce even though the position of the parties in the agreement should be equal or equal.

If in the negotiation process one of the parties imposes coercion on the other party, then the party who feels compelled can refuse or disagree with it. However, if the parties have already made an agreement, then if it can be proven that the agreement that was born came from a coercion, the party who feels compelled can apply for the cancellation of the agreement they have made. This is because there is a defect in the agreement. Thus, one of the subjective terms of the agreement is not fulfilled.

Another example of the application of the principle of good faith in the negotiation process is that the parties do not commit fraud against the other party in order to reach an agreement on a matter. If an agreement has been made, it can be proven by one of the parties who made it that the agreement was generated from an agreement in which there is fraud, then the party who feels that he has been cheated can apply for the cancellation of the agreement to the court. This is based on the existence of defects in the agreement, which is a subjective condition for the validity of an agreement.

The application of other good faith principles at the pre-contractual stage, for example when one of the parties conducts a legal audit of a potential partner. Legal audit is essentially an examination (audit) of documents and other matters related to legal matters. Matters or documents that will be used as objects of legal audit are very dependent on the agreement to be made.

During the legal audit, the party conducting the legal audit will ask for a number of documents and other matters related to the law. The purpose of the legal audit is essentially to ensure that the agreement to be made can run well and does not conflict with the applicable laws and regulations.

The party conducting the legal audit and the party being audited must both have good faith in its implementation. For example, the party conducting the legal audit must maintain the confidentiality of the documents provided by the audited party. The party conducting the legal audit must not misuse the documents provided by the audited party for purposes outside the legal audit process.

Likewise, the audited party must carry out good faith during the legal audit process. Documents or information provided to the auditing party are not allowed be manipulated. The information given to the auditing party must not conflict with the facts which will result in an advantage for one of the parties.

If there is one party who feels aggrieved in the implementation of a legal audit, the provisions regarding unlawful acts contained in Article 1365 of the Civil Code can be used. However, if it has entered the post-contractual stage and it turns out that there is poor faith from one of the parties during the legal audit, then the party who feels aggrieved can also demand that the agreement he has made to be canceled to court.

Then if one of the parties is deemed not to have good intentions, for example in canceling the MoU (Memorandum of Understanding), even though the aggrieved party has taken actions that incur large costs in order to implement the MoU, then the party who feels aggrieved can sue the party who is deemed to have harm him based on the provisions of Article 1365 of the Civil Code concerning unlawful acts. However, in this case, the party who feels aggrieved must be able to prove that the resulting loss is the result of the actions of the party canceling the MoU.

If evidence is found that there is no good faith in the negotiation process or pre-contract between the two parties, then the agreement can be requested for cancellation by one of the parties. Because the agreement is declared null and void only if the conditions are canceled as agreed or included in the agreement which is a law for the parties.

Marjane Termorshuizen explained that the meaning of nietig is void. nietigheid is cancellation and vernietigbaareid is something that can be canceled (Marjane Termorshuizen, 1999).

4. Conclusions

The application of good faith at the preliminary contract stage in Common Law and Civil Law countries has differences. Even with a different approach, they still place good faith as the epicenter of the pre-contract. In the civil law system, good faith is highly emphasized at the stage of contractual negotiation. Meanwhile, in the common law system, it prioritizes efforts to restore the rights of the aggrieved party in the pre-contract stage with the principle that a promise made which is subsequently not kept and causes harm to the other party creates an obligation for the person concerned to restore the rights of the aggrieved party. This concept became known as promissory estoppel, which is a prohibition for someone to withdraw a promise that has been made and cause harm to others.

The partied who do not have good faith at the pre-contract stage will have legal consequences, namely the cancellation of an agreement, if evidence is found that there is no good faith in the negotiation process or pre-contract between the two parties, the agreement can be requested for cancellation by one of the injured parties.

Implications

The logical consequences of the conclusions of the research results above, the implications can be formulated as follows:

With the Application of Good Faith Principle in The preliminary Stage of Good Faith Principle Implementation of Common Law and Civil Law Country, it can become a benchmark or reject the parties who will later enter into an agreement in order to be more concerned with the contents of the agreement so that it can be implemented according to what is stated in the agreement.

With the existence of Legal Consequences for Parties who do not have Good Faith at the Pre-Contract Stage, then in the future the parties who commit bad faith will have a benchmark or benchmark in carrying out a good settlement and will not repeat their actions again.

Suggestion

It is preferable to need a regulation that is lex specialis, especially regarding doctrines that live outside Indonesia and its application in pre-contract agreements that are made and involve Indonesian citizens as one of the parties who bind themselves in the pre-contract agrément.

For the parties in pre-contracting, they must understand the form and content of the agreement, especially since the form and content of the agreement serves to guarantee legal interests for both parties and to anticipate losses that will arise if there is a bad faith.

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