Prevention of Criminal Prosecution Resulted from Breach of Contract

Cindy Indudewi Hutomo Njoo, Dian Dharmayanti and Selvi Wibriana Sari
Faculty of Law, Airlangga University, Surabaya, Indonesia

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Abstract: The business world is closely associated with agreements. In fact, there is no business without agreement. Under the Indonesian Civil Code, agreements are classified into special names which are arranged in chapter five to chapter eighteen Burgerlijk Wetboek (abbreviated BW) and those which is not known under a special name, still subject to the general provisions which are stipulated in BW. The agreement is like a vessel that provides the parties justice and certainty in carrying out their obligations to obtain their respective rights. However, in its development it is not uncommon for an agreement that started from a civil deed later then transform to become a criminal act. From time to time, creditors, who are entitled to rights of debtors' accountability, may take shortcuts in an effort to suppress debtors to immediately pay off their obligations in ways that are not necessarily "as is" to create a criminal condition from an agreement that was originally regulated under the private law. This paper reviews (1) what legal elements create a breach of contract; (2) which legal element of breach of contract that risk in creating conditions that could arise to criminal prosecution; and (3) how to prevent it.

1 INTRODUCTION

Business activities are always related to legal aspects, namely agreements or contractual relationships. The essence of an agreement is the binding of obligations, which is a commitment that held accountable for one party that becomes the right of the other party. When one party does not carry out his or her obligation, which becomes a liability so as to cause harm or loss to another party, the aggrieved party can hold accountable the party who breaks the promise through the law enforcement system. It then becomes the concern of how parties claim responsibility for the loss, whether parties at a loss are pursuing justice through the civil or criminal system of law.

Despite the obvious differences of the civil and the criminal law system, it is still difficult or at least blurry to distinguish between issues that purely is a breach of contract or that is categorized as a crime of fraud. Therefore, disputes that arise from a breach of contract, which then later evolves to become a crime of fraud, until now remains as an ambiguous law enforcement problem that is not easy to resolve. The problem of ambiguity is highlighted with the difference of consequences resulted from civil or criminal law enforcement system used in the pursuit of justice. Hence, the topic of legal issues related to contracts, breach of contract, and fraud has always been a relevant field of research because the issue always exists and seems incessantly present.

One of the aggravations is the liquidity and the width of the variants that can be examined in many court decisions that are never standard. When it comes to judges' consideration of verdicts in determining whether an injury of promise is a matter of breach of contract or whether it contains deception thus is a crime of fraud, has never been standard. According to the basic norms of law, the law must provide justice, certainty and utility in the form of merit. If an implementation of the law (*das sein*) does not work according to the law as it should be (*das sollen*), by all means study has to be done in obtaining future improvements that will reflect proportionate legal implementations at work. Therefore, legal issues arise from default obligations in the fulfilment of agreements, still is a relevant subject to conduct research, so as to yield ideas to problem solving specifically on how business people can prevent or at least minimize risks to avoid criminal prosecution from the aggrieved party. For this reason, a more accurate understanding of what

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elements composes a breach of contract? How a breach of contract is regulated under the Indonesian Civil Code? That is, when a right of a person that is protected by law is injured, such loss, which is suffered from a breach of contract, must be distinguished from a loss that is resulted from unlawful action under the regulation of the Indonesian Civil Code.

Fraud is an unlawful action under the Indonesian Civil Code, but is also a crime under the Indonesian Penal Code. Hence, in regard to the allegation of fraud over a default of the contract, it cannot be taken lightly. This is because as stipulated in article 378 Indonesian Penal Code, punishment for the criminal act of fraud has a sentence maximum of four years imprisonment. Hence, it becomes this paper's goal to educate and make aware business people on how they can take preventive measures in minimizing risks of criminal prosecution should conflict arises between parties when carrying out the agreed obligations.

2 METHOD AND MATERIALS

This research is normative juridical research, namely research based on legislation or binding legal norms that have relevance to the formulation of the problem. According to Peter Marzuki, legal research is a scientific process to find solutions to legal issues with the aim of giving prescriptions about what should be the legal issues that could have arisen (Marzuki, 2011).

The approach to the problem used in this study is the statue approach, which is carried out by examining all the laws and regulations concerned with the legal issue discussed. The second approach used in this legal research is a systemic approach. This approach implies that we have to be aware of the complexity of the problems by avoiding opinions that oversimplify the issue, which later produces wrong opinions (Rahardjo, 2006). The third approach used in this legal research is a conceptual approach that investigates the development of law from legislation and its making (i.e. legislation academic text) to doctrines that develop in legal science. By studying the legislation and the doctrine, ideas would be found that give birth to legal notions, legal concepts, and legal principles that are relevant to the issues at hand. Thus, legal concepts become a foundation for researchers in building a legal argument to solve prevailing legal issues.

To answer arising legal issues, legal materials are needed. In seeking legal material the preparation of this study consists of primary legal material and secondary legal material. Primary law material is legal material that is authoritative, meaning having authority. The primary legal material used in the preparation of this research is legislation product that includes: *Burgerlijk Wetboek* (abbreviated as BW). Meanwhile, secondary legal material is a source of material obtained through the library that relates to problems to be studied, including literature, collection of journal writings and other scientific works.

3 RESULT AND DISCUSSIONS

The discussion in this study begins by examining the meaning of the agreement and the elements and principles underlying the concept of the agreement and how the agreement binds its legality. *Burgerlijk Wetboek* does not regulate the definition of agreement, but regulates how the agreement was born, namely; from the provision of legislations and agreements (article 1233 BW). Meanwhile, the understanding of the agreement in article 1313 BW is defined as an act in which one or more people jointly attach themselves to one or more other people. This also reflects the principle of freedom of contract as stipulated in article 1338 BW that all agreements made legally apply as laws for those who make them. Actually what is meant by the article is that each agreement "binds" both parties (Subekti, 2011). The principle of freedom of contract also reflects that people can freely make any agreements, as long as they do not violate public order or morality (courteousness norms). This has been regulated by article 1337 BW that states; "A cause is forbidden, if it is forbidden by the law, or if it is good for public morals." Based on that understanding, it can be concluded that agreement is a law for people or anyone who promises, because they agree to bind themselves to other people or other parties and are obliged to obey the things that have been promised. This definition is simplified by R. Subekti as followed; an agreement is an event where two people promise each other to do something.

3.1 The Binding Terms of an Agreement

Legal terms of an agreement are regulated in article 1320 BW, which determines the need for four conditions to be present, namely:

1) The consent of those who commit themselves;

2) The capability to make an agreement;
3) A particular object;
4) A legal cause.

The first two conditions are called "subjective conditions" because of the two conditions concerning the subjects (parties) of the agreement. If the subjective conditions are not fulfilled, the agreement can be cancelled (*vernietigbaar*), meaning that the agreement does not automatically cancel, but must be submitted to the court for cancellation. Thus, the agreement must be considered binding until the court decision of *inkracht van gewijsde* judicially cancels the agreement. Meanwhile, the last two conditions (the above points 3 and 4) are called the "objective conditions". If one is not fulfilled, the agreement becomes null and void by law (*nietig*).

It is important to note that "an agreement which can be cancelled (*vernietigbaar*)" is distinctive from "an agreement, which is null and void by law (*nietig*)". An agreement that is null and void by law does not require the consent of the parties to make its binding power ineffective. This means that when the objective conditions are not fulfilled, the agreement automatically becomes null and void. The agreement is assumed to never have existed. The agreement that is null and void does not have the power to bind parties to commit to the agreement (Bakarbessy, 2018).

3.1.1 Consent

The first legitimate term requires parties to consent (*toesteming*). It means that the parties declare each other's wishes and their wishes match or in other words, there is conformity between the parties' stated wishes (offer = acceptance). Consent (*toesteming*) is the manifestation of the principle of consensus that determines when an agreement is born. Article 1321 BW states: "there is no valid consent if such consent is given by mistake, or if it is obtained by violence, extortion, or fraud". Therefore, the 3 (three) elements that are contained in consent that can cause an agreement to become defective are (i) mistake (*dwaling*), (ii) coercion (*dwang*), (iii) fraud (*bedrog*);

(i) Mistake (*dwaling*) has been stipulated in article 1322 BW that states: "the mistake does not result the cancellation of an agreement unless that mistake happens to the nature of the object which forms the principle of the agreement." Paragraph (2) article 1322 BW states that "the mistake is not the reason for cancellation, if such mistake only concerns the identity of the person with whom a person intends to make an agreement, unless if such agreement has been made principally because of the identity of that person." As a countermeasure against this default of consent, the aggrieved party can file a claim based on an error to demand cancellation along with the loss caused by the conditions that must be fulfilled as followed;

a. Is the decision to terminate the agreement formed under the influence of a false description of the nature and condition of the goods (the nature of the goods) as the main object of the agreement (*error in substantia*)?
b. Does the misrepresentation of the nature and condition of the goods (the nature of the goods) for the perverse party have a decisive meaning?
c. Does the opposing party know or should know that the nature and circumstances of the goods that cause error have a very decisive meaning for the other party?

The three conditions mentioned above are cumulative (Bakarbessy, 2018).

A claim for cancellation of an agreement for reasons of mistake will only succeed, if the party is misguided if he knows that there are no traits or conditions which he/she thinks exist or not, or at least he/she will not close the contract with the same conditions (i.e. there is a causal relationship between mistake (*dwaling*) and the emergence of an agreement). The mistaken perception must be related to the traits or circumstances, which for the perverse party have a decisive meaning (Saraghi, 1985)

(ii) Compulsion (*dwang*) or duress is regulated in article 1324 BW which states that "the compulsion has taken place if the action has such a character that frightens a person having a sound mind, and if the action can strike fear to the person that he or his assets is imperilled by an obvious and real loss". Threats in this case must be unlawful and include 2 (two) fundamentals, namely;

a. The threat itself is an illegal act both physically and psychologically (i.e. murder, persecution, false reports, disclosing secrets),
b. The threat is not an illegal act, but the threat is intended to achieve something that cannot be the right of the perpetrator.

(iii) Fraud (*bedrogs)* is stipulated in article 1328 BW and it states that "fraud is a reason to cancel an agreement, if the deception used by a party, is in such way that it is obvious and definite that the other party would have not entered into the agreement without such deception. Fraud shall not be presumed, but

must be proven." Fraud as an act against the law must be proven as a real loss: that is, losses that are no longer anticipated, but which have already occurred and can be proven to be the result of these illegal acts. It is important to note that deception is different from lies. It could be that a businessman in his series of words when offering his goods so that they sell well, he excels the quality of the goods which are not necessarily true. The lie conveyed by the seller of the item cannot be called a fraud because a fraud is a series of deceptive acts which requires bad intentions as the foundation of planned actions (Bakarbessy, 2018).

It is interesting to investigate further about the legal implication when the default of consent is under the influence of fraud (*bedrog*) or that, which was thought as fraud was actually resulted from the mistake (*dwaling*). It then leads to the question: why do the parties who want to cancel the contract that is closed under the influence of a misguided perception base their primary lawsuit on fraud (*bedrog*), and their secondary lawsuit on the mistake (*dwaling*)?

The cancellation of the agreement based on fraud will give the right to the opponent for compensation if there are reasons for it (as stipulated in article 1453 BW). This is also in accord to the court's practice that the basis for payment of compensation is when the actions of the other party violate the law (also imposed in article 1365 BW). The advantage of applying the primary suit based on fraud when claiming for cancellation of an agreement is that the claim is granted for the compensation of the loss suffered by the aggrieved party on this basis while ensuring the court's verdict to affirm violation of the opposing party's actions (intentional misguidance). On the contrary, the success of the lawsuit claim based on the mistake (*dwaling*) does not legally affirm that the actions of the other party are illegal. Thus, the two kinds of consent default must be disclosed separately. In many ways the conditions for the success of the two claims are different, but there are similarities between the legal concept of mistake (*dwaling*) and fraud (*bedrog*), that is, both lawsuit claims will only be successful if the claims can be proven that an agreement will not be closed otherwise with the known conditions not the same as when there was no deception or mistake (causal relationship between mistake and fraud) (Saraghi, 1985).

In addition to the causes of defaults of freewill that have been stated above, the doctrine of *Misbruik van Omstandigheden* or misuse of state (undue influence) has developed. In Indonesia, doctrine or teachings of misuse of the state (*misbruik van omstandigheden*) have not been included in the source of positive law, but have implicitly accepted as it is conveyed in the Decision of the Supreme Court of the Republic of Indonesia, among others, with decision Number 3431 / K / Pdt / 1985, dated 4 March 1987. The verdict in principle states that the statement of intention given so that it gives birth to an agreement, if it is influenced by "misuse of the situation" by another party is an element of consent default, thus, it is regulated by the private law.

According to Z. Asikin Kusumah Atmadja, misuse of the state is a factor that limits or interferes with the free will of the agreement. This is because of the imbalance and incompatibility of bargaining powers belongs to the parties. According to R. Cheeseman, in the common law system there are 3 (three) benchmarks for classifying the occurrence of misuse of state, namely;

a. Contracting parties are in a very unbalanced position in an effort to negotiate offers and receipts.
b. The stronger party irrationally uses its very dominating position of power to create a contract based on the pressure and imbalance of rights and obligations.
c. The party whose position is weaker has no choice but to approve the contract (Bakarbessy, 2018).

3.1.2 Capability to Make Agreement

The ability to make an agreement is measured by the standards of adulthood or quite common (*bekwaamheid - meerderjarig*), while proficiency in legal entities (*rechtpersoon*) is measured from the aspect of authority (*bevoegheid*). Based on article 1330 BW, the provision regulates those who are incompetent to make an agreement, namely children who are minors, people who are placed under custody, and everyone to whom the law has prohibited making certain agreements. Jurisdictional maturity contains the notion of the authority of a person to carry out legal acts are those who have been married under conditions stated by law, and in general all people who are not prohibited by law from making certain agreements. Elements of ability to make agreements include:

a. The main indicator for determining legal maturity is the authority of someone to do their own legal actions, without the help of parents or guardians,
b. A person who has grown up can be burdened with responsibility for all legal actions he or she

has committed,

c. The age limit must be a prerequisite for legal actions in general, not for certain or particular legal actions.

In the case that the legal subject is a legal entity, the standard of competence to carry out legal actions is sufficiently seen in its authority (*bevoegheid*) based on the inherent authority of the party representing it (the aspect of authority or *bekwaamheid-bevoegheid*).

3.1.3 Certain Matter or Object of Agreement

An agreement must have an object in the form of an item that can be determined by its type (Badrulzaman, 2015). Certain matter as the third condition of the validity of an agreement is regulated in articles 1332, 1333, and 1334 BW; Article 1332 BW states that "only the trading property can be the object of an agreement." Article 1333 BW states that "an agreement has to have an object that at least its type can be determined; "The quantity can be fixed or calculated later on." Article 1334 BW states, that "the future property can be the object of an agreement; but it is not allowed to release an unopened legacy, or with the consent of the person who must pass the legacy that becomes the object of the agreement; without prejudice to the provisions of articles 169, 176 and 178."

3.1.4 Legal Cause

The legal cause is the purpose, content, and intention desired by parties to enter into an agreement that gives birth to legal relations (Hofman, 1971). The cause is one of the underlying requirements for an agreement to have its binding power in effect. A cause that is legal is the fourth legal term that gives an agreement its binding power. This is associated with article 1335 BW, which reads as follows; "An agreement without any reason, or that has been made on a false or forbidden reason, shall have no effect." Likewise the case that is allowed is also regulated in article 1337 BW that "a cause is forbidden, if it is forbidden by the law, or if in contrary to good morals or public order."

The intention of the agreement (*causa*) is formed by what the parties want to achieve at the time of closing an agreement. From this point of view there is certainly no agreement without *causa*. According to jurisprudence an agreement is without *causa* if what the parties want to achieve since the closing of the agreement is not possible to realize. Thus the function of the understanding of *causa* is to protect the parties from the heresy of promises that are certainly not possible to fulfil. Next, the function of the understanding of *causa* in relation to the terms and conditions of *causa* must be in line with the desire to stem the freedom of contract within limits of appropriateness and propriety. If what is desired by the parties (*causa*) is not lawful, that is, contrary to the law and the norm of appropriateness (also known as *openbare order*) (stipulated in article 1337 BW) that were assessed according to the conditions at the time of the agreement closed, then the agreement that aims to achieve these results is null and void (Saraghi, 1985).

3.2 Underlying Principles of Agreement

It is necessary to note that each agreement that was made legally and that fulfilled the legal requirements of the agreement as stipulated in article 1320 BW contains basic values as follows:

1) Principle of Freedom of Contract
2) Principle of Consensus
3) Principle of Legal Certainty
4) Principle of Personality (Personality)
5) Principle of Compliance
6) Moral Principles
7) Principle of Legal Equality and Balance

The whole principles mentioned above are contained in article 1338 BW. This means that the agreement must be held in compliance with the requirements of article 1320 BW. The agreement binds as a law for the parties who make it (*pacta sunt servanda*), therefore the agreement must be obeyed without the right to change it unilaterally. The agreement is carried out in good faith and must be carried out rationally and properly (*rational en billjk*) that lives in the community. This figure is called the *objectieve goede trouw*, which is interpreted as good faith and in a subjective manner is known as honesty (*subjectieve goede trouw*). This mental attitude is contained in man and is applied in the law of objects, provision regulated in Book II BW. In its development, civil law experts agree that good faith in the implementation of contracts has three functions. They are:

a. Good faith to function as complementation / additional (*aanvullende werking van de goede trouw*) to the contents of an agreement.

b. Good faith to serve that is to limit the implementation of an agreement (*derogerende werking van de geode trouw*).
c. Good faith to serve as an eliminator of the implementation of an agreement.
(Badrulzaman, 2015)

In the opinion of Mariam Darus Badrulzaman, it is appropriate that the principle of good faith is used as a reference in implementing the agreement. That is, the agreement in its implementation must be tested in good faith. This is based on changes in the conditions that occur in people's lives, which are generally recognized as related to *clausula rebus sic stantibus*. That everything in this life changes (the principle of *rebus sics stantibus*). If change is not taken into account in the implementation of an agreement, the principle of proportionality, which is one of the principles in the provision of the agreement, will be disrupted and this does not provide justice for the parties. The disruption is likely to happen in long-term agreements. Until now the Supreme Court in Indonesia has not consistently implemented the principle of good faith in its decision to implement the agreement (Badrulzaman, 2015).

Principles are values of justice, certainty and benefit, which are the foundation of the parties to be committed. Meanwhile, the structure of an agreement usually consists of the following sections;

1) Essentialia section, which is the core part of an agreement, namely are: the parties, the agreement, the specified object / object, and the cause. As an illustration, in the sale and purchase agreement, the sale and purchase price and the goods are the core of the agreement, which is called the essentialia part.
2) Naturalia section, is a non-core part which is the nature of the agreement so that it is secretly attached to the agreement. That is, even though the provision is not stated in the agreement, the law has already regulated it. But surely it would be better to reaffirm the provision again in the agreement clause.
3) Accidentalia section, is an integral element in an agreement, in the form of regulated provisions that deviate from the provisions in BW or specifically agreed by the parties which are not an achievement that must be carried out or fulfilled by the parties.

3.3 Breach of Contract

After the agreement was born and binding to all parties, a commitment called obligation was born. The obligations carried out by the parties are the rights of the other parties bound by the agreement. If there are parties who cannot carry out or fulfil their achievements, there will be a default. The term breach of contract is derived from the Dutch term 'wanprestatie', which means bad performance, can also mean injured or broken promises. Basically breach of contract is in the civil or private law system corridor because the default was born out of an agreement. Whereas duty to compensate was born from the provision that gives rise to an obligation not as a result of an agreement, but because of the losses suffered as a result of an action that is prohibited by law. Article 1234 BW states that the forms of obligations are to give something, do something or not to do something. So, breach of contract can be interpreted as an act of not giving something, not doing something or doing something that is prohibited in an agreement.

Forms of breach of contract are:

1) Not fulfilling the obligations at all;
2) Late in fulfilling the obligations;
3) Fulfilling the obligations but not as promised; and
4) Do something that according to the agreement should not be done (added by Subekti).

In the event that a default has occurred, the legal remedies that can be taken are (i) demanding fulfilment of the agreement, (ii) fulfilment of the agreement along with compensation, (iii) compensation, (iv) cancellation of an agreement, (v) cancellation of the agreement along with compensation.

3.4 Fraud

Fraud according to dogmatic law is regulated under two different law systems; the first is under the domain of civil law system as referred to in article 1328 BW while second is under the domain of criminal law as referred to in article 378 of the Indonesian Criminal Code. Due to this overlapping provision that regulates fraud, the victim can pursue justice in anyone of this legal system.

Fraud as a crime or violation of penal law is regulated under article 378 of the Indonesian Criminal Code, which states that anyone with the intent to benefit themselves or others is unlawful, either by assuming false names or false capacity,

dignity, with trickery, or by crafty artifices, or by a web of fictions, induces someone to deliver any property or to negotiate a loan or to annul a debt, shall be guilty of fraud and will be punished by a maximum imprisonment of four years.

Meanwhile, fraud as an unlawful act is not defined in Indonesian Civil Code as that in Indonesian Penal Law, but fraud still can be interpreted to have the same elements as that referred in article 378 of the Criminal Code. Elements of the offense shall include:

1) Intention;
2) To benefit themselves or others against the law;
3) Usage of a false name or false state, reason or deception, a series of false words; and
4) Persuade people to give something, even to make debt or write off accounts.

Fraud as a criminal act must contain elements of actions that are prohibited by law, so that those who cause the incident can be subject to penal law (punishment). Elements of criminal events can be viewed from the following two aspects. They are subjective and objective elements;

- Subjective elements are elements that are inherent in a person who is involved or related to the person's actions and it includes everything contained in his mind. The elements, which are subjective elements of criminal acts are (i) intention or unintention, (ii) presence of cause and purpose to conduct an attempted act that has been planned, (iii) the psychological condition of the offender who is responsible for circumstances. Subjective elements are also acts carried out with an element of guilt (*men's rea*) in which the elements of the offender's guilt have resulted in the occurrence of the criminal event itself.

- Objective element is an element of a criminal act that is defined by criminal law which is a condition born from the act. According to Lamintang, what is meant by objective elements are elements, which are related to circumstances, that is, in circumstances where the actions of the perpetrator must be carried out. The elements, which are objective elements of a criminal act are the nature of the act that is against the law and that violates the law, as a result of the act being prohibited and threatened with punishment.

An event that can be said as a criminal event must fulfil the following conditions:

1) There must be an act, namely an activity carried out by a person or group of people. Actions must be in accordance with what was formulated in the law. The culprit must have made a mistake and must be accountable for his actions.
2) There must be guilt that can be accounted for. So, the act can indeed be proven as an act that violates the provisions of the law: there must be a penalty. In other words, the violated legal provisions include sanctions.

The fraudulent crime includes the *materieel delict*, which means that its completion must cause a consequence. The fundament of fraud is actions taken to get goods or money belonging to someone else and profit in an unlawful way such as using fake identities, like fake names and fake positions, with a series of lies and tricks. In fraud, causality must be proven between deception and the giving of certain items; that is, if there is no such trick, there will be no giving away of the item.

One of the similarities between fraud and breach of contract is that both issues started from a legal accord that usually is contractual, but then later branches out to become a crime of fraud that is regulated under a penal law or it remains as a breach of contract issue that is regulated under the civil law. Although the issue may be overlapping and to many common people who have undergone a painful process in claiming their right of the agreement, which had been violated by the other parties, would develop a notion at least thinking that they have been misled with fraud. Hence, it becomes an urgent discussion in this paper to understand the underlying differences between the breach of contract and fraud.

Fraud in civil law occurs because one party does not carry out the obligations agreed upon in bad faith. Fraud that begins with the contractual relationship is a concept of fraud in private law or in other words is a 'characteristic' of fraud in civil law. Fraud in criminal law as stipulated in article 378 of Indonesian Penal Code and fraud in civil law stipulated in article 1328 BW constitute 2 (two) legal corridors. Both of these legal corridors can be used by someone who had suffered a loss due to the emergence of a contractual relationship, which is known when in closing the previous contract carried out by deception and a series of false words and false conditions. In such circumstances a person can prosecute criminally by reporting to police (POLRI) related to deterrent effects rather than criminal sanctions, and can also file a civil suit related to compensation caused by one of the parties who violated the contract.

3.4.1 *Materieel Delict*

General provisions in the Indonesian Penal Code still adhere to the general principles, that every person who commits a crime will receive criminal sanctions through the criminal justice process. In the practice of solving fraud cases, discretion can be used by the authority to problem solve in ways that may give restorative justice to the parties in conflict.

In the practice of the judiciary there was the Supreme Court's Jurisprudence Number: 1600 K / Pid / 2009 dated November 24, 2009 in the case of a contractual relationship between an electronic business / trade business partnership between Ismayawati and Ny. Emiwati, which causes detriment to Mrs. Emiwati with a value amounting Rp. 3,910,000,000 (three billion nine hundred and one million rupiah). The defendant Ismayawati was charged with a fraudulent act pursuant to article 378 of the Indonesian Penal Code. In this case, the detrimental loss experienced by Mrs. Emiwati was a loss that could be proven real and that which has occured.

In the development of the case, both victim and the complainant wanted the case to be resolved in a familiar manner, given that the loss suffered by the victim has been compensated. In the decision of the Yogyakarta District Court Case Number: 317/Pid.B/2008/PN.YK dated December 3, 2008, the verdict granted the request for revocation of the complaint filed by the victim witness Ny. Emiwati; stated that the Prosecution of Case Number: 317 / Pid.B / 2008 in the name of defendant Ismayawati was not acceptable. Regarding this verdict, the Public Prosecutor made an appeal to the Yogyakarta High Court. In the decision of the Yogyakarta High Court Case Number: 01/Pid/PLW/2009 PT. Y stated that the judges' rule at the trial of the Yogyakarta District Court was null and void; hence, ordered the Yogyakarta District Court to re-examine the case of accused Ismayawati. The defendant did not receive the High Court Judge's verdict, then later through her legal counsel an appeal was made to the Indonesian Supreme Court. A verdict of the Supreme Court of the Republic of Indonesia Case Number 1600 K / Pid / 2009 dated November 24, 2009 was:

- To cancel the decision of the Yogyakarta High Court Case No. 01 / Pid / PLW / 2009 / PTY dated 02 March 2008 which overturned the decision of the Yogyakarta District Court Number: 317 / Pid.B / 2008 / PN YK on 02 December 2008;
- To grant the request for revocation of the complaint submitted by Emiwati;
- To state that the Prosecution Case Number: 317 / Pid.B / 2008 on behalf of the accused Imayawati is not acceptable.

3.4.2 Restorative Justice Solution

In practice, it is still often found, in cases relating to criminal acts of fraud, that along with the law enforcing process, both parties (complainant and defendant) do not want the case to continue. They want the settlement to be done in a usual manner and they do this by revoking the case report in the police so that the process does not continue. Normatively, fraud is an ordinary offense. Therefore, the victim's report cannot be revoked by the complainant and the termination of the case hearing is the authority of the police and the prosecutor's office. However, when compensation has been paid and both parties have achieved justice, it is fitting that the case is not followed up in court (Yaman, 2016).

This agreed consensus resolution model is not known in the Indonesian Criminal Code, but this settlement model is a shift in the concept of dispute resolution to realize a restorative justice law. Barda Nawawi Arief stated that the crime prevention efforts could be broadly grouped into two, namely through the reasoning line (criminal law) which focuses on repressive actions, or through non-reasoning lines (outside criminal law) which focus more on preventive nature.

In dealing with these two phenomena, the criminal law system in Indonesia does not recognize criminal remedies with non-criminal lines. So in practice, the settlement carried out without going through the reasoning line is a discretionary action whose authority is owned by the police through article 16 of Act Number 2 of 2002 concerning the National Police of the Republic of Indonesia which states;

"Paragraph (1) letter I, namely: an authority granted in carrying out other actions that are responsible."

"Paragraph (2), namely:

a. Does not conflict with the rule of law;
b. In line with legal obligations that require these actions to be carried out;
c. Must be appropriate, reasonable, and included in the office environment;
d. Worthy consideration based on compelling conditions; and
e. Respect for human rights."

So that in the context of the investigation for the authority to act in its own judgment (discretion) in accordance with Article 18 paragraph (1) and

paragraph (2) the Police Law can be carried out under the following conditions:

1) A vital and urgent situation;
2) Not against the law;
3) Does not conflict with the police professional code of ethics.

The discretion can undoubtedly be carried out by the authoritative police with consideration of the benefits and risks of his or her actions and truly is in the public interest.

3.5 Uncertainty in Court Verdicts

Breach of contract in the agreement can only be settled through a civil court, but in reality there are law enforcers in the regions who resolve cases of default through criminal justice, such as legal conflict that occur in Malang, East Java. The act is an agreement that starts from one of the parties an entrepreneur borrows money from another party, which was amounted Rp. 105,250,000 (one hundred and five million two hundred fifty thousand rupiahs).

In the loan agreement, the party owes 10 Bilyet Giro guarantees. The Bilyet Giro which successfully disbursed by the parties owing is only 4 pieces with a total value of Rp 48,500,000 (forty eight million five hundred thousand rupiahs). The other 6 Bilyet Giro was not able to be disbursed at the maturity date or at the agreed time limit, the reason being that the debtor does not have funds. The debtor asks to postpone the due date by 1 month, postponing of the disbursement was settled in an amendment of the loan agreement, handwritten in 1 (one) sheet of paper. However, after 1 month of the agreed postponed due date, payment of debts still was not realized and there was no real solution until the debtors reported it to the Malang regional police on charges of fraud. The report was processed and tried by a Judge in the Kepanjen District Court with a prison sentence of 1 year 6 months against the party owed because he was guilty of committing a fraudulent crime pursuant to Article 378 of the Criminal Code.

The appeal of the attorney of the defendant and the public prosecutor at the Surabaya High Court stated in the verdict that was to strengthen the decision handed down by the Kepanjen District Court. The decision of the District and High Court was different from the Decision of the Supreme Court No.1294 K / Pid / 2007. The Supreme Court Judge granted the appellant's petition, the party who owed and cancelled the decision of the Surabaya High Court, which upheld the decision of the Kepanjen District Court. The judge's consideration in the Supreme Court's verdict states that legal actions that occur between the defendant and the reporter originate from a loan agreement. Of the 10 pieces of Bilyet Giro given, only 4 Giro can be disbursed, the total of which has not fulfilled the amount of the defendant's debt. This means that the defendant has not repaid the remaining debts, thus he has broken his promise / has not carried out his obligations (*Wanprestatie*).

Based on this case approach, conflicts, which includes civil affairs must be resolved through civil court not criminal justice. The problem arises when law enforcers impose criminal sanctions of fraud on civil actions carried out by dealing parties. Due to differences in considerations between the first and second level courts with the Supreme Court on the settlement of this case, it shows the existence of social symptoms of mishandling by justice enforcement officials in the law enforcement.

Law Enforcement has a very important position in implementation of the provision, because only through law enforcement that the law can be enforced, hence, there would be consistency and assurance when there are no deviations in implementation of the law in resolving cases and thus, would not injure the spirit of justice.

4 CONCLUSIONS

The effectiveness of an agreement not only relies on the binding legality of the agreement itself, but also the principles underlying the establishment of the terms of the agreement. If the principles reflected in article 1338 BW are properly placed, an effective and efficient agreement will result, which means binding the parties productively. In its journey, if the agreement cannot operate productively, then the agreement that is born of civil action should be settled also by the civil law system. For this reason, prevention is needed so that an agreement that is born from a civil act remains in the civil corridor.

The prevention methods are:

1. Establish an authentic agreement, such as a notarial agreement, which is made in front of a Notary Public. The reasons are:

- Notaries as public officials guarantee the accuracy of the date and place where an agreement is held.
- The Notary Public first verifies the identity of the parties to know whom they are as a person, while

ensuring the fulfilment of the capability term required according to article 1320 BW.

- The Notary Public, according to the provision, shall also perform legal counselling prior to the agreement made. Thus, the notary shall confirm the legality of the object of the agreement, together with the intent and purpose of the parties upon entering into the agreement, and that is, the cause of the agreement does not violate the law. In this case, the Notary Public has the role of guarding so that each part, namely essentialia, naturalia and accidentalia section of the agreement is legal and binding.
- The Notary Public must read the agreement before the parties sign the agreement. This is to ensure that both parties who are making the agreement understand and aware of the contents of the agreement they are signing. Such procedure prevents the odds of having a clause or article smuggling in the agreement. This action also can be interpreted as an implementation of the principle of transparency, which is at the same time can be interpreted as performing good faith. Note that proof of good faith fends off allegations of fraud.
- The notarial agreement is made not only before the Notary, but also in the presence of at least 2 (two) witnesses. The Notarial agreement is an authentic deed. That is, the deed, which has the power of perfect judicial testament does not require other evidence to prove that indeed a social activity had occurred.
- While agreement that is made in the form of notarial deed helps to fend off accusations of bad faith and fraud, it is still at risk in protecting parties from false information in authentic deeds, as is the offense of the crime of article 266 of the Criminal Code.

2. Contract design that covers the principles of predict, provides, and protects, can be a legal vessel that reaches and protects the interests of the parties.

- Predict as a principle means calculating the possibilities and pouring them into the articles and clauses, which anticipate possible losses or detrimental risk that could occur. Regarding the anticipated losses, the parties' agreement can provide certainty so as to reduce the risk of future disputes.
- Provide as a principle means providing a countermeasure plan for possible losses, so that losses can be minimized, by anticipating how compensation can be made and the nominal to be compensated. Thus, parties in conflict can be resolved efficiently to obey the agreement at the time of default.
- Protect as a principle means protecting the achievement of the aims and objectives and interests of the parties.
- When the agreement reflects proportionality between rights and obligations, the agreement will be a fair ground for productive cooperation to flourish.

The implication for further investigation will be juridical empiric research that can measure the effectiveness of the prevention methods suggested.

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REFERENCES

Badrulzaman, M. D., 2015. *Hukum Perikatan dalam KUHPerdata Buku Ketiga, Yuriprudensi, Doktrin, serta Penjelasan*, Citra Aditya Bakti, Bandung, Cet. I.

Badrulzaman, M. D., et al, 2001. *Kompilasi Hukum Perikatan*, PT. Citra Aditya Bakti, Bandung.

Bakarbessy, L., Anand, G., 2018. *Buku Ajar Hukum Perikatan*, Zifatama Jawara, Sidoarjo, Cet. I.

Lamintang P. A. F., 1984. *Dasar – Dasar Hukum Pidana Indonesia*, Sinar Baru, Bandung.

Lamintang P. A. F. dan Theo Lamintang, 2009. *Delik – Delik Khusus Kejahatan Terhadap Harta Kekayaan*, Sinar Grafika, Jakarta.

Miru, A., 2016. *Hukum Kontrak & Perancangan Kontrak*, Rajagrafindo Persada, Jakarta, Cet. VII.

Muljadi, K.,Widjaja, G., 2003. *Perikatan yang lahir dari Perjanjian*, RajaGrafindo Persada, Jakarta.

Setiawan, R., 1978. *Pokok Pokok Hukum Perikatan*, Binacipta.

Soenandar, T., et al, 2016. *Kompilasi Hukum Perikatan*, Citra Aditya Bakti, Bandung, Cet. II.

Subekti, 2011. *Pokok-Pokok Hukum Perdata*, Intermasa, Jakarta, Cet. XXXIII.

Widijawan, D., 2018. *Dasar-Dasar Hukum Kontrak Bisnis Transaksi & Sistem Elektronik (UU ITE Perubahan No. 19/2016)*, Keni Media, Bandung, Cet. I.

Yahman, 2016. *Cara Mudah Memahami Wanpretasi & Penipuan*, Kencana, Jakarta, Cet. II.

Yahman, 2014. *Karakteristik Wanprestasi & Tindak Pidana Penipuan yang lahir dari Hubungan Kontraktual*. Prenadamedia Group, Jakarta.

Saraghi, Djasadin, Mr. J.H. Nieuwenhuis, *Pokok-Pokok Hukum Perikatan*, 1985

Subekti R., 1997. *Hukum Perjanjian*, Intermasa, Jakarta.

Sudradjat, Bassar M., 1986. *Tindak – Tindak Pidana Tertentu*, Remaja Karya, Bandung.
Suhardana, FX., 2009. *Contract Drafting Kerangka Dasar dan Teknik Penyusunan Kontrak*, Universitas Atma Jaya Yogyakarta, Yogyakarta.
Zen Abdullah M., 2009. *Intisari Hukum Perdata Materil*, Hasta Cipta Mandiri, Yogyakarta.