

## Agreement, Disagreement and against the Law in the Perspectives of Civil Law in Indonesia

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### Abstract

The truth value of an agreement is to perform an exchange of right and obligation in a fair way, so that the unbalanced responsibility can be accepted as something fair especially when the process of the exchange is done proportionally. One of law consequences of an exchange is that all agreements that are regally made will function as a state regulation which is binding to all involved in the making of this regulation. Thus, those who do not implement that agreement, it can be regarded as those who do not strive for disagreement. The central point of the act of disagreement lies in the failure of fulfilling the obligation by a party to follow up their promise stated in the agreement. Consequently, there will be no action of disagreement when there is no agreement made earlier. Hence, disagreement action cannot be regarded as a act against the law, as act against the law act must be indicated by a wrongdoing done by someone that causes harm to someone else. But both parties had no law connection. Nevertheless, law sanction involved is not too far different from that given to disagreement; that is to replace any harm caused to the victimized party.

**Keywords:** Agreement, disagreement, against the law, civil law, Indonesia.

### A. Background

As one of the most dynamic disciplines of law science, a stage development of an agreement has developed in accordance with dynamicity, complexity, and problematics of the community. In such a kind of condition, according to Yudha “the dynamicity is real, especially in business affairs which have been more globalized. In every practice of business affairs, an exchange of interest from the parties involved is usually implemented through an agreement, since every business activity is largely part of law activity”.<sup>4</sup>

This principle is the main foundation that needs to be considered by all parties when interacting in a world of business, in which an agreement is made to connect the interests of the parties involved. However, in reality, many business practitioners tend to ignore and do not realize the importance of the agreement. It must be realized that anyone who does a business activity, basically he or she also does a law practice with all consequences. Thus, various kinds of modern, fair, and humanized business must be made based on moral ethics within the frame of law.

Besides, an agreement basically begins with a disparity of interests between the parties involved. The formulation of the contractual business, in general, is initiated through a process of negotiation from both parties involved. Through this negotiation, all parties involved are trying to point out any aspects of deals to connect all interests through a process of bargaining. Hence, a business agreement is basically made to connect the differences of interests among parties involved and start looking at core business to be implemented by all sides through a contract. With this contract, the disparity is accommodated and subsequently tied in a frame of law which is binding to all parties involved. However, as sated earlier, most of the articles stated in the agreement are often ignored and neglected in the implementation process either with or without intention.

Indonesia, a country where its legal systems are highly affected by European Civil Law System, should base its contract agreement on the conditions which are determined through various regulations, such as those stipulated in Chapter 1233 of Code of Civil Law which states that: “Every deal is made either through an agreement or through regulation”. Furthermore, in Chapter 1234 of Code of Civil Law, it is stated that: “Every contract or agreement aims to provide something, to do something, or not to do something”. Meanwhile, according to Chapter 1313 of Code of Civil Law, “An agreement is any act which is performed by someone or by more people in order to bind himself or themselves from one to another”.

Obviously, for an agreement to be legally approved in accordance with certainty in Chapter 1320 of Code of Civil Law, it must fulfil both subjective and objective conditions. For an **objectively approved condition**, an agreement must be preceded with a deal which is legally binding and agreed by those involved, and both parties must have enough capacity and knowledge to perform the agreement. A **subjective condition** includes something which is specific in nature and specific cause in a religiously acceptable manner.

Furthermore, based on certainty which is stated in Chapter 1321 of Code of Civil Law that: “There is no

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<sup>4</sup>Agus Yudha Hernoko, “The Principle of Proportionality in the business Contract: Efforts to Create a Business Relationship in Perspective Equitable Contract”. Business Law Journal. Vol. 29 Number 2, 2010, p. 5.

agreement approved legally when the deal of the agreement is made with careless efforts, intimidation, and fraud". Thus, according to Chapter 1338 Article 1 of Code of Civil Law, it has been stated firmly and specifically that: "All legally approved agreements function as a law certainty and are binding to those involved in the making of the agreement". Hence, those who are involved in the making of the agreement should fully understand all related principles used and prevailed to the agreement and these include the principles of freedom, concession, law certainty, good willing, and personality.

Consequently, there are at least seven essential principles that must be taken into account by those who want to perform an agreement. They include:

1. Understand the concept and function of the agreement in business activities.
2. Understand various kinds of conditions required by law so that the agreement is legally approved.
3. Understand the technical aspects in the making of the agreement.
4. Understand the technical aspects of the writing of the agreement so that it is strongly approvable.
5. Understand the strengths and the weaknesses of various kinds of agreements.
6. Understand the techniques of analyzing the agreement.
7. Understand ways of resolving any conflicts in the agreement.

In addition, there are other aspects that are frequently ignored by those involved in the making of an agreement and these include: time period, time of commencement and earlier time of termination. All parties should be aware of all of these aspects and have a thorough check whether they are fully described, realized and understood by all parties involved before they decide to sign an agreement. Another important aspect is that make sure that all parties are well informed and notified about reimbursement process, payment and interest rate due to the termination of the agreement.

The termination or disconnection of an obligation or responsibility in a contract may occur based either on an agreement or non-agreement made by all parties. If the termination or disconnection is made based on a deal, this should have been understood and approved earlier by all parties involved in the making of the contract or agreement. On the other hand, the termination can happen beyond the expectation and this may occur due to law conflict, caused by, for instance, the missing of goods to debts. The termination can also happen because of unexpected conditions (*force majeure*), or because of unexpected deals which are against law, social norms, and public safety. In this context, all parties should make further deals whether they agree to continue the contract even though without any further obligations or agreements to postpone the contract for a certain period of time. The statement of the agreement that the contract needs to be postponed for a certain period of time should be made and signed by all parties involved in the making of a contract agreement.

## **B. The Aims of the Agreement**

Conceptually, an agreement is something simple, as it is described in Chapter 1320 of Code of Civil Law. This does not only work in Indonesia, but it is also universally applied in some other countries in the world. Countries with a tradition of European Continental Law (*Civil Law System*) which has regulation and certainties that have been standardized in the form of codification of State Law or Anglo Saxon System through the principle of its *precedent*, have converted to *ajudge-made law*. Hence, a doctrine of Law Science claims that as long as there is a deal concerning the essential factor related to law connection made by the parties involved in the making of an agreement, that agreement is truly workable in nature.

What we mean by an essential factor is any factors which distinguish a form of law connection with the so-called agreement from any other types of law. In merchandizing activities, for example, an essential factor can be seen from an obligation to pay a sum of money by a debtor and from an obligation to hand in goods or personal belonging of the seller to the buyer. Furthermore, any certainties that are bound to the obligation as a result of that agreement are fully ordered in the prevailed regulations. In addition, in the example of the merchandizing practices, the obligation of the buyer to pay a sum of money to the seller, can be subsequently prescribed into other deals such as, the place and the time of the payment, meanwhile the obligation of the seller can be made in the form of when and how the goods are delivered to the buyer. With this deal, the *natural* factor means that all certainties in the agreement have been made according to the regulation or law. Basically, this natural factor can be organized by all parties involved in the making of an agreement based on their deals.

The third factor in an agreement is *accidental*. This accidental factor is known as the factor which makes an agreement recognized as an open law system. The openness of this kind of law means that all parties involved are free to organize the deals based on their want and expectation which are not prescribed in law certainties or regulation (*natural* factor); and more importantly these deals are also beyond all law certainties of accidental factor. This condition has made the freedom principle of contract agreement very important based on Chapter 1337 of Code of Civil Law.

Consequently, according to Atijah in her book entitled *An Introduction to the Law of Contract*, an agreement is a form of a *fair exchange* "who contributed what" which is related to an *exchange of obligation*

based on its own proportion. In addition, an agreement is a form of an *exchange of benefit for benefit*.<sup>1</sup>

Furthermore, according to J. H. Niewenhuis in his book entitled *Drie Beginselen van Contractenrecht*, the background of an agreement comes from the purpose of the fairness of the exchange of personal belonging (*ruilrechtvaardighed*).<sup>2</sup> A fair exchange will happen if there is an achievement in the agreement (contract) together with disagreement.

Hence, an obligation of a contract (agreement) occurs because of an *exchange of promise* made by all parties involved. An exchange of interest is a starting point for an agreement (contract) to be made for the purpose of all parties' fairness. Thus, according to P.S. Atijah, a contract (agreement) has three purposes:

1. A contract (agreement) is binding to all to be implemented and gives a protection for a common expectation.
2. A contract (agreement) prevents something from an unfair business to be made for one side profit only.
3. An agreement is made to prevent a certain loss in the contractual relationship.<sup>3</sup>

In addition, if seen from the aspect of contract drafting, an agreement is a legal document which determines more detailed procedures, terms and conditions in a business transaction than those in ordinary consumer contract. This is in line with what Elmer Dooman and Charles Foster claim in their book entitled *Drafting* that the procedures, terms, and conditions, need to be established in every business deal or agreement for the purposes of:

1. Providing a printed evidence (credential) of the transaction that they made;
2. Preventing any act of fraud;
3. Describing the rights and obligations of all parties involved in the transaction, and;
4. Prescribing everything in details concerning the complex business transaction to avoid any problems they may encounter during the implementation of the agreement they made.<sup>4</sup>

Accordingly, J. Beatson claims that there are several functions of an agreement (contract) that show the characteristics of an exchange of interest which involve business makers. They are:

1. An agreement (contract) should guarantee the expectation of all parties to be fulfilled and there must be a certain amount of compensation to be made if the contract disconnects.
2. An agreement (contract) should ease the business transaction plan from any possible loss in the future.
3. An agreement (contract) should prescribe the standard of implementation and responsibilities of all parties involved.
4. An agreement (contract) should possibly describe all potential risks as the result of the business transaction (also to eliminate the risks for all parties involved).
5. An agreement (contract) should provide a resolution for conflicts between parties involved.<sup>5</sup>

Consequently, the functions of an agreement (contract) in a business activity are:

1. An agreement (contract) provides a legal room for all parties in determining their own rights and obligations;
2. An agreement (contract) functions as the rule of the game;
3. An agreement (contract) is a legal proof (credential) for a legal connection;
4. An agreement (contract) ensures a legal enforcement.
5. An agreement (contract) encourages a conducive condition for the business transaction (win-win solution; efficiency-profit).

Basically, in order for a process of interest exchange in a contract agreement to be implemented in a fair basis, all parties involved are required to fully understand legal consequences or background. This is important because, in principle, a contract agreement made by all parties involved can be regarded as an attempt to convert a business transaction to a law practice or consequence. Through this understanding, all parties are expected to have a legal guidance in making a contract agreement, so that they have a legal basis for the business transaction which provides terms and conditions (regulation) along with all necessary basic indicators of the contract agreement.

### C. Force Majeure (Unexpected Problem/Condition)

This unexpected condition is known as "*force majeure*" in French which means "*superior force*" in English.

<sup>1</sup> P. S. Atijah, *An Introduction to the Law of Contract*. New York: Oxford University Press Inc. 1995, pp 1-8.

<sup>2</sup> J. H. Niewenhuis, *Drie Beginselen van Contractenrecht*. Kluwer-Deventer, 1979, pp. 57-61.

<sup>3</sup> P.S. Atijah, *Op. Cit.*, p. 9.

<sup>4</sup> Elmer Dooman and Charles Foster, 2001, pp. 3-5.

<sup>5</sup> *Ibid.*, p. 5.

Force Majeure is a general term used in a contract agreement which provides an opportunity for all parties involved to be free from any rights and obligations when an unexpected or an extraordinary problem occurs; all beyond the control of nobody; this includes, for example: war, strike, crime, riot, or any other catastrophic condition legally known as “*Act of God*” such as: flood, earthquake, and volcano eruption. These all conditions will make it impossible for all parties involved to prosecute their rights and obligations stated or prescribed within a contract agreement. Nevertheless, *force majeure* is not intended to remove any act of negligence or disobedience (*malfeasance*) from any party for which their obligations cannot be prosecuted or implemented due to any unnatural causes or any specific interventions from other parties.

Obviously, judges of a trial court will be able to determine whether or not there is an essential force majeure condition based on the *expression* of some psychological or material obstacles which can be associated with any act of fears or worries that are potential to hinder the rights and obligations of a particular party within the contract agreement.

Hence, the *expression* can provide a broader meaning than just “*Act of God*” or “*vis major*”. The term *vis major* derives from Latin language which means “*a superior force*” in English. That refers to a bigger strength or more superior; or something that cannot be avoided (*irresistible force*). All of these may result in a direct loss due to a natural cause that cannot be avoided although everything has been anticipated very carefully from the beginning (with *prudence, diligence, and care*). Another term for this condition is *vis divina* or superior force. This also indicates a similar condition which is irresistible or something that cannot be avoided (Act of God). This all refers to a natural force or power that cannot be controlled such as: a robbery with physical threats, making all rights and obligations cannot be done according the contract agreement made earlier.

Understanding *force majeure* within French Law is like understanding *vis major* in International Law. According to French Law, something can be regarded as a force majeure if it fulfils three conditions. They are:

1. Something which is happening beyond human capacity (externality). With regard to this externality, the one related to this should be in a condition where she/he cannot do anything related to the event.
2. Something which cannot be predicted earlier (unpredictability). In a situation which cannot be predicted earlier, someone must get himself well prepared to anticipate the problem.
3. Something which cannot be refrained (irresistibility). This is in line with something that happens unpredictably and cannot be avoided.

Another event which can be categorized into force majeure in French Law is, for example, tornado, hurricane, and earthquake. Thus, force majeure that is potential to happen very frequently in a particular region should have a clear guidance concerning these conditions where force majeure can be considered as something essential to enable any party to be free from any rights or obligations prescribed within the contract agreement. For example, in a place where earthquake often occurs, the agreement should include an article concerning force majeure so that all parties involved in the making of the contract can be made aware of this.

In Indonesia, a superior force condition which is known as *overmacht* or *toeval* (a sudden condition) can hinder the implementation of an agreement, releases or frees someone from debts, compensation, loss, and loan interest. Legal regulations controls and puts extraordinary cause (*vreemdeoorzaak*) in line with superior force or unexpected problems or sudden accidents that cannot be redeemed to debtors. Usually, these three conditions are categorized into superior force. Legal certainties or regulations concerning this condition can be seen in the third book of Code of Civil Law which does not describe anything about unexpected condition or superior force, but the description can be seen in several Chapters. An example of this is Chapter 1244 and Chapter 1245 of Code of Civil Law concerning compensation and Chapter 1444 of Code of Civil Law concerning coincident events that are not predicted earlier. Chapter 1244 of Code of Civil Law names this condition *overmacht* or *toeval*. Furthermore, Chapter 1444 of Code of Civil Law determines the coincident events that cannot be predicted earlier or *oonvorziene toeval*.

Accordingly, as claimed by Mariam Darus Badruzaman in her book entitled *The Compilations of Legal Agreement*, there are three factors that need to be achieved in a super force condition, namely:

1. Failing to get a high achievement, due to a devastating event toward the objects of the contract agreement;
2. There are causes beyond the debtor’s failures which can affect the debtor’s efforts to do their best to get a high achievement;
3. The causing factors cannot be predicted earlier and neither can they be made accountable to the debtor.<sup>1</sup>

In relation to this super force condition, thus, according to R. Setiawan, in his book entitled *The Basics of Contract/Agreement Law*, there are several factors that need to be considered:

1. Any events that cause a super force condition should be realized to happened after the contract agreement is signed;

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<sup>1</sup>Mariam Darus Badruzaman, *The Compilations of Legal Agreement*, Bandung: Citra Aditya Bakti. 2011, p. 25.



2. Any events that hamper the fulfilment of the achievement should be in the area of that achievement;
3. The debtor should have done a lot to avoid any events that hamper him/her from fulfilling the achievement;
4. The debtor should never face any risks, meaning that he/she be given any risks, either seen from regulations, agreement, or from any prevailed community perceptions;
5. The debtor cannot predict or anticipate any events that hamper the fulfilment of the achievement by the time of the contract agreement signed or made.<sup>1</sup>

#### **D. Disagreement and Actions Against Law**

A disagreement act can be defined as any act which causes someone fails to fulfill his/her obligation (achievement) that has been determined through a contract agreement. An achievement can be described as something that is conditioned or requested by a creditor towards a debtor as determined within a contract agreement signed by both creditor and debtor. According to Chapter 1234 of Code of Civil Law, there are three types of achievements: (a) an achievement to submit something; (b) an achievement to do something; and (c) an achievement for not doing something. In principle, an act of disagreement can be regarded as something related to any obligation that cannot be achieved by a party as agreed by both parties involved in the making of a contract agreement. The consequence of an act of contra-achievement is similar to that of any acts against law that is compensation.

On the other hand, an act of against law (*onrechtmatigedaad*), as stipulated in Chapter 1365 of Code of Civil Law, is: "Any act against law which gives harm to someone, and makes that someone pay for that harm, must be compensated or replaced by those who are responsible for that harm". According to this certainty, an act can be classified as an act of against law, if it fulfils a few conditions such as: (a) there is an act of law violation; (b) there is a case (theme) of violation; (c) there is a potential loss; and (d) there is an interconnection between these factors involved. Consequently, an act of law violation can occur if there is a violation committed by someone that causes any harm to someone else. The law sanction is compensation given to the harmful party.

Although, theoretically, the difference between an act of law violation and an act of contra-achievement is clear but in practice or in the implementation it may become blurred. The interpretation towards the act of law violation can be variously and broadly made, causing all actions that are proved to contradict to regulations, norms, values, suitability, and public safety, can be classified as an act of a law violation. If the act causes harm to someone else, thus a law consequence is fulfilled.

Overall, in the making of a contract agreement, it is possible that an act of law violation, act against social norm, and act against public safety can occur. To anticipate or avoid these possibilities to happen, an objective condition has been made through Chapter 1320 of Code of Civil Law, where any contract agreement should never contradict to regulations, social norm, and public safety. Any contract agreement containing any kind of these violations is not valid for law. Beside, Chapter 1321 of Code of Civil Law also states that there is no valid agreement made if the agreement is made under careless efforts and under pressure or intended fraud.

#### **E. Conclusions**

Based on the above description, it can be concluded that:

1. A basic concept of a contract agreement is to perform an exchange rights and obligations in a fair basis, and an unbalance of a responsibility can be accepted as something fair if the exchange process is made proportionally.
2. A law consequence of a contract agreement is that all deals within contract agreement are legally binding to those involved in the making of the contract agreement. Those who do not implement the deals (of the agreement) can be regarded as disagreement.
3. The central point of an act of disagreement lies on the failure to fulfill rights and obligations that are stated and agreed within the contract agreement by all parties involved in the making of the contract agreement. Hence, there is no act of disagreement if there is no agreement made earlier. A law consequence of the act of disagreement is compensation.
4. An act of law violation (act against law) happens if there is a violation committed by someone which causes harm to someone else. But all parties involved do not have any law connection earlier. Thus, a legal sanction given is similar to that of disagreement; that is a compensation given to the harmful party.

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