

THE PRINCIPLE OF NON MALEFICENCE IN RELATION WITH CONSTRUCTION CONTRACT IN INDONESIA

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ABSTRACT

The construction contract is the whole or part of a series of architectural, civil, mechanical, electrical, and environmental planning activities to achieve a building or other physical form. The existence of a construction contract as a document governing the legal relationship between service users and service providers in the implementation of construction works. Therefore, the parties' achievements must be in line with the principle of non-maleficence. That is, the parties not only obey the contents of the agreement, but also the values and norms that live in society. This non-maleficence principle has been accommodated in Law No. 2 of 2017 on Construction Services, Presidential Regulation No. 16 of 2018 on Procurement of Goods and Services, Civil Code and Federation Internationale des Ingeniuer Conseils (FIDIC). With the implementation of the principle of non-maleficence in the construction contract, then the principle of legal certainty, justice and benefit is accommodated in the contract, so the contract will remember as law for the parties as mentioned in the principle of pacta sunt servanda.

Keywords: Principles, Non-Maleficence, Construction Contracts.

INTRODUCTION

The procurement of construction project in the form of physical building, followed by binding in the form of construction contract. The existence of contracts is the implementation of contractual rights and obligations that breed the legal relations. That is that the working relationship between service users and service providers is based on the law set in the form of construction contracts.

The binding in the working relationship of construction services is done based on the principle of fair competition through the selection of service providers in the presence of tenders with the aim of producing construction products in the form of physical buildings both used for the benefit of service users and in community services. According to article 1339 of the Civil Law Code, a covenant is not only binding on things expressly stipulated in the covenant, but also for "*everything that is by nature of the covenant is required by propriety, custom and law*". Likewise in Article 1337 of the Civil Law Code states that

"There is no lawful cause, if it is prohibited by law, morality and public order".

RESEARCH METHODOLOGY

Article 1234 of the Civil Code (further abbreviated as the Civil Law Code) provides arrangements for achievement; in the form of giving, doing or not doing anything. This means that a legally-binding contract will be binding and applicable to the law (basic pacta sunt servanda). As stated in Article 1338 paragraph (1) of the Civil Law Code that a legally binding agreement applies as a law for those who make it. Harry Purwanto stated, pacta sunt servanda is the basis of the sacralisation of the agreement which the point is freedom of contract with the principle of autonomy, but if it has been agreed as law (Purwanto, 2009).

In its development, the principle of *pacta sunt servanda* must be based on good faith. The meaning of good faith is contained in Article 1338 paragraph (3) of the Civil Law Code, referring to the standards of behaviour that can be accounted for. That is, the person must obey the promise or word in all circumstances or an act that reflects the justice or propriety of society, requiring respect for the legal objectives of legal certainty, justice and the usefulness of the existence of the law itself.

Binding in the form of construction contract becomes very important done by guiding principles and legal norms, both at the planning stage, construction work and supervision. The form of the contract may be in accordance with Indonesian law or by using an international contract form, such as a contract form from the world civil engineering consulting organization or Federation *Internationale des Ingeniuer Conseils (FIDIC)*.

Based on the description above, this paper discusses issues relating to the concept of legal relations between the parties in the construction contract and the principle of construction contract which provides a guarantee of legal certainty in the principle of non-maleficence.

RESULT AND DISCUSSION

According to R. Feenstra en M. Ahsman, that the formation of an agreement because of the meeting of the will or consensus of the parties. Agreement in essence can be made free of unbound form and achieved not formally but sufficiently through consensus (Feenstara and Ahsman, 1998). R. Subekti pointed out that the principle of consensus is very important in contract law, particularly on the aspect of contract formation. This is an absolute requirement and provide to ensure legal certainty, although for consensus begins with the offer and acceptance and fulfilment of certain requirements and procedures (Subekti, 1986).

Understanding the agreement is the existence of supply and acceptance. Related to that, Treitel stated that

The offering is basically An offer is an expression of willingness to contract on specified terms, made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed (Trietel, 1995).

It can be said that if the other side accept, then the offer applies to the main element that has been expressly stated, as well as additional elements. If additional elements are excluded from the agreed parts then this unconfirmed applies: (1) Rules in Supplemental Law (Aanvullend recht); (2) Commonly agreed terms (Bestendig gebruikelijke bedingen); (3) Habit and Compensation. In addition to the principal terms of the agreement, the offer is also binding

because of the intention to be bound. According to Clive Turner, this requirement in common law system is commonly called "*intention to create legal relation*" (Turner, 1995).

In this way, in the system of contract law built by consensus, it is also based on the fundamental principles of law and thought about the truth to sustain the legal norms which become the juridical element of a system of covenant law that embraces an open system, so that everyone is free to organize any type of agreement, determine the contents of the treaty and organize the agreements with whomever as long as it is not prohibited by law, morality and public order (Kamello, 2006).

In relation to construction contract, the regulation provisions are clearly and firmly stipulated in Law No. 2 of 2017 concerning Construction Services, if one of the parties of state or government, apply the provisions of Presidential Regulation Number 16 of 2018 concerning Procurement of Government Goods/Services. In general, there is also the Civil Law Code and other binding provisions as a form of legal certainty.

The procurement of construction in the form of physical building in the form of availability of infrastructure using the State budget is used model or contract of a standard in accordance with the provisions of Law No. 2 of 2017 concerning Construction Services, its implementation regulations, Presidential Regulation No. 16 of 2018 on Procurement of Government Goods/Services, unless if the procurement of the construction is applied by cooperation or foreign funding assistance may be made by choice of model or form of construction contract stated by the Federation *Internationale des Ingeniuer Conseils* (FIDIC) as it is more complete and detailed (Yasin, 2006).

Fidic as Reference of Construction Contract in Indonesia

One of the inevitable challenges in the globalization era related to development is the involvement of foreign contractors in development tenders in Indonesia. This is a consequence of Indonesia's membership in various international organizations. This requires an understanding of construction contracts in Law no. 2 of 2017 concerning Construction Services on the one hand and on the other hand must understand the FIDIC standard.

According to Galih Adya and Sarwono, that one of FIDIC's contract standard/system related to the design by the contractor, all must meet the needs of service users by applying the principles of quality, integrity and sustainability. Furthermore, the scope of construction contract in FIDIC covers four aspects: (1) Agreement/Contract Agreement, (2) Form of Tender, (3) General Conditions and (4) Conditions of Particular Application (Adyah & Sarwono, 2013).

Nazarkhan Yasin asserted that the application of FIDIC standard in Indonesia is done by making changes and adding certain clauses to be adjusted with the project to be implemented. It is intended that the construction contract can be a liaison between the interests of the owner and the contractor and can be a balancer of the rights and obligations of both parties. Even in practice, it leads to increased contractor liability and rights to the owner (Yasin, 2006).

For the existence of construction services must also comply with the basic principles that determine in Article 2 of Law No. 2 of 2017 concerning Construction Services namely the principles of honesty and fairness, benefits, equality, secrecy, balance, professionalism, independence, openness, partnership, security and safety, freedom, sustainable development and environmental insight. This principle also relates to the principles contained in Article 6 of

Presidential Regulation No. 16 of 2018 concerning Procurement of Goods/Services that is efficient, effective, open and competitive, transparent, fair and accountable.

Principles of No Maleficence

Philosophically, the principle is a fundamental truth, law or doctrine underlying an idea that is used as a reference to implement something, not deviant actions that can cause maleficence to others. Likewise, the principle of non-maleficence is, initially known in medicine, which prohibits actions that endanger patients. This principle is known as

"Do no maleficence"

The principle that relates to the hypocrates expression stating

"I will use therapy to help the sick based on my ability and opinion, but I will never use it to maleficence them" (Suryadi, 2009).

The principle is if it is related with an agreement that has been agreed upon and has a binding force for the parties (*pacta sunt servanda*), the parties executing it in good faith on the determined achievement, as well as the provisions of the regulatory law. It is also closely related to the purpose of the treaty which is not contrary to the law, morals and public order. Likewise, that the parties will carry out what has been agreed in good faith and implement the promised achievements and the basic principles that exist as the basis of the binding power of the agreement.

The principle of non-maleficence is reinforced by Pancasila values as the foundation of idios and philosophy of the Indonesian nation. Pancasila as the foundation of idios is a crystallization or compaction of the Indonesian life view, including in the case of individuals or societies having a legal relationship, such as contracting agreements or construction contracts that can accommodate the values in Pancasila, as well as this serve as one of the basic principles in order not to the occurrence of maleficenceful acts. One of them by formulating it in the consideration to enter into contracts contained in the contract premise/recitals. It is also at the same time that there is a guarantee of legal certainty for the parties.

According to Van Apeldoorn that the existence of a guarantee of legal certainty is a guarantee that the law is exercised which is legally entitled to obtain its rights, so also that the decision can be implemented. At the same time it is a fair protection against arbitrary acts, because the law is responsible for creating legal certainty, as well as justice and its usefulness (Wantu, 2007).

CONCLUSION

The contractual relationship is basically a bond between the person and the person in the juridical sense of the law relationship. The parties are bound up of the achievements determined in the agreement, as well as the legal arrangements that provide for its arrangements, such as Law No. 2 of 2017 concerning Construction Services, Presidential Regulation No. 16 of 2018 and other binding provisions. Similarly, the goodwill of the parties, the legal principles contained in the construction contract is a fundamental reference for achievement. This is reinforced by the values of Pancasila followed by the understanding of these values, is essential to avoid non

maleficence. In the meantime, the choice of contract modelling, such as contracts contained in the community, under Indonesian law and international contracts is essentially a choice of parties based on agreement, provided that it is not prohibited by law, morality and public order.

REFERENCES

- Turner, C. (1995). *Australian commercial law*. The Law Book Company. Sydney.
- Trietel, G.H. (1995). *Law of contract, sweet & Maxwell*. London.
- Purwanto, H. (2009). Keberadaan asas pacta sunt servanda dalam perjanjian internasional. *Mimbar Hukum. Jurnal berkala FH UGM*, 21(1), 155-170.
- Feenstara, R. & Ahsman, M. (1988). Contract, aspecten van de begrippen contract en contracts vrijheid in historisch perspectief, tweede druk, deventer. In H. Budiono (Eds.), *Asas Keseimbangan Bagi Hukum Perjanjian Indonesia*. Citra Aditya Bakti, Bandung.
- Subekti, R. (1986). *Aspek-aspek hukum perikatan nasional*. Alumni, Bandung.
- Kamello, T. (2006). *Hukum jaminan fidusia suatu kebutuhan yang didambakan*. Alumni, Bandung.
- Yasin, N. (2006). *Mengenal kontrak konstruksi di Indonesia*. Gramedia, Jakarta.
- Adya, G.T. & Sarwono, H. (2013). Analisis faktor penyebab klaim pada proyek konstruksi. *Jurnal Konstruksia*, 5(1), 14-25.
- Suryadi, T. (2009). *Prinsip etika dan hukum dalam profesi kedokteran*. FK Unsyiah, Banda Aceh.
- Wantu, F.M. (2007). Antinomi dalam penegakan hukum oleh hakim. *Jurnal Berkala Mimbar Hukum*, 19(3), 145-157.