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Legal Consequences in Pre-Contracting in the Perspective of Indonesian Contract Law: Comparative Study of Law with Other Countries

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Abstract

This article discusses the development of law on the pre-contract side in Indonesia by making legal comparisons with other countries, including court decisions. The basis of the comparison is from the aspect of the principle of good faith and promissory estoppel at the pre-contract level and its legal consequences. Pre-contracts in Indonesia do not yet have legal matters, even though one of the parties has taken legal actions to be realized in the contract. These legal acts have not been recognized because they are not included in the contract area, even though these legal actions can harm the person who commits them. The UK, Australia, and the United States are based on the principle of good faith and promissory estoppel. It is often debated, such as London Property Trust Ltd against High Tress House Ltd, Carter v Boehm, Sheikh Al Nehayan v Kent, Amey Birmingham Highways Ltd v Birmingham City Council, and Bates v Post Office Ltd, but can still claim damages. The law in the Netherlands recognizes that good faith must exist at the pre-contract stage, as in Arrest Hoge Raad, NJ 1983, 723. Still, in Indonesia, in the Supreme Court Decision Number: 3138 K/Pdt/1984, contracts in Indonesia have not been binding on the parties because the bids entered in the pre-contract domain are considered not yet critical to the parties.

Keywords

Legal Consequences, Pre-contract, Indonesian Contract Law, Comparative Law.

INTRODUCTION

Contract law is a field that continues to develop along with the times because it concerns various things, especially in transactions both on a local, national and international scale. According to Giliker (2022): "Classically a duty to negotiate commercial contracts in good faith has been seen as part of the civil, not

the common, law world." In any legal system, the principle of good faith is an integral part of the contract's drafting, although there are doubts regarding the embodiment of good faith. The principle of good faith affects the legal system of contracts. However, it is not uncommon to clash with the principle of freedom of contract, but based on good faith, the freedom of contract that the parties have can also be limited by good faith itself (Alper, 2022).

For the most part, Indonesia's contract law system cannot be separated from the influence of the civil code left by the Dutch East Indies government. However, the influence and enactment of other legal systems also exist in it, such as the customary law system, which in Indonesia consists of various customary legal systems in their respective regions; the Islamic contract law system also affects the existence of the Sharia economy, muamalat banks, the Common Law contract law system, as well as other contract law systems that do not expressly affect Indonesian contract law (Gaffa et al., 2021; Trinugroho et al., 2021; Sukmana et al., 2020). These various contract law systems bring a diversity of contract law models to Indonesia. However, the basics of contract law, such as the subject and object of the contract, do not contain any inherent differences, and their specifications are characteristic of contract law itself.

Contract law principles govern what is necessary to create a legal and enforceable contract, and even though each jurisdiction has specific regulations, there are many similarities between them (Ferreira, 2021; Zheng et al., 2022). Contract law's flexible nature and depending on how the parties behave in drafting, approving, and executing the contract itself is the most critical element because the contract already exists formally. A formal contract is a legal instrument that binds the contracting parties with the benefits and obligations stated in the contract (Liao, 2020; De Graaf, 2019; Malgieri, 2019). On the other hand, the contract must be drawn up carefully and firmly so that it does not contain multiple interpretations. If necessary, the consultant must explain the contract's meaning. Occasionally, contracts contain non-equivalent concepts unknown in the target language's legal system, making it the translator's responsibility to convey their meaning so that readers may comprehend the contract (Timofeeva, 2021; Billhardt et al., 2022; Jiang et al., 2018; Sorbet & Notar, 2022).

There are three steps involved in preparing an agreement or contract: the pre-contract stage, the contract stage, and the contract implementation stage. This phasing will decide when a contract or agreement is formed, drafted, and carried out. These three stages differentiate the legal effects of Indonesian contract law from the development of contract law in developed nations (Singh, 2019; Kurniawan et al., 2021; Sormin & Aryati, 2021).

These stages have different legal consequences. The pre-contract stage is the initial stage for the contract to occur, and at this stage, the parties only agree on the purpose for which the contract is made; this stage is the occurrence of an agreement. The pre-contract stage indicates agreement regarding the goods and prices, although it is possible to take specific steps toward the contract (Li &

Kassem, 2021; Owusu et al., 2021). At the contract stage, it means that the parties have fulfilled the conditions for the contract's validity as regulated by Article 1320 of the Civil Code, while the contract execution stage is the stage of executing the contract.

These three stages are the stages that apply to Indonesian contract law that has different legal consequences. The pre-contract stage has not given the parties legal repercussions, although one of the parties has already attempted to meet the conditions for the conclusion of the contract. Such legal actions are possible with the knowledge or have been approved by the opposing party, but this stage has no legal consequences (Maitre, 2021; Chang et al., 2019). At the contract and post-contract stages, both already have legal consequences for the parties, so if the agreement is violated or not fulfilled, it results in a lawsuit for default in the morning of one of the parties.

The development of Indonesian contract law is outdated because the legal actions carried out by one of the parties to realize their contract do not have any influence and the occurrence of the agreement may end because one of the parties withdraws the agreement. This is in contrast to the development of contract law in other countries, especially developed countries that have modernized their contract law so that it can already bind the parties at the pre-contract stage. On the other hand, in others, it also appears ambiguous about binding the parties since some include it as part of the pre-contract law, but some agree when the contract is in progress (Eenma et al., 2019). The Common Law system prevailing in the United States, UK, and Australia, which bases on court rulings as its primary source of law, has evolved its contract law by applying the promissory estoppel doctrine. This doctrine embodies the fulfillment of a sense of justice because of the legal acts of one party's greetings that the opposing party must respond to, and tends not to heed too much the formal conditions that place more emphasis on the certainty of the law.

In countries that adhere to the Civil law system, such as France, Germany, the Netherlands, and other countries in Europe, the basis for protecting the parties in the pre-contract is the principle of good faith because it can be as a basis for demands by the aggrieved party if the opposing party reneges on the promises that have been given, that is, agreeing to certain legal acts to realize contract. The principle of good faith has been an essential cornerstone in pre-contracting. This article will examine the consequences of pre-contract law in Indonesian law and its comparison with other countries, especially those that emphasize the principle of good faith and promissory estoppel.

LITERATURE REVIEW

Construct Theory

The function of contracts, especially in the business world, is to protect the parties' interests regulate rights and obligations and create legal certainty for the

parties who make them. Usually, in the business world, agreements are made in writing, namely by making a contract. Before entering into a contract, the parties usually enter the pre-contact stage, which is the stage where the parties have an initial understanding of entering into a contract (Crockin et al., 2020).

Legal issues will arise if, before the agreement is valid and binding on the parties, i.e., during the negotiation process or preliminary negotiation, one of the parties has taken legal actions, such as borrowing money or purchasing land, even though they have not yet reached a final agreement on the business contract. This can happen because one of the parties trusts and puts hope in the promises made by his business partner. If, in the end, the negotiations reach a stalemate and no agreement is reached, for example, no agreement is reached regarding fees, royalties, or license period, then compensation cannot be claimed for all costs, investments that have been issued by the business partner (Ahmadisheykhsarmast & Sonmez, 2020; Shabanzadeh et al., 2022).

Contract theory has a significant meaning in the life of the nation and state because this theory analyzes the legal relationship between legal subjects with each other. According to Erb et al. (2021), there are several elements of a contract, namely: 1) There is an agreement; 2) The existence of parties or legal subjects; 3) The existence of legal obligations from all parties, and 4) Doing or not doing something. Meanwhile, the object of study from the contact theory consists of three things: 1) the legal relationship of the parties, 2) the existence of legal subjects, and 3) the existence of rights and obligations. Estoppel's Promissory Doctrine is also a growing doctrine in this field. The promissory estoppel doctrine is a doctrine that developed in the standard law legal system, namely in countries such as England and the United States. The word estoppel is an essential part of the doctrine. Estoppel is taken from the word estop, which to the Oxford Dictionary, is called stop up.

In the Indonesian context, contracts or agreements are regulated in the Civil Code, a codification of Burgerlijk Wetboek (after this referred to as BW), and has become the basis for regulating civil law in Indonesia to date. The Civil Code often refers to the term contract as an agreement or agreement, so it needs to be clarified that the definitions of contracts, agreements, and agreements are the same (referring to Title Chapter 2, Book III of the Civil Code). According to Black's Law Dictionary, a contract is an agreement between two or more parties that creates an obligation to do or not to do something.

The regulation regarding contracts in Indonesia is precisely regulated in Article 1313 of the Civil Code, which essentially stipulates that a contract is a legal act in the form of binding oneself by one person to one or more other people. This definition is still too narrow because it only regulates one-sided contracts and does not regulate reciprocal contracts. In contrast, nowadays, most contracts in the community contain reciprocal relationships between the parties. However, the provisions of Article 1314 of the Civil Code, which regulates free and burdensome contracts, expand the definition of contracts in Article 1313 of the Civil Code. A free

contract is a one-sided contract in which one person gives achievements to another without receiving any contra or reciprocity. At the same time, an aggravating contract is a contract that obliges the parties to give each other achievements so that it can be interpreted that an incriminating contract is a reciprocal contract.

Autonomy of Corner Theory and 3P Theory

The Autonomy of Contract Theory focuses on the approach to the justice of the parties in a dispute related to contracts. Based on the results of research conducted by Andrew S. Gold (in Dimyati et al., 2021), this theory is divided into three types, namely: 1) Promissory Theories, 2) Reliance theories, and c) Transfer theories. Promissory theories are theories that explain the binding of a contract because of the agreement of the parties. Consent is an essential component of a contract. The agreement is the basis for carrying out the rights and obligations of the parties. Promissory theories are built based on a principled approach.

Reliance theory or dependency theory is a theory that focuses on the interests of the promissory. Promise, i.e., people accept an offer from the bidder (promisor). The idea is that the promisor asks the promise to carry out its contractual obligations. Transfer theories or transfer theory is a theory that analyzes the implementation of the contract because the promise has obtained the rights of the promisor. This means the promise must transfer or carry out its contractual obligations (Santika et al., 2019; Ochieng, 2022).

This theory is based on the ownership of Scoott J. Burham (in Santika et al., 2019), which is based on the preparation of a contract; it must begin with the following thoughts: a) Predictable, in the design and analysis of contracts, a registrar must be able to predict or make predictions about the possibilities of what will happen. Which is related to the contract drawn up; b) Provider, namely being prepared for the possibility that will occur; and c) Protect of Law, legal protection for contracts that have been designed and analyzed to protect clients or business actors from the worst possibilities in running a business.

Three Principles in the Law of Contact (Principle of Consensualism, Principle of the Binding Power of Contracts, and Principle of Freedom of Contract)

In contract law, there are three interrelated principles, namely the principle of consensualism, the principle of the binding force of the contract (de verbindende kracht van de overeenkomst), and the principle of freedom of contract (de contractsvrijheid) (Benoliel, 2021).

The pre-contract stage is governed by the principles of consensualism and contract freedom. Under consensualism, a contract is considered to have been born if the parties to the contract have reached a consensus or agreement. With the pledge, the parties express a desire to attain each other and a willingness to bind themselves together. This contractual requirement enables the parties to freely

define the contractual terms and their legal ramifications (Winanti & Diprose, 2020; Tritto, 2021). The parties voluntarily reconcile their respective wills based on this will. The contract is based on the will of the parties. A legal action's occurrence is determined by an agreement (consensualism). With the freedom of contract principle, everyone is acknowledged as having the ability to enter into a contract with anyone, determine the contract's substance, determine the contract's form, and pick the law that applies to the deal at hand (Gholamijalal et al., 2020).

The principle of the binding force of this contract is an essential basis in contract law that people must keep promises. In other words, this principle is the basis that the parties in the contract are bound or obliged to carry out the agreement. Juridically, this principle is recognized by Article 1338 paragraph (1) of the Civil Code (KUHPerdata). This article states that all agreements made legally apply as law for those who make them (alle wettiglijk gemaakte overeenkomsten strekken dengenen die dezelve hebben aangegaan tot wet).

Common Law System

The common law system initially developed under the influence of an adversarial system in British history based on court decisions based on tradition, custom, and precedent. The form of reasoning used in common law is known as casuistry or case-based reasoning. Common law can also be unwritten or written as stated in statutes or codes (Khan et al., 2019; Ghollamijalal et al., 2020).

Common law comes from the French "communeley," which refers to customs (customs) in England that are not written down and which, through judges' decisions, are made legally binding. Common law is customary law or unwritten principles that have become the basis of court decisions and have long been accepted in human behavior. The customs and principles in common law come from case law, which has long been accepted so that it becomes a precedent. Case law is a collection of higher-level court decisions that lower-level judges must follow in deciding similar cases. Case law that has become present is often called common law (Poole et al., 2021; Nugraheni et al., 2022).

METHOD

This research uses a normative juridical approach method, with secondary data as the primary data, and is sourced from various laws and regulations, norms, principles, and theories of contract law and various relevant sources. In addition, by using a transcendental philosophical approach, it is hoped that it will obtain truth values in its study. The research specifications used are descriptive-analytical, namely research that describes validly, straightforwardly, thoroughly, and systematically based on the correlation of relevant data to discuss and review the relevant material in this writing. The data collection method uses a literature study, with steps to inventory the data, then classify and selectively so that the basis for the regulation of legislation, theory, principles, and other legal sources will be

obtained. The data is analyzed qualitatively, and then the complete data is presented narratively to obtain conclusions.

RESULT AND DISCUSSION

Momentum of Contract

Legal contracts are commonly expressed in natural language and contain many legal requirements that are often ambiguous, incomplete, and possibly inconsistent (Sepehr, 2020). The language used is the language that applies in the preparation of contracts and is strongly influenced by laws and regulations and the habits of the people, so the momentum of the contract is very influential in the preparation of the contract.

Contract drafting is a momentum based on supply and demand, which can then be followed up or stopped at the time of supply and demand. Supply and demand are statements of the will of the parties which, if following their will, an agreement will occur, which can then be followed up with the validity of the agreement. There are several theories to determine the momentum of the occurrence of agreements: will theory, the bargain theory, equivalent theory, ontvangs theory, and injurious-reliance theory (Pound, 1982).

Will theory assert that the binding of the agreement is due to the parties will, so the agreement becomes the basis for binding the contract? The bargain theory asserts that binding the parties is based on their agreement, not the agreement that took place. The agreement is binding on what the parties have agreed to in the contract. Equivalent theory embodies the similarity of positions. Injurious-reliance theory teaches that the word agrees on binding, which means that a violation of the agreement will cause harm. (Pound, 1982).

From these various theories, the momentum for the occurrence of a contract is a statement of will that the parties then agree to. The result of the statement of will carries the consequence that it is possible to suffer losses suffered by one of the parties, especially if there is a higher offer from the other party. At this stage, the parties can exchange information for the benefit of their contract. The parties can request information from the opposite party in detail and vice versa so that it is possible that no contract occurs or continues with the preparation of the contract. These consequences are part of the precontractual.

The momentum for a contract in the realm of pre-contracting can have legal consequences if the pre-contract has been followed up with legal actions to realize the contract. The pre-contract can already determine when the contract already binds those parties. The binding force of this pre-contracting can be based on the injurious reliance theory, which asserts that the aggrieved party can demand damages. Losses may occur because either party reneges on the agreement or applies dishonestly to the agreement made.

In Continental law countries, good faith becomes the primary basis for resolving pre-contract issues. According to Kovac (2021) that "Continental legal

literature extensively addresses the question of what kinds of conduct are then regarded contrary to such a good faith standard, is this negotiating without intending to conclude a contract, conducting parallel negotiations, breaking off negotiations unilaterally, knowingly concluding an invalid contract, not giving adequate information, disclosing confidential information or causing physical harm to the other party in the course of negotiations ." The traditional idea is that reviewing unfair conditions is a type of protection for weaker parties. It is intended to compensate for unequal negotiations in some way. Standard term contracts are "contracts of adhesion" that are offered on a take-it-or-leave-it basis to the customer (Hasselink, 2014).

Pre-Contract Binding Force.

The stages in contract law have an essential difference between Indonesian contract law and the contract law of other countries, based on the Continental European and Common law systems. Art. 1104 of the French Civil Code states, "Contracts must be negotiated, formed, and performed in good faith. This provision is a matter of public policy (Giliker, 2022).

Indonesia's contract law system confirms that a pre-contract has no legal consequences because it does not have binding force. The pre-contract stage is the stage of occurrence of a contract that is considered not yet binding on the parties. Article 1320 of the Civil Code confirms that the validity of the agreement/contract must meet four conditions: 1) the agreement of those who bind themselves, 2) the ability to agree, 3) a certain thing, and 4) a legal cause. The occurrence of a new contract meets the first condition, namely agreement, so the pre-contract is not yet valid and has no legal consequences for the parties.

The binding force of the pre-contract depends on the applicable laws of each country, although, on the other hand, it can also be left to the drafters of the contract.

The cornerstone of pre-contract binding force in Civil Law-abiding countries is the principle of good faith. However, this principle is also the cornerstone of the Common Law System in countries. The principle of good faith became a common legal principle after World War II, and its function was to limit and negate. Hoge Raad and the new Burgerlijke Wetboek also extended the principle of good faith as a common legal principle for other legal fields (Wery, 1990).

The principle of good faith in the UK and Australia is still being debated; as Christie (2022) puts it: "Both the UK and Australia have debated the place and role of good faith in contract, its definition, and its application for a long time. Since Carter v Boehm, the notion has appeared before the English courts without their taking a definite stance on the matter.

The principle of good faith emphasizes the aspect of propriety, which means that it cannot be separated from the principle of honesty. The principle of honesty is an ethical principle. However, it is involved in the scope of legal ethics after it is

regulated in the codes as a corrective principle while exercising rights and obligations (Benlii, 2020). The principle of honesty, also known in Roman Law, was developed by the German Pandectists. The principle of honesty has mainly three functions. The first and second functions are complementary and corrective functions called 'aequitas.'The third function helps determine the debtor's obligation, 'bona fides.' The principle of honesty aims to eliminate the injustices caused by strict adherence to legal positivism (Benlii, 2020).

The Anglo-Saxon legal system asserts that the doctrine of promissory estoppel and consideration are the two fundamental principles of law contracts. The doctrine of promissory estoppel or detrimental reliance is an equitable doctrine that prevents the withdrawal of a promise by a promisor if it will adversely affect a promisee who has adjusted his or her position in justifiable reliance on the promise (Cheeseman, 2001).

Elements of the doctrine of promissory estoppel, according to Cheeseman (2001), are:" the promisor made a promise, the promisor should have reasonably expected to induce the promisee to rely on the promise, the promisee relied on the promise and engaged in the act of forbearance of a right of a definite and substantial nature, and injustice would be caused if the promise were not enforced."

The Estoppel and Consideration promissory are in a pre-contract position so that the aggrieved party can demand compensation at this stage. A person who commits legal acts to realize the existence of a contract and can be taken into account the losses suffered by him can already claim compensation to the opposite party if the opposing party cancels the pre-contract unilaterally. Consideration also plays an essential role in pre-contracting because it will provide counter-achievement or reciprocity in the contract. Consideration is a necessary element for the existence of a contract. Consideration is the value given in exchange for a promise (Cheeseman, 2001). A contract without consideration is non-binding, so it has no law consequences for its execution.

Based on the principle of binding force and the principle of freedom of contract, the function of the pre-contract depends on the agreement of the parties, whether the pre-contract performed by the parties is the first step before entering into a binding agreement of the parties or is only considered a preliminary step that has not been binding on the parties.

The substances that are negotiated in the framework of the preparation of the contract include several essential matters: 1) planning on what the parties do and what the parties do not do; 2) planning on the rights and obligations of the parties; 3) the legal consequences of the contract to be executed; 4) fulfillment of the rights and obligations of the parties; 5) one of the defaulting parties; 6) events that may arise beyond the expectations of the parties; 7) legal consequences in pre-contract; and 8) provisions on dispute resolution.

Prior to the execution of the contract, the stages are the first stage conducting a pre-contract, among others, concerning the rights and obligations of the parties, what is agreed upon, what is to be achieved in the pre-contract, to the

resolution of disputes that may exist. This means that the parties already understand the substance of the agreement and negotiate its operationalization.

Good Faith as a Pre-Contract Basis in a Court Decision.

Some examples of court decisions are the subject of study to discuss whether the pre-contract is binding on the parties. The rulings in the United Kingdom, Australia, the United States, and Indonesia are examples of such pre-contract discussions.

According to Christie (2022), "Since Carter v Boehm, the notion has appeared before the English courts without their taking a definite stance on the matter. Australian courts are also ill-at-ease with it and prefer adjudicating on other matters to avoid dealing with the concept of good faith and its application in Australian contract law. Moreover, "good faith" emerges in different ways, whether as an implied term, a more general value, or an express term of the parties' agreement. All of these show some attempts to recognize the ideas noted above: to try and adjust the parties' approach to contracting".

According to Christie (2022), Baik's intention is approached to agreed and mutually understood standards of cooperation to avoid losses for either party. Good faith also translates matters not stated in the contract as a clausula of mutual trust. It is possible that it can be realized in advance as part of fulfilling the parties' obligations, even if it has not been promised. However, it can be seen in, amongst others, Sheikh Al Nehayan v Kent, Amey Birmingham Highways Ltd v Birmingham City Council, and Bates v Post Ofce Ltd where the courts recognized the parties' common purpose in seeing the contract performed (Christie, 2022).

In Indonesia, one example of an interesting case that can be positioned as a pre-contract is the housing consumer Narogong Indah lawsuit. The offer through the brochure contains the developer's promise of a 1.2-hectare fishing and recreational facility, attracting many consumers. The reality is that if the promised facility was not fulfilled, the consumers sued the developer. The suit was dismissed based on the Supreme Court Decision Number: 3138 K/Pdt/1984. The Supreme Court's legal consideration is that from the site plan approved by the Local Government, there is no fishing and recreation and no public facilities, so developers are not obliged to build them. This ruling shows that the principle of good faith in a pre-contract has not been recognized by the court and is because of the legal theory of the contract. The characteristics in the Supreme Court Decision still adhere to the classic contract theory, the offer of brochures about the promised facilities that cause many consumers to take houses in the housing is not the legal act of the pre-contract realm, so the promises in the pre-contract are not binding and have no legal effect.

Jack Beatson and Daniel Friedmann (Suharnoko, 2004) state: "modern contract theory tends to abolish formal conditions for legal certainty and emphasize more on the fulfillment of a sense of justice." The consequence is that the party who resigns from the negotiations without proper reason is responsible for the

losses suffered by the other party, even though the other party has already committed legal acts and hopes for the promises given in the negotiation process. The brochure includes promises that give the other party hope to realize a contract in homeownership credit. Therefore, it is necessary to understand other aspects that affect pre-contracts existence because of their interpersonal nature.

The debate over good faith in contract law in the UK also remains ongoing. However, from some court rulings, such as those mentioned above, recognition of good faith in contract law has also occurred. The pre-contract in force in the Netherlands is already binding on the parties, especially since one of the parties has taken legal action to realize the contract's validity. According to Latimer (Suharnoko, 2004), Hoge Raad in the Netherlands recognizes that good faith must already exist at the pre-contract stage, as in Arrest Hoge Raad dated June 18, 1982, NJ 1983, 723.

Developments in the United States, the application of the promisory estoppel doctrine was carried out so that the promissor did not withdraw the promise that had been made to the promisee because it believed that the promise was binding, so that the promisse who had done something or did not do something, would not suffer a loss. The case was decided in the London property trust ltd case against High Tress House Ltd, (1947) K.B.130 (Suharnoko, 2004).

CONCLUSION

Basically, a contract is based on the principles of good faith and trust, so we should avoid incurring losses suffered by the opposing party to make it happen. The legal effect in the pre-contract has not fully guaranteed the legal protection of the parties, and what one of the parties does to realize its contract by committing certain legal acts does not guarantee its rights to claim compensation for the losses suffered by it.

In Indonesia, the pre-contract position has not brought any legal consequences, so the offer is not necessarily binding on the parties. This is different from other countries based on good faith and promissory estoppel, so the pre-contract is already binding on the parties and can have legal consequences for the parties. Based on various studies comparing theories and court decisions, it can be emphasized that developing the principle of good faith and protecting the parties' interests through promissory estoppel has become part of the pre-contract. However, in Indonesia, a pre-contract does not yet have binding force for the parties, so what is done during the pre-contract must consider whether the legal acts committed can harm themselves, even though the opposing party already knows about the legal action carried out to fulfill the contract.

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