PROMISSORY ESTOPPEL DOCTRINE AND INDONESIA CONTRACT LAW DEVELOPMENT

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ABSTRACT

The development of contract law in countries that embrace the Common Law System based on the doctrine of Promissory Estoppel. This doctrine tells that the agreement is followed by certain legal actions by either party to fulfill the contract have been able to sue for damages. The development of contract law in the Netherlands is also experiencing growth where is at this stage of the deal, but there have been legal acts from one of the parties to consummate the contract, that party can sue for damages on the basis of the principle of good faith. The development of contract law in Indonesia is still rests on the eligibility contract validation governed by Article 1320 of the KUHPerdata. A compliance agreement does not have any legal consequences that losses arising from pre-contract does not receive compensation. On the other hand, contract law also undergone many developments that can be seen from the many types of contract are developing in the community or which are not regulated in the KUHPerdata, such as leasing contracts, leasing, contract work, outsourcing, and francaise.

Keywords: contract law, the doctrine of promissory estoppel, the principle of good faith

Preface

There are still fundamental differences about the Indonesian legal contract with contract law in force in other countries, particularly in developed countries. Indonesian law contract theory still considered as classic contract law, because it does not recognize the stages in such contract negotiations and the memorandum of understanding, although both can occur simultaneously with the execution of the contract.

Contract law in developed countries, the negotiation and the memorandum of understanding are part of the contract and already have the force of law. Negotiations and a memorandum of understanding must have the strength and binding on the parties if one party has done legal acts for the realization of the contract. This contract theory is called the theory of modern contract.

In countries that embrace the Common Law system, based on the doctrine of promissory estoppel or detrimental reliance, thus the negotiation phase can also sued for damages. This is to protect the recipient of the promises made to do or not do something deeds, so will incur a loss if the donor appointment take their promise back.

The development of the modern theory of contract law which occurred in countries that embrace the Civil Law system, such as Germany, France and the Netherlands, have implemented that negotiations have been binding on the parties. At the negotiation stage, when one party has made certain legal acts for the realization of the contract but the contract does not materialize, then that party may sue for damages on the opposing side. Its application is based on the principle of good faith.

According to Jack Beatson and Daniel Friedmann as quoted Suharnoko[1] that modern contract theory tends to abolish the formal requirements for legal certainty and more emphasis on the fulfillment of a sense of justice. The consequence is that the party withdrew from negotiations without reason that should be, responsible for the losses suffered by the other party, if the latter has opened a trade secret, spend or invest, because they believe and have hope for the promises given in the negotiation process.[2] Similar views given by Stewart Macaulay[3], who said that business people are often more likely to trust the words of soy sauce in a short letter, a handshake, or the honesty and decency that is commonplace, although the transaction risks are great. Disputes are often resolved without the benchmark contract or sanctions law. There are two norms which have been widely accepted, namely:

a. commitments must be respected in almost all situations, one does not deny a contract or transaction;
b. one must produce good products and keep it off.

[1] Suharnoko, 2004, *Hukum Perjanjian, Teori dan Analisa Kasus,* Prenada Media, Jakarta, hlm. 2.
[2] *Ibid*. hlm. 2
[3] Macaulay, Stewart, 1963, Non-Contractual Relations in Business, American Sociological Review, p. 55-67.

The Doctrine of Promissory Estoppel

The doctrine of promissory estoppel or detrimental reliance, is a doctrine in the contract law developed in countries that embrace the Common Law system. This doctrine deals with losses that can be experienced by one of the parties as recipients of the promises made to do or not do something deeds, so will incur a loss if the donor appointment take their promise back.

Black's Law Dictionary[4]says thatpromissory estoppel:

> that which arises when there is a promisor should reasonably aspect to induce action or forbearance of a definite and substantial character on a part of promise, and which does induce such action, and such promise is binding if injustice can be avoided only by enforcement of promise.

The doctrine ofpromissory estoppels or anotherdetrimental relianceis:

> 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.[5]

The elements of promissory estoppel are:

> A promise clear and unambiguous in its terms, reliance by the party to whom the promise is made, with that the reliance being both reasonable and foreseeable, and injury to the party asserting the estoppel as a result of his reliance.[6]

The application of the doctrine of promissory estoppel or detrimental reliance must meet the requirements:

1. the promisor made a promise;
2. the promisor should have reasonably expected to induce the promisee to rely on the promise;
3. the promisee actually relied on the promise and engaged in an action of forbearance of a right of a definite and substantial nature;
4. injustice would be caused of the promise were not enforced.[7]

According to the doctrine of promissory estoppel, the position of the parties in the law is balance, as protection against legal acts directed to the realization of the agreement on both sides. Balance position is that both sides have the same rights and obligations and a balanced position is even a part of the moral virtues. It is as expressed by Lord Cowper: Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth.

The balance of the position of the parties to a contract is a form of legal protection of the parties, both in the stage of negotiations, a memorandum of understanding or contract itself.

The Principle of Good Faith

The principle of good faith is one of the principles in contract law. The principle of good faith was actually derived from Roman law, namely *bonafides*. KUHPerdata uses the principle of good faith in two senses. Good faith understanding that the first is the notion of good faith in the subjective sense, in Indonesian, in the sense of subjective good faith is called honesty. Definition of good faith within the meaning subjectively contained in Article 530 of the KUHPerdata and so on are arranged on the positions of power. Article 530 of the KUHPerdata says that: "such position (*bezit*) has either a good or bad faith". A bezitter is called as having a good faith if he was not aware of any defect in the ownership of objects under their control. This means that the concerns regarding the psychological atmosphere of someone's honesty. Good faith, within the subjective meaning, constitutes mental attitude or state of mind (Psychische Gestelheid). Good faith meaning, secondly, is in the objective sense. In Indonesian, in the sense of good faith in the objective sense, also called decency. Good faith in the objective sense defined in paragraph (3) of Article 1338 of the KUHPerdata, which reads: "A treaty shall be implemented in good faith". Definition of objective good faith is both parties should apply the one against the other appropriately among people who act polite without guile, without subterfuge, without disturbing the other hand, do not see with their own interests, but also look at the interests of the otherparties.

After World War II ended, the principle of good faith itself is experiencing rapid development, namely that good faith has the function of limiting and negate and secondly, concerning the good faith as a general principle of law. not only as one of the

[4] Black, Henry Campbell, 1990, *Blacks Law Dictionary*, Sixth Edition, St Paul Minn, West Publishing Co, p. 1214.
[5] Cheeseman, Henry R., 2001, *Business Law, Ethical, International & E-Commerce Environment*, Fourth Edition, Upper Saddle River, Jew Jersey 07458, p. 220.
[6] Black, *Loc.Cit*, p 1214.
[7]Cheeseman, Henry R, *Loc Cit.*

principles in the contract law but it has been a principle of common law. The function of good faith which limits and negate is recognized in the jurisprudence of the Netherlands, initially incidental, but since 1967 in principle. And this function is also included in the new BW. This means that the level of good faith negotiation must already exist in it. Limiting function and should not negate run away, but only if there are very important reasons (allen in sprekende gevallen). Neither Hoge Raad nor the new BW agreements allow restrictions only in cases in which the execution of the words, really unacceptable because it is not fair. This is understandable because the function of limiting an exception on important legal principles, namely the principle of *pacta sunt servanda*.

Furthermore, Hoge Raad expanded the development of the principle of good faith as a general principle of law through its decisions, that does not only apply to the execution of an agreement but also applies to other legal fields. Hoge Raad decided that a particular legal relationship that is not well controlled by contractual good faith. This means that the principle of good faith has been a principle of common law.

Based on the development of good faith, negotiations and memorandum of understanding can be applied in a way the injured party and have done certain acts to realize the contract can sue for damages.

Contract Law Development in Indonesia

Indonesian contract law is pluralism, which is indicated by the customary law and the law is influenced by other legal systems in the world. Customary law itself also has properties of pluralism, because according to the number of tribes who inhabited the Indonesian archipelago in the container the unitary Republic of Indonesia with the motto Unity in Diversity, with customs and different legal systems, although there are a lot similarities.

This legal pluralism appeared not only because of the many tribal and customary legal validity of each tribe in Indonesia, but also because the Dutch colonial that had an impact on the increase and the rule of law for the people of Indonesia and has different characteristics. Pluralism is almost penetrated into all fields of existing laws such as criminal law, administrative law, commercial law and civil law to the judicial system.

As a result of the colonial administration of justice the private law in Indonesia has an apparent heterogeneous character. Each of the population groups has its own laws. There is no songle uniform code throughtout the archipelago. In Indonesia the private and commercial laws are different from one population group to another and from one area to another.[8] Job descriptions of law can still simply be shared but can not be separated that material concerning public law and private law. Nationally, the public already has the legal entity that is in the legislation that have binding force and force, although there are some laws which are publicly applied but not nationally; for example Kanun Aceh. National private law also already has unity, with various laws and regulations that govern them.

One part of private law is the law of contract, whose the legal basis can follow the legislation in force and agreements agreed by the parties.

Basically the law of contract in Indonesia will continue to rely KUHPerdata and various other legislation pertaining to the contract. KUHPerdata and various laws and regulations relating to the contract is a source of written law.

The development of contract law in Indonesia has not been fully able to follow the development of contract law in other countries, especially in countries that have developed. This is why the law of contract in Indonesia is still included in the category of classical contract law. The realization of rights and obligations as well as claims for damages can only be realized if already set forth in the contract. Negotiations and a memorandum of understanding that has not been regulated in the laws and regulations in Indonesia can not sue for damages. If the contract is based on the application of the legislation in force, negotiations and a memorandum of understanding that is not recognized in the laws and regulations in Indonesia is a pre contract that does not have binding legal force for the parties.

One of the parties who have committed certain legal acts to realize the contract belong to the realm of negotiation and memorandum of understanding, still can take legal actions / can sue for damages based on an agreement between the parties based on the principle of freedom of contract.

Conclusion

Indonesian contract law is still considered in the category of classical contract law, as claims for damages made by one of the parties based on the contracts. Negotiations and a memorandum of understanding, which is part of the pre-contract has not become the legal basis for claims for damages, because it has not set in legislation in Indonesia.

Based on the provisions of the legislation in force in Indonesia, the pre contract can not be a basis of claims for damages. The basis for claims for damages is the principle of freedom of contract, that is the way the parties have determined in advance at the stage of negotiations and the memorandum of understanding regarding claims for damages. The principle of freedom of contract is an important basic principle in the contract, since freedom of contract childbirth freedom for the parties and intervene as little

[8] Gautama, Sudargo, 2006, *Indonesian Business Law*, Citra Aditya Bakti, Bandung, p. 2.

as possible for the authorities in drawing up the contract. Freedom of contract is a legal foundation on which the contract was drawn up.

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