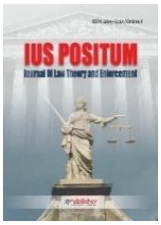

ISSN 2809-672X (Online)
IUS POSITUM: Journal of Law Theory and Law Enforcement
https://journal.jfpublisher.com/index.php/jlte
Vol. 3 Issue. 4, October 2024
doi.org/10.56943/jlte.v3i4.649

Comparative Study of the Doctrine of Repudiation of Contract in the Contract for The International Sale of Goods (CISG) and the Terms of Cancellation in the Civil Code

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ABSTRACT

In International Civil Law, several types of breach can be found, one of which is anticipatory breach. The term anticipatory breach has its roots in the concept of repudiation, which covers a wider range of refusals. Repudiation includes not only anticipatory breach, but also every form of refusal to fulfill contractual obligations, both before and after the contract period begins. Anticipatory breach refers to actions that indicate one party's intention not to fulfill its contractual obligations to the other party. This research aims to analyze how the Contract for the International Sale of Goods or CISG and the Civil Code regulate the return of rights for breach committed by one of the parties. The method applied is normative juridical research with statute and comparative approach. The findings of this research indicated that validity of an agreement under Article 1320 of the Civil Code requires an agreement, capacity, a specific object, and a lawful cause. If these subjective and objective conditions are unmet, or if there is a breach causing harm, the agreement may be canceled, but only through a court decision as per Article 1266. Repudiation, the refusal to fulfill an agreement, has two models: the mirror image model and the differentiated model, which assess potential future losses. In international civil law, anticipatory breach, a concept linked to repudiation, is covered in Articles 71-73 of the CISG.

Keywords: *Agreement, Anticipatory Breach, Breach of Contract, CISG, Civil Code*

INTRODUCTION

The development of trade in Indonesia has given rise to numerous agreements governing the responsibilities of parties in business transactions.[1] These agreements are an important element in many business transactions, as they provide legal certainty and help reduce potential conflicts. The agreement can cover various aspects, according to the interests of the parties involved in the transaction, such as the procedures for conducting trade, payment, and the responsibilities of each party.

The Civil Code is divided into four books: the first book on persons, the second book on objects, the third book on obligations, and the fourth book on expiration and proof. The third book that discusses engagement mentions freedom of contract, which provides each party with the right to create an agreement as long as it is not contrary to the law.[2] Article 1320 of the Civil Code details four conditions of the validity of an agreement that must be complied with in order for a contract to be legally valid, including:

1. Agreement of the parties who bind themselves,
2. Capacity to create an obligation,
3. A certain subject matter, and
4. A lawful cause.

International Civil Law uses the United Nations Convention on Contracts for the International Sale of Goods (CISG) as the legal basis for cross-border transactions. The CISG, drafted by the United Nations (UN), facilitates the making of agreements between countries without any confusion as to which law to follow in the event of a dispute. The CISG governs contract formation, delivery procedures, the obligations of the parties, and remedies for breach of contract. The CISG also recognizes the concept of anticipatory breach, which stems from repudiation, or a party's refusal to fulfill a contractual obligation, either before or after the contract has commenced. Anticipatory breach refers to a party's intention not to fulfill its contractual obligations, which is regulated in Articles 71 to 73 of the CISG. On the other hand, the Civil Code does not regulate such anticipatory breach.

Losses due to breach of contract in International Civil Law can be categorized into two types, actual loss and potential loss.[3] Actual loss refers to the significant loss that has been experienced by the aggrieved party as a result of the breach of contract. Meanwhile, potential loss or consequential loss is an indirect loss that

[1] Victor Tulus Pangapoi Sidabutar, "Kajian Pengaruh Kerjasama Perdagangan Indonesia – Chile Terhadap Peningkatan Perdagangan Indonesia Di Wilayah Asia Pasifik," *JURNAL BISNIS STRATEGI* 26, no. 1 (January 2018): 39.
[2] Bernadetha Aurelia Oktavira, "Macam-Macam Perjanjian Dan Syarat Sahnya," *Hukumonline.Com*.
[3] Simon A. Butt and Tim Lindsey, "Liability for the Death of Aircraft Passengers in Indonesia," *Journal of Air Law and Commerce* 85, no. 4 (2020): 573–731.

could potentially occur if such breach is not prevented.[4] In Indonesian Civil Law, losses are classified as material and immaterial losses. Material losses can be quantified in money, while immaterial losses cannot be quantified in money.[5] The difference between these losses lies in the timing of the loss; material and immaterial losses are actual losses as they occur simultaneously with the breach of contract. Meanwhile, potential loss occurs if one party refuses to fulfill obligations before the agreement period begins, thus the party's good faith in carrying out the agreement can be questioned, in accordance with the principle of *pacta sunt servanda*.

Referring to the background of the problems that have been described, this research aims to analyze the ways in which the CISG and the Civil Code regulate the return of rights for parties aggrieved by a breach of contract. In addition, this research is expected to provide an insight to the relevant audiences regarding the different regulations between the CISG and the Civil Code.

LITERATURE REVIEW

Theory of Legal Certainty

Law, as is known, serves three main purposes: certainty, expediency, and justice. In the context of anticipatory breach, the researcher uses the theory of legal certainty as this provision has yet to be regulated in Indonesian legislation, thus creating uncertainty in its law enforcement. Legal certainty is a principle that ensures that the law is enforced consistently, so that aggrieved parties can obtain their rights. According to Jan Michiel Otto, legal certainty includes the provision of clear and easily accessible legal rules.[6] Sudikno Mertokusumo added that legal certainty is a guarantee that the law must be carried out properly.[7] Purnadi and Soerjono Soekanto stated that legal certainty provides a sense of peace in human life, including interpersonal and personal order.[8] Gustav Radbruch refers to legal certainty as a product of law, especially legislation. Legal certainty entails two aspects: legal formation and legal certainty itself.[9]

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[4] Ibid.
[5] Rai Mantili, "Ganti Kerugian Immateriil Terhadap Perbuatan Melawan Hukum Dalam Praktik: Perbandingan Indonesia Dan Belanda," *Jurnal Ilmiah Hukum DE'JURE: Kajian Ilmiah Hukum* 4, no. 2 (March 2022): 298–321.
[6] Mohamad Adya Laksmana Sudradjat and Faisal Santiago, "Legal Certainty in Law Number 8 of 2016 Concerning Persons with Disabilities in Industrial Relations," *Journal of Social Research* 2, no. 10 (September 4, 2023): 3349–3356, https://ijsr.internationaljournallabs.com/index.php/ijsr/article/view/1401.
[7] E. F. Pakpahan, Atika Sunarto, and Dicky Alfredo Ginting, "Analysis of Consumer Protection Regulations Against Unlicensed Cosmetics by BPOM. Case Study: Etude House Cosmetic," *Legal Brief* 11, no. 2 (2022): 1482–1491, https://legal.isha.or.id/index.php/legal/article/view/323.
[8] Kadek Agus Sudiarawan, Putu Edgar Tanaya, and Bagus Hermanto, "Discover the Legal Concept in the Sociological Study," *Substantive Justice International Journal of Law* 3, no. 1 (May 20, 2020): 94, http://substantivejustice.id/index.php/sucila/article/view/69.
[9] Imran Imran et al., "Aspects Of Justice Of Marriage Dispensation And Best Interests For Children," *Jurnal Hukum dan Peradilan* 13, no. 1 (March 2024): 63.

From these various views, it can be concluded that legal certainty provides a guarantee that the law is enforced consistently, resulting in the rights of the injured party being protected, and decisions that support the fulfillment of these rights can be achieved.

Legal certainty also plays an important role in realizing justice in the legal system. When legal certainty is realized, it provides clarity for the parties in taking legal action, prevents arbitrariness in the implementation of the law, assists law enforcement, guarantees the rights and interests of every citizen, and creates a stable and reliable system.[10] A dynamic law should not hamper people's activities due to uncertainty. Instead, the law must effectively regulate things that have yet to be regulated while still considering the legal principles inherent in the draft regulation. The implementation of legal certainty in laws and regulations can be seen in the attribution authority granted by higher regulations.

The Principle of Pacta Sunt Servanda

The principle of *pacta sunt servanda* is a fundamental principle with universal recognition in the law of agreements, which means that every agreement must be kept. This principle is the foundation of contract making in both national and international law. In Indonesian national law, this principle is regulated in Article 1338 of the Civil Code, which states that agreements made legally apply as law to the parties who make them. At the international level, this principle is stated in Article 26 of the Vienna Convention on the Law of Treaties, which reads, "every agreement shall be binding on the parties and shall be executed in good faith." In addition to civil agreements, this principle is also used by countries as a basis for preserving peace in the implementation of applicable international conventions.

Pacta sunt servanda is an absolute principle in the making of agreements, as it gives confidence that every agreement will be honored.[11] Violation by a state of an international treaty may create disturbances in international relations.[12] In the common law legal system, this principle is referred to as the principle of sanctity of contract, which emphasizes the importance of adherence to agreements that have been concluded.

This principle emphasizes that agreements that have been made carry the same legal force as laws, thus binding the parties to fulfill the obligations stipulated in the agreement. In civil law, this principle requires the parties to carry out their obligations in the agreement in good faith. If one of the parties does not fulfill its

[10] Diya Ul Akmal and Fauzziyyah Azhar Ramadhan, "Legal Ideals: Lawmaking and Law Enforcement Primarily Based on Community Social Life in Indonesia," *Precedente Revista Jurídica* 23 (November 2023): 129–162.
[11] I Gede Angga Adi Utama, "Asas Pacta Sunt Servanda Dalam Perspektif Hukum Perjanjian Internasional," *Ganesha Civic Education Journal* 1, no. 1 (2019): 37–48.
[12] Feni Annisa et al., "Hubungan Hukum Internasional Sebagai Sumber Hukum Dalam Hukum Nasional," *Aliansi: Jurnal Hukum, Pendidikan dan Sosial Humaniora* 1, no. 4 (June 2024): 188–198.

obligations in good faith, then that party may be subject to legal sanctions in accordance with applicable provisions.

The Principle of Freedom of Contract

The principle of freedom of contract provides freedom to the parties to make agreements with anyone, as well as determine the contents, implementation, and terms of the agreement in accordance with applicable laws and regulations. This principle allows parties to draft agreements in accordance with their respective interests and necessities.[13]

Despite providing extensive freedom, this principle has limitations to protect the interests of society and prevent imbalances between the parties to the agreement.[14] This restriction is necessary to ensure that the agreement does not impose disadvantages on one of the parties or violate applicable legal norms.

The principle of freedom of contract also guarantees legal certainty for the parties, as agreements that have been made are considered binding such as laws for those involved.[15] Under this principle, the parties have a legal guarantee of the agreement concluded, because they themselves have agreed to bind themselves to the provisions that have been mutually agreed upon. Therefore, it is important for the parties to pay attention to the applicable legal provisions in order to avoid potential violations of the law that may disadvantage both parties.

RESEARCH METHODOLOGY

Legal studies has three main types of research methods, normative research, empirical research, and normative-empirical research. Normative research focuses on legal studies that examine rules, legal principles, and doctrines in legal theory.[16] This method includes analysis of various laws and regulations, legal literature, and juridical interpretation to comprehend and develop applicable legal concepts.

In this research, the authors used a normative juridical method with a statutory and comparative approach. The statutory approach aims to analyze the applicable legal provisions by referring directly to regulatory texts, thus resulting in a comprehensive understanding of a particular legal foundation. Meanwhile, the

[13] Dimas Aditya and Neneng Oktarina, "The Principle of Freedom of Contract in Procurement of Goods and Services Agreement between Commitment Making Officer and Provider (Study at the Office of Publics Work of Sijunjung Regency)," *Unes Journal of Swara Justisia* 3, no. 2 SE-Articles (September 3, 2019): 169–181, https://swarajustisia.unespadang.ac.id/index.php/UJSJ/article/view/105.
[14] Tami Rusli, "Asas Kebebasan Berkontrak Sebagai Dasar Perkembangan Perjanjian Di Indonesia," *Pranata Hukum: Jurnal Ilmu Hukum* 10, no. 1 (2015): 24–36, https://jurnalpranata.ubl.ac.id/index.php/pranatahukum/article/view/152.
[15] Arum Puspita Kesuma and Muh Afif Mahfud, "The Implementation of Pacta Sunt Servanda Principle as a Basis for Making Memorandum of Understanding," *Awang Long Law Review* 5, no. 2 (May 31, 2023): 432–440, https://ejournal.stih-awanglong.ac.id/index.php/awl/article/view/724.
[16] Ayu Purnama sari, "Kedudukan Hukum Salinan Akta Notaris Dari Minuta Akta Yang Belum Lengkap Dalam Perspektif Prinsip Kehati-Hatian," *Recital Review* 4, no. 2 (June 2022): 474–493.

comparative approach allows researchers to compare similar regulations across different jurisdictions, providing insight into the advantages and disadvantages of different legal systems, as well as their potential adaptation and implementation in the local context.

Normative research, as a whole, aims to provide theoretical contributions to the development of legal science and become the basis for formulating policies that are more effective, equitable, and in accordance with the societal needs.

RESULT AND DISCUSSION

Conditions for Contract Cancellation in the Indonesian Civil Code

An agreement is a legal act that forms a legal relationship or is commonly referred to as an engagement. This is due to the fact that when the parties sign an agreement, they have committed a legal act by binding each other to carry out as agreed, thus creating a bond between them in the legal relations of the agreement. In Indonesian Law, the concept of an agreement is explained in Article 1233 of the Civil Code (KUHPerdata), which states that "An agreement is created by mutual consent or by law."

According to Pitlo, an agreement is a legal bond involving rights and obligations between two or more specific people, which places one party in a position of entitlement and the other party is obliged to fulfill certain demands.[17] According to Pitlo, an agreement is a legal bond involving rights and obligations between two or more specific people, which places one party in a position of entitlement and the other party is obliged to fulfill certain demands.[18]

Article 1313 of the Civil Code defines an agreement as an act in which one or more people bind themselves to one or more people. Subekti also describes an agreement as a legal relationship between two or more parties, in which one party has the right to demand something from the other party, and the other party is obliged to fulfill the demand.

Article 1234 of the Civil Code regulates the types of agreements, which include: giving something, doing something, or not doing something. This agreement must be performed in good faith by the contracting parties. In order to qualify for validity, the agreement must fulfill the following conditions:

1. Agreement must be definable.
2. The agreement must not be contrary to law, public order, or decency.
3. It is not required that the agreement can be performed or fulfilled.
4. It is not required that the agreement must be capable of being valued in money.

[17] A. Pitlo, *Het Nederlands Burgerlijk Wetboek: Algemeen Deel van Het Verbintenissenrecht* (Arnhem: Gouda Quint BV., 1979).
[18] L. C. Hofmann et al., *Het Nederlands Verbintenissenrecht: De Algemene Leer Der Verbintenissen*, 1959.

In Book III of the Civil Code, entitled Obligations, the scope of obligations is broader than agreements. This book not only regulates obligations originating from agreements or contracts, but also obligations arising from unlawful acts (onrechtmatige daad) and from the management of other people's interests without prior consent (zaakwaarneming). In addition to the terms obligation and agreement, the term contract is also often used to describe the commitment of the parties to fulfill an obligation.

The regulation of contracts is included in the term civil law, which emphasizes on the obligation to carry out self-imposed obligations. Civil law also recognizes five important principles in the theory of contract law, including:

1. The principle of freedom of contract, which provides freedom to the parties in determining the provisions of the agreement.
2. The principle of concensualism, which prioritizes agreement as the basis for the validity of the contract.
3. The principle of legal certainty (pacta sunt servanda), which states that a valid agreement applies as law to the parties.
4. The principle of good faith, which requires the parties to act with honesty and good intentions.
5. The principle of personality, which emphasizes that contract rights and obligations apply only to the parties involved in the agreement.

By understanding these principles, the parties are expected to respect each other's rights and obligations stipulated in the agreement and create a fair and balanced legal relationship.

Repudiation Of Contract in Convention On Contracts For The International Sale Of Good

In the course of operating a business, there are often several risks associated with the contracts that will be signed. These risks are not limited to possible defaults, but also include situations where one party has bad faith during the pre-contractual period. From an economic perspective, less than optimal choices may be made to prevent losses that exceed the capital that has been invested in an agreement. This encourages parties to consider canceling a contract if future losses are expected, where such cancellation is considered an effective measure to achieve economic efficiency in business.

The Convention on Contracts for the International Sale of Goods (hereinafter CISG) is a rule of material law applied to every international trade transaction. In the CISG, in Chapter V which regulates General Provisions on the Obligations of Sellers and Buyers, Section 1 explains the Anticipatory Breach and Replacement of Contracts, which are stipulated in Article 71 to Article 73. The concept of Anticipatory Breach has been studied by many law enforcers as it relates to the repudiation of the party bound by the agreement. This anticipatory breach serves as

a preventive measure in the event of uncertainty that may be experienced by one of the parties in the performance of obligations. A simple example of this uncertainty is when a seller informs that the promised goods are not available, causing the contractors to halt the project by withdrawing all employees and equipment used to construct the building.

In such an example, this act of withdrawal is referred to as repudiation. Repudiation is a basis for rescission of the agreement. In the literature, there is still ambiguity regarding the definition of repudiation. However, in general, repudiation is defined as an action or statement by one of the parties to the agreement that indicates the potential for breach in the future. Therefore, if the agreement has been fully performed by the parties, the concept of repudiation cannot be applied.

Repudiation requires an express repudiation of the agreement concluded by the parties. This can occur in cases such as a significant delay in the fulfillment of the performance by one of the parties for many years. For example, a business owner cannot explain the reason behind the late payment of salaries to its employees. However, repudiation can also take the form of a rejection of the validity of the agreement between the parties involved. Repudiation does not occur if the parties only question the validity of the agreement without any threat of intent not to fulfill future obligations.

In some cases, repudiation is often associated with immaterial losses that may arise in the future. This is due to the element of "wilfulness" which is influential in determining the existence of repudiation in a contract. As such, repudiation contains an element of default. This can be seen not only from the repudiating party's statement but also from the actions taken. Failure to perform an agreement can be considered an unlawful act, and this also applies to repudiation. In a similar vein, the other party has the right to object to the breach of the agreement and also has the right not to repudiate the contract.

Repudiation has two models in practice, the mirror image model and the differentiated model.[19] The differentiated model, proposed in this research, is the conventional understanding of the doctrine, which includes different authority lines and addresses different situations that develop in the context of repudiation. The mirror image model, on the other hand, is a relatively new model, as there is still ambiguity as to whether repudiation is attempted with full awareness or simply due to a misunderstanding of fundamental legal principles.

Repudiation can also lead to legal consequences. A person who has committed repudiation can be considered not to have good faith in implementing the agreement, even with the potential to commit a complete breach of contract.[20]

[19] J W Carter, Wayne Courtney, and Gregory Tolhurst, "Two Models for Discharge of a Contract by Repudiation," *The Cambridge Law Journal* 77, no. 1 (November 7, 2018): 97–123, https://www.jstor.org/stable/26850925.
[20] Nury Khoiril Jamil, "Implikasi Asas Pacta Sunt Servanda Pada Keadaan Memaksa (Force Majeure) Dalam Hukum Perjanjian Indonesia," *Jurnal Kertha Semaya* 8, no. 7 (2020): 1044–1054.

Given this, the non-repudiating party has the option to initiate legal action, such as filing a lawsuit in court based on the cause of repudiation, canceling the agreement, and filing a lawsuit for compensation against the repudiating party. In addition, they might refuse to accept the repudiation, which will result in the agreement remaining in force for the benefit of the parties, as well as delaying the fulfillment of the contract until an agreement is reached to proceed.

CONCLUSION

The requirements for the validity of an agreement listed in Article 1320 of the Civil Code can serve as a basis for canceling an agreement if it does not meet the subjective and objective requirements, which are agreement, capacity, specific object, and lawful cause. In addition to the non-fulfillment of these conditions, default or breach of contract can also be the reason for canceling the agreement if it causes harm to any of the parties. However, this cancellation can only be conducted through a court decision as stipulated in Article 1266 of the Civil Code.

Repudiation is a refusal of one of the parties to carry out the agreement that has been agreed upon. Repudiation is divided into two models, the mirror image model and the differentiated model, which are used to examine potential losses that have yet to occur due to repudiation. The term anticipatory breach is also used in the context of repudiation. In international civil law, anticipatory breach is regulated in Article 71 to Article 73 of the Convention on Contracts for the International Sale of Goods (CISG).

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