

Legal Assurance: A Comparative Study of the Good Faith Doctrine in Australia and Indonesia

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ABSTRACT

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Purpose: This study aims to analyze and compare the legal assurance of the good faith doctrine in Indonesia and Australia by examining the doctrine's existence in each jurisdiction.

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Methodology: This study used a normative legal research method through a case approach, both in Australia and in Indonesia.

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Results: The results of this study show that good faith does not have a definite definition in either Indonesia or Australia, but the existence of good faith is clearer in Indonesia than in Australia.

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Applications of the study: This study examines the comparison of good faith in Australia and Indonesia both in terms of definition and position in contract law. Furthermore, it also provides an overview of legal assurance in two different legal systems.

Novelty/Originality: This study compares the regulation of the doctrine of good faith in Indonesia and Australia using a case approach (jurisprudence) which is still rarely used in Indonesia.

Keywords: Good Faith, Indonesia, Australia, Legal Assurance

INTRODUCTION

The common law and civil law systems are the products of two fundamentally different approaches to the legal process (Pejovic, 2001, p. 820). Mason stated that the doctrine of precedent is one of the differences between common law and civil law (Mason, 1988, p. 93). It is undeniable that the primary feature of common law is precedent, whereas the main feature of civil law is codification (Vranken, 2015, p. 27). Another important distinction to be made between these two legal systems is the method of legal reasoning. Common law employs bottom-up (inductive) legal reasoning, whereas civil law uses a top-down (deductive) approach (Vranken, 2015, p. 27).

Although it is widely acknowledged that these two legal systems are fundamentally different, they both serve the same purpose (Pejovic, 2001, p. 840). The goal is to provide the community with legal assurance (Pejovic, 2001, p. 840). Based on this, it will be interesting to see which legal system can achieve this goal better. Vranken argued that the formal codification used in civil law performs well in terms of supporting legal assurance (Vranken, 2015, p. 16), however, does this mean precedent cannot do the same? One approach to answer this question is to compare a doctrine that exists in the two legal systems, namely good faith.

To answer this question, this study will compare the good faith in Australia and Indonesia, where these two countries adopt common law and civil law, respectively. In terms of law, Australia and Indonesia have little in common because Australia adheres to common law and the jurisprudence used by Australia is still closely related to the UK, with judges in Australia frequently referencing the decisions of judges in England. On the other hand, in Indonesia, judges still rarely, if ever, use jurisprudence to resolve a dispute. This is understandable given that jurisprudence is a non-binding source of law in Indonesia (Agustine, 2018, p. 643). This fundamental difference becomes an interesting basis for determining whether the position of good faith is the same in these two very different legal systems to assess the legal assurance of each legal system. Finally, the writers chose Australia as a point of comparison because the position of good faith in Australian contract law is currently unclear (Fredericks, 2018, p. 25; Viven-Wilksch, 2019, p. 276). Does Indonesia, which adopts a civil law legal system, have good faith in a definite position in its contract law?

METHODOLOGY

This type of research is juridical-normative legal research. Juridical-normative research or normative legal research is referred to as library research (Soemitro, 1998, p. 11). This legal research employed both the statute approach and the case approach. Legal research using a statute approach was conducted through an assessment of the laws and regulations relating to good faith in Indonesia, namely the Civil Code. The case approach was carried out by analyzing and criticizing court decisions in Indonesia and Australia that dealt with good faith. The materials obtained from the research findings were then systematically collected and classified according to the subject matter, which was then qualitatively analyzed, namely according to the quality of the truth.

RESULTS AND DISCUSSION

A. STATUS QUO OF GOOD FAITH IN AUSTRALIA

Many Australian academics and practitioners argue that the position of good faith in Australian contract law is unclear and is an unresolved issue (Dixon, 2011, pp. 235–237; Fredericks, 2018, p. 19; Gray, 2015, p. 358; Hoffman & Dias, 2012, p. 23; Naris & Thomas, 2015, p. 62; Viven-Wilksch, 2019, p. 276). The root cause of this situation can be found in the decision of the New South Wales Court of Appeal in the case of Renard Constructions (ME) Pty Ltd v Minister for Public Works ('Renard Constructions'). This ruling is recognized as a pivotal point in the recognition of good faith in Australian contract law (Fredericks, 2018, p. 20; Hoffman & Dias, 2012, p. 23).

However, even though it has been nearly 30 years after the Renard Constructions case was decided in 1992, the High Court of Australia continues to refuse to provide clarification on Australia's good faith obligations (Gray, 2015, p. 358; Warren, 2010, p. 345). It should be of particular interest that the High Court of Australia has had several opportunities to present a good faith explanation. Some examples are the decision of the High Court of Australia in the case of the Royal Botanic Gardens and Domain Trust v South Sydney City Council ('Royal Botanic Gardens') or Commonwealth Bank of Australia v Barker ('Barker'). However, the High Court of Australia did not use these two opportunities to resolve the issue of good faith in Australia (Gray, 2015, p. 358). One thing to keep in mind is that, while the

High Court of Australia has never considered or ruled on issues of good faith, it has also never rejected them (Supreme Court of South Australia, 2012, p. [594]).

The implication of the High Court of Australia's decision is the ambiguity of the concept of good faith in Australian contract law. This is demonstrated by the fact that there is no single precise definition of good faith in Australia (Peden, 2003, p. 189). As a result, it is understandable that other lower courts have differing views on the definition and scope of good faith. Several Australian courts define good faith as "honesty and fidelity to the bargain" (Supreme Court of New South Wales, 2009, p. [70]), while some other courts include reasonableness in their definition of good faith (Federal Court of Australia, 2015, p. 288; New South Wales Court of Appeal, 2001, p. [186]; Supreme Court of Victoria, 2018, p. [83]; The High Court of Australia, 1992, p. 263). Against this debate between courts in Australia, Warren stated that 'whole forests have been felled to produce judicial and academic writing on the meaning of good faith in contract law' (Warren, 2010, p. 345).

However, it should be noted that, aside from the definition of good faith, there are other critical issues in Australia. The ways in which the obligation of good faith is incorporated into a contract is also a serious issue. Specifically, if the parties do not expressly state in the contract that this good faith obligation exists. There are three mechanisms that can be used by judges to include good faith obligations into contracts when they are not explicitly stated in the contract (Hoffman & Dias, 2012, p. 24; Warren, 2010, p. 357). Good faith can be entered into a contract by a judge through the implication in fact, the implication in law, or as a rule of construction (Hoffman & Dias, 2012, p. 24; Warren, 2010, p. 357).

The clause entered through the implication in fact stems from the parties' intentions, which are not expressly stated in the contract (Dixon, 2011, p. 233). However, for a clause to be entered into a contract through the implication in fact, it must first meet the BP test (Dixon, 2011, p. 235; Peden, 2001, pp. 224, 230). This test is based on the decision of *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*, in which the Privy Council established five cumulative criteria, which are as follows:

- (1) it must be reasonable and equitable;
- (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
- (3) it must be so obvious that 'it goes without saying';
- (4) it must be capable of clear expression; and
- (5) it must not contradict any express term of the contract (Privy Council, 1977, p. 283).

The implication in fact arises from the parties' implied intention, so the implication in fact only applies to the contract at issue. This is markedly different from the clause that is entered through the implication in law. Clauses entered by implication in law apply to certain types of contracts (Collins, 2014, p. 302). Based on this, Peden stated that for a clause to be entered by implication in law, it must be required for that type of contract (Peden, 2001, p. 230). In addition, it is also necessary to consider the legal effect (policy consideration) of the clauses entered through the implication in law (Warren, 2010, p. 351). Finally, Peden defined the rule construction mechanism as interpreting all contracts on the basis that there is good faith in all clauses (Peden, 2001, p. 230).

Courts in Australia have different opinions about which mechanism should be used if they have to enter good faith into a contract when the parties have not stated in writing in the contract. For example, the court at *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* ('Esso') ruled that good faith must be governed by implication in fact. On the other hand, some courts have ruled that good faith is a legal occurrence of a type of contract (Federal Court of Australia, 2005, p. [64]; New South Wales Court of Appeal, 2001, p. [159], [164], 2004, p. [125]; Supreme Court of New South Wales, 1998, p. 369; Supreme Court of Victoria, 2000, p. [120]), in other words, as an implication in law. Several other courts have argued that the principle of good faith should apply to all contracts (Federal Court of Australia, 1997, pp. 192–193, 2003, p. [920]). The lack of clarity on how good faith is entered into a contract has ramifications for another issue, namely whether or not the obligation can be excluded (contract out).

If good faith is entered through implication in fact or implication in law, good faith can be excluded from the contract. The main reason is that there is a decision stating that clauses derived from implication cannot contradict the clauses written in the contract (Supreme Court of New South Wales, 2007, p. [25]). However, this is still up for debate. According to some courts, good faith can be excluded from a contract if there is a written clause stating it or if it is inconsistent with the existing written clause (New South Wales Court of Appeal, 2004, p. [191]; Supreme Court of Western Australia, 2012, p. [155]). On the other hand, there is a decision that refuses to recognize the existence of a clause that 'allows dishonesty' because it excludes good faith (Federal Court of Australia, 2003, p. [920]). Based on this explanation, it is possible to conclude that Australian courts do not share the same

perspective on the exception of good faith in contracts. This is reasonable considering that the existence and position of good faith in Australian contract law are unclear.

Ultimately, the position of good faith in Australian contract law is ambiguous. There is no precise definition, and the scope is unclear. Furthermore, it is unclear how these obligations are incorporated into a contract, which raises additional issues concerning exceptions. This uncertainty can be viewed as a flaw in a legal system that employs a bottom-up legal reasoning method. The disadvantage is that different courts have different perspectives on a doctrine because the highest court does not provide clarity on the doctrine. Legal uncertainty will inevitably result from these courts' differing perspectives. Based on this, it is worth considering whether similar issues arise in legal systems that do not rely on precedent, namely legal systems that employ top-down thinking methods.

B. STATUS QUO OF GOOD FAITH IN INDONESIA

Good faith is one of the important principles in contract law in Indonesia (Sinaga, 2018, p. 64). It is governed by Article 1338 paragraph (3) of the Civil Code, which states that an agreement must be executed in good faith. However, the Civil Code does not define good faith or go into further detail about this obligation. As a result, good faith is frequently referred to as a "blanket norm" in theory (Noor, 2015, p. 4). Even in practice, there is still disagreement about what constitutes "good faith." Thus, it will be interesting to see how Indonesian academics define good faith. This is because academics are the primary actors in the civil law system, whereas judges are the primary actors in the common law system (Vranken, 2015, pp. 25–27).

Academics in Indonesia have differing views on the definition of good faith, with Khairandy stating that Indonesian contract law lacks a single precise definition of good faith (Khairandy, 2015, p. 129). Furthermore, he stated that even today, more than 150 years after Indonesia's Civil Code was passed, there is still much debate about the definition of good faith (Khairandy, 2015, p. 129). As an example, Hernoko defined good faith as *contractus bona fide*, which means that the agreement must be carried out with fairness and justice. (Hernoko, 2010, p. 135). Other scholars, including Prodjo Dikoro and Subekti, interpreted good faith as honesty (Prodjodikoro, 2006, p. 56; Subekti, 1997, p. 41). In summarizing these various points of view, Satrio stated that the definition of good faith is abstract and that even if people eventually understand what good faith means, it will be difficult to formulate the obligation

(Satrio, 2001, pp. 165–166). Thus, it can be concluded that there is no definite definition or formulation of good faith in Indonesia.

According to the provisions of contract law in Indonesia, good faith is divided into two categories, namely:

- a. Objective good faith. It means that an agreement must be carried out in accordance with the standards of decency and morality, and that the agreement must be implemented in such a way that neither party is harmed.
- b. Subjective good faith. It is the concept of good faith that is rooted in one's inner attitude. In the law of matter, this good faith can be interpreted as honesty (Subekti, 1997, p. 25).

In other words, subjective good faith refers to the party's "good faith" attitude, whereas objective good faith refers to the contract's execution (Priyono, 2017, p. 21). However, it should be noted that judging good faith subjectively is a difficult task for judges (Faisal, 2021, p. 15). Specifically, subjective good faith exists at the pre-agreement stage where the parties are obliged to notify or explain (Yuanitasari & Kusmayanti, 2020, p. 294), and gather material facts about the subject under negotiation for the parties. For example, in the Jurisprudence of the Jambi District Court Decision No. 23/Pdt.G/2007/PN.JMB, the judge considered that if Defendant II as the buyer has good faith, then Defendant II should first check whether the object in dispute is involved in a dispute or controlled by another person, as a form of prudence good faith buyer. Defendant II, on the other hand, purchased the object of the dispute without first inspecting it. In this case, the judge determined that Defendant II, the buyer, did not act in good faith when purchasing and selling. What should be noted in this decision is the lack of clarity regarding what is meant by "good faith."

Meanwhile, objective good faith is contained in Article 1338 paragraph (3) of the Civil Code, which states that an agreement must be carried out in good faith. Objective good faith can also mean that an agreement must be performed in accordance with propriety or justice (Arifin, 2020, p. 80). According to Subekti, what is meant by Article 1338 paragraph (3) of the Civil Code is that the implementation of an agreement must proceed by considering decency norms (Subekti, 1997, p. 41). One example of good faith in the implementation of the agreement is in the decision of the Probolinggo District Court No. 09/Pdt.G/2010/PN.Prob, which is of the opinion that Defendant I as the buyer has good

intentions because the buyer has submitted the purchase money to Defendant V as the seller and it has been declared paid off. Thus, the buyer has fulfilled his obligations by making payments. With the payment settled, the judge determined that the buyer had heeded the seller's good faith. In this case, good faith can be interpreted as fidelity to the bargain, where the buyer must make payments according to the agreement.

It should be noted that the above classifications are not based on the Civil Code, but rather on the arguments of several Indonesian professors (Prodjodikoro, 2006, pp. 56, 61–62; Resta, 2016, pp. 53–59). Therefore, the classification is non-binding and it is natural for courts to often establish their own definition of good faith as well as its scope (Resta, 2016, p. 8; Untung, 2012, p. 87). However, it is believed that Indonesian courts do not yet have a complete understanding of the definition, standards, and function of good faith in contract execution (Khairandy, 2004, pp. 291–345). Based on this, it is understandable that Indonesian courts use different definitions of good faith.

Based on the two examples described above, it can be concluded that in practice, the determination of whether the agreement has been carried out based on good faith and propriety is left to the judge to decide (Priyono, 2017, p. 20). Article 1338 paragraph (3) of the Civil Code gives power to judges to supervise contract implementation so that decency and justice are not violated (Subekti, 1997, p. 41). In other words, the judge has the authority to deviate from the contract if the execution of the contract violates one of the parties' sense of justice (*recht gevoel*) (Priyono, 2017, p. 20). In the practice of contract law, judges can use their authority to interfere with the contract's content or subject matter. Thus, good faith must exist not only during the making (signing) and post-making (implementing) stages of the contract but also during the pre-production stage (designing) (Syaifuddin, 2012, p. 130). As another example, in civil case No. 341/K/Pdt/1985, dated March 14, 1987, the Supreme Court of the Republic of Indonesia decided that the loan interest rate of 10% per month was excessive and caused injustice to one of the parties. As a result, the Supreme Court of the Republic of Indonesia lowered the interest rate from 10% to 1% per month (Syaifuddin, 2012, p. 130). Based on the decision of the Supreme Court of the Republic of Indonesia, good faith can also be interpreted as a justice where an excessively high-interest rate is considered unreasonable.

C. GOOD FAITH: INDUCTIVE OR DEDUCTIVE?

Comparing good faith in Australia and Indonesia has shown that neither jurisdiction has a clear definition of the term. Although both have the same condition in terms of the unclear definition of good faith, there are substantial differences. The difference is that in Australian contract law, the position and existence of good faith are unclear because the High Court of Australia has yet to issue a definitive decision and there are no regulations governing good faith (McDougall, 2006, pp. 29, 36). This raises the question of whether the entire contract should be carried out in good faith. However, the position and existence of good faith in Indonesia are regulated in the Civil Code. Thus, under Indonesian contract law, all agreements must be decided in good faith, even if the obligation of good faith itself is unclear.

Based on the foregoing, the certainty of the position of good faith in Indonesian contract law will bring clarity to the exception. It is obvious that the parties cannot contract out of good faith obligations because the Civil Code has required all contracts to be executed in good faith. However, as previously stated, in Australia, it is 'possible' for the parties to exclude good faith from a contract (McDougall, 2006, p. 35), although this is still a contentious issue. From this, it is clear that the concept of legal reasoning using the deductive method is superior to the concept of legal reasoning using the inductive method in terms of providing legal certainty.

As previously mentioned, the definition of good faith in Indonesia is abstract. However, Vranken stated that the civil law system uses abstract arrangements in its codification so that it can meet new legal demands in the future (Vranken, 2015, pp. 18–20). In support of this, Prodjodikoro said that good faith in Indonesia must be able to adapt to the demands of the times because the law only regulates the current conditions (Prodjodikoro, 2006, p. 56). Based on this, it is understandable that good faith in Indonesia is not precisely defined and remains an abstract doctrine. It should be noted that, while good faith in Indonesia can adapt to future conditions due to its 'abstract' form, there will be different interpretations of the definition and scope of good faith itself. Disagreements in the scope and perspective of this good faith will undermine legal assurance, which is the goal of the law.

CONCLUSION

This brief comparison of the regulation of the doctrine of good faith in Indonesia and Australia demonstrates that the civil law legal system's deductive (top-down) approach can provide greater legal assurance than the common law legal system's bottom-up approach. It should be noted, however, that even civil law cannot provide complete legal assurance because the clauses in a codification are always made abstract. This is evidenced by this study, which discovered that the definition and scope of good faith in Indonesia are unclear. Nevertheless, there is clarity in Indonesian contract law regarding the existence and position of good faith. Good faith in Indonesian contract law is expressly regulated in the Civil Code, so all agreements must be carried out in it. In contrast, in Australia, not only is there no clear definition of good faith, but the position and existence of this doctrine in Australian contract law are also unclear. This has resulted in the middle and lower courts in Australia having different perspectives regarding the definition and scope of good faith because the High Court of Australia and the Australian legislature have not provided any clarification on this doctrine.

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