



## The Role of the Good Faith Principle in Pre-Contractual Phase of E-Commerce

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### **Abstract**

This research is aimed to know the role of the Good Faith Principle in the pre-contractual phase of e-commerce. The method used in this research is normative research that refers to the second literature review consisting of primary and secondary legal resources. This research uses prescriptive research characteristics that means giving research findings argumentation that has been done. The principle of good faith is regulated in Article 1338 paragraph (3) of the Indonesian Civil Code, which is: "An agreement must be carried out in good faith." The role of the Good Faith principle in the pre-contractual phase of E-Commerce is essential; the principle of good faith must exist since the first time agreement will be dealt with. It is essential because, if at the first agreement, one of the parties does not have good faith, so it will be a disadvantage for other parties in the agreement.

**Keywords:** *The Good Faith Principle; Pre-contractual; E-Commerce*

### **Introduction**

Nowadays, the digital economic era increases quickly as technology is also highly developed, and many new opportunities appear in business. One of them is E-Commerce. E-commerce is trading that can be done online. It uses the Internet as the media. Using E-Commerce, a buyer or a seller should not have to meet each other face-to-face or directly in a transaction<sup>1</sup>. The transaction can be done by email, website, or e-commerce apps. The payment can be made by bank transfer. The seller's data messages that contain agreement and contract agreement can be sent through an electronic contract agreement such as email, website, or e-commerce apps.

An electronic contract is an agreement made by an electronic system<sup>2</sup>. Electronic transactions which are written into electronic agreements are binding on the parties<sup>3,3</sup>. The agreement that has been

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<sup>1</sup> M. Arsyad Sanusi. Transaksi Bisnis dalam Electronic Commerce (e-commerce): studi tentang Hukum dan Solusimya. *Jurnal Hukum*. No. 16 Vol.8 Maret 2001. p. 11

<sup>2</sup> Law Number 19 of 2016 Concerning Amendment to Law Number 11 of 2008 Concerning Information and Electronic Transaction Article 1 Paragraph (1)

agreed will bind both parties, but not infrequently in the contract. There will be problems or obstacles in the future; therefore, before implementing the agreement, it is very important for the parties to know and understand the content or substance of the agreement before agreeing to the contract. According to Van Dunne, the arrangement of the agreement can be divided into three stages, namely, the pre-contractual (pre-contractual phase), implementation of the contents of the agreement (contractual phase), and the stage after the contract is implemented (post-contractual phase)<sup>4</sup>.

In the pre-contractual stage, both parties agree to determine the contents of the agreement they will make. The contents of the agreement must meet the terms of the contract according to Article 1320 of the Indonesian Civil Code (KUHPerdata), namely understanding, competence, certain matters, and lawful causes. In addition to the terms of the agreement, making the agreement must also pay attention to the agreement's principles, namely the principle of legal certainty, the principle of benefit, the focus of prudence, and the principle of good faith.

Article 1338 paragraph (3) of the Indonesian Civil Code states that "An agreement must be carried out in good faith." The principle of good faith in the agreement must exist since the agreement will be agreed upon, where the principle of good faith appears at the time of negotiating the contract. This is important because, at the beginning of the agreement, if someone makes an agreement without good faith at the beginning of the agreement, it will harm one of the parties to the agreement.

In e-commerce transactions, a principle of good faith is required, especially at the pre-contractual stage, because, at that stage, it determines the content of the agreement in e-commerce transactions. The implementation of e-commerce transactions has a positive impact, including being more practical, and buyers can compare prices between stores, but in e-commerce, it is also prone to problems including goods received by consumers with defects, goods received by consumers do not match the image on the e-display. Commerce, this usually occurs because there was no good faith at the beginning of the agreement by the seller who did not explain the details of the product so that the consumer suffered a loss. While in Law number 8 of 1999 concerning Consumer Protection (hereinafter referred to as UUPK), one of the rights of consumers is that consumers have the right to know true, clear, and honest information regarding the conditions and guarantees of goods offered by business actors. Therefore, the researcher wants to analyze how the role of the principle of good faith at the pre-contractual stage in e-commerce transactions.

## **Research Method**

The research method used is a kind of normative research which is arranged by referring to the library resource or secondary resource consisting of primary legal resource and secondary legal resource<sup>5</sup>. This study also used all legal publications that related to the object of research, namely books, legal journals, as well as non-legal materials that are relevant and support the results of this research. The nature of this research uses the nature of prescriptive and applied legal research. Prescriptive means providing arguments for the research results that have been done as a prescriptive science; Law studies the law's objectives, the values of justice, concepts, and legal norms. As an applied science, legal science sets standard procedures, provisions, and guidelines for carrying out legal activities<sup>6</sup>.

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<sup>3</sup> Ibid. Pasal 18 ayat (1)

<sup>4</sup> Ridwan Khairandy. *Itikad Baik dalam Kebebasan Berkontrak*. Pascasarjana Fakultas Hukum Universitas Indonesia: Jakarta. 2003. p. 190

<sup>5</sup> Peter Mahmud Marzuki. *Penelitian Hukum (edisi revisi)*, ctk. 9. Jakarta: Kencana. 2014. p. 55-56

<sup>6</sup> Ibid. p 22

## ***Finding and Discussion***

### **Good Faith Principles**

Article 1338 paragraph (3) of the Indonesian Civil Code states that all agreements must be carried out in good faith (*te goader Trouw*; in good faith). This principle is a principle that must exist in every agreement and cannot be negated even if the parties agree to it (immutable)<sup>7</sup>.

Good faith in an agreement must exist since the new agreement is agreed to, meaning that good faith must exist during the negotiation of the agreement before the agreement is made, when the deal is executed, until the agreement is fulfilled<sup>8</sup>. Theoretically, the principle of good faith is divided into two:<sup>9</sup>

#### 1. Subjective Good Faith

Before the agreement is executed, the parties must show honesty. Usually, subjective good faith exists at the negotiation stage, where the parties openly provide true information about who they are by providing evidence in the form of documents about themselves (for example, the Articles of Association document if the party to the agreement is a PT) and the other party is obliged to examine carefully.

#### 2. Objective Good Faith

At the time of execution, the agreement must be in accordance with propriety or fairness. This occurs at the contractual stage because, at that stage, the contents of the agreement in the form of rights and obligations must be carried out in good faith as well. Objective good faith aims to resolve disputes about the content or rights and obligations in the agreement.

## **Rights and Obligations of Consumers and Business Personnel**

The rights and obligations of consumers and business actors are regulated in the UUPK. Article 4 UUPK containing consumer rights:

1. Right to comfort, security, and safety in consuming goods and/or services;
2. The right to select goods and/or services and to obtain the said goods and / or services in accordance with the exchange rate and conditions and guarantees promised;
3. Right to correct, clear and honest information regarding the condition and guarantee of goods and/or services;
4. The right to hear their opinions and complaints regarding the goods and/or services used;
5. The right to obtain advocacy, protection, and efforts to properly resolve consumer protection disputes.

Article 5 UUPK regarding consumer obligations:

1. Read or follow information instructions and procedures for the use or utilization of goods and/or services for security and safety;
2. Have good intentions in making transactions for the purchase of goods and / or services;

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<sup>7</sup> Ery Agus Priyono. Peranan Asas Itikad Baik dalam Kontrak Baku (Upaya Menjaga Keseimbangan bagi Para Pihak). *Diponegoro Private Law Review*. Vol 1 No. 1 November 2017. p. 19

<sup>8</sup> Ridwan Khairandy. *Kebebasan Berkontrak & Pacta Sunt Servanda Versus Itikad Baik: Sikap yang Harus Diambil Pengadilan*. Yogyakarta: FHUII Press. 2015. p. 21

<sup>9</sup> Subekti. 2009. *Hukum Perjanjian*. Intermasa: Jakarta. 2009. p. 7

3. Pay according to the agreed exchange rate;
4. Participating in proper legal settlement of consumer protection disputes.

Article 6 UUPK regarding the rights of business actors:

1. The right to receive payment following the agreement regarding the conditions and exchange value of the goods and / or services being traded;
2. The right to get legal protection from consumer actions with bad faith;
3. The right to conduct self-defense properly in settlement of consumer disputes;
4. The right to rehabilitate a good name if it is legally proven that consumer losses are not caused by the goods and/or services being traded;
5. Rights regulated in the provisions of other laws and regulations.

Article 7 UUPK regarding the obligations of business actors:

1. Have good faith in carrying out business activities;
2. Provide true, clear, and honest information regarding the condition and guarantee of goods and/or services and explain the use, repair, and maintenance;
3. Treating or serving the consumers well, honestly, and indiscriminately;
4. Guaranteeing the quality of the products and/or services produced and/or traded based on the applicable quality standard of products and/or services;
5. Providing opportunities for the consumers to test, and/or try particular products and/or services as well as assurance and/or guarantee for the products produced and/or traded;
6. Providing compensation, indemnity, and/or replacement for the loss due to the usage, consumption, and utilization of the traded products and/or services;
7. Providing compensation, indemnity, and/or replacement if the products and/or services are received or utilized inappropriately according to the contract.

The principle of good faith in the pre-contractual stage must contain offer and acceptance. Offer contains the information provided by the seller in offering the products including several indicators, namely seller's business identity, product picture, price, payment method, and delivery method. Acceptance covers the information provided in receiving the products including several indicators, namely prospective client's name, address, contact number, and ordered products<sup>10</sup>.

The stage of e-commerce transaction is started with the offer made by the seller in e-commerce covering the product's detail in terms of price, color, condition, and delivery method. If there is a consumer interested in the offer, the consumer must make a product acceptance by making payment as prepayment of the product's purchase. The payment is usually made via transfer through the joint account provided by the e-commerce or cash on delivery (COD). Accordingly, the seller must send the products according to the consumer's order to the customer's address. If the products ordered have been received by the consumer and they are all appropriate, the consumer must press the "order received" button in the e-commerce application and the money paid by the consumer will be transferred to the seller.

E-commerce transaction can also be referred as electronic transaction, a legal act conducted through computer, computer network, and/or other electronic media. In such transaction, there will be an electronic contract binding all parties according to the Article 18 paragraph (1) Law Number 19 of 2016 Concerning Amendment to Law Number 11 of 2008 Concerning Information and Electronic Transaction. The electronic contract possesses a legal force equal with that of conventional contract.

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<sup>10</sup> Fatia Gupita and Anjar Sri C.N. Pelaksanaan Asas Itikad Baik dalam Perjanjian Jual Beli secara Online di Beteng Trade Center Surakarta. *Privat Law*. Vol 6 No.1 2018. p. 179 - 180

E-commerce transaction is regulated in the Book III of Indonesian Civil Code concerning agreement. E-commerce transaction is related with agreement. Article 1313 of the Indonesian Civil Code states that an agreement is an act in which one or more person binds his/her self to another one or more person. In such affair, a legal relationship is formed, namely an agreement in which there are rights and obligations of the involved parties. A contract is a source of an agreement.

According to Sukarni, the legal basis of e-commerce transaction is the same with that of conventional transaction regulated in Article 1457 of the Indonesian Civil Code until Article 1540 of the Indonesian Civil Code, namely:<sup>11</sup>

1. Electronic commerce (e-commerce) is an agreement, therefore the provisions of agreement in Book III of the Indonesian Civil Code are applied against it;
2. Electronic commerce (e-commerce) is a consensual agreement, it has been formed since there is an agreement reached on products and price;
3. The rights and obligations of the parties have been set since an agreement is reached even though the price has not been paid and the products have not been handed over.

According to Article 1320 of the Indonesian Civil Code, in order to be valid, an agreement must fulfil the following four conditions:

1. Consent  
A consent exists if the individuals bound in the agreement have reached an agreement on the contract of the agreement. The contract in the e-commerce is formed when the seller provides information on the traded objects and the buyer makes an agreement on that contract by giving a checklist or pressing the accept button<sup>12</sup>.
2. Capacity  
The subjects in the agreement must have legal competence, proved by uploading the identity card of the parties.
3. Specific subject matter  
In the agreement object, what is meant by specific matter is the products which will be traded and which have been agreed upon mutually.
4. Halal cause  
The main purpose of e-commerce transaction must not be contradictive with the law, decency, and public order.

In an agreement, besides fulfilling the valid conditions of agreement, the involved parties must also pay attention on the principles of agreement, namely:

1. Principle of Freedom of Contract  
It is regulated in Article 1338 paragraph (1) of the Indonesian Civil Code that all valid agreements apply to the individuals who have concluded them as laws. This principle gives freedom to the parties to make or not to make an agreement; to make an agreement with

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<sup>11</sup> Sukarni, 2008, *Kontrak Elektronik dalam Bayang-Bayang Pelaku Usaha*, Bandung: Pustaka Sutra. 2008. p. 3

<sup>12</sup> Yosi Krisharyawan, Tinjauan Hukum Mengenai Transaksi Jual-Beli Melalui Situs Belanja *Online (Online Shop)* Menurut Kitab Undang-Undang Hukum Perdata dan Undang-Undang Nomor 8 Tahun 1999 tentang Perlindungan Konsumen, *Jurnal Privat Law*, January – June 2015. p. 146

anyone; to determine the content, implementation, and conditions of the agreement; and to determine the form of agreement whether in written or in oral<sup>13</sup>.

2. Principle of Pacta Sun Servanda

This principle explains that the judge of the third party must respect the substance of the agreement made by the parties, as if it is a law. They are not allowed to make any intervention on the substance of the agreement made by the parties.

3. Principle of Good Faith

Good faith in the subjective definition is the honesty existing when the legal act is conducted, while its objective one is that the implementation of an agreement must be based on the norm of decency or what is felt as appropriate with the decency of the society<sup>14</sup>. This principle is regulated in Article 1338 paragraph (3) of the Indonesian Civil Code, that an agreement must be implemented with a good faith. In this principle, all parties must implement the contract based on trust.

4. Principle of Consensualism

It is regulated in the Article 1320 paragraph (1) of the Indonesian Civil Code that one of the conditions of a valid agreement is the consent among the parties. This principle states that an agreement in general is not conducted formally, yet it is conducted merely based on the consent of agreement among the parties.

In the pre-contractual stage, the parties negotiate to reach an agreement on the substance they desire in the agreement to protect the importance and purpose of the agreement, even though there has not been any agreement binding the parties, yet the elements contained in the pre-contractual agreement binds all the parties if an agreement has been reached upon what is agreed.

Therefore, the agreement on main matters in the pre-contractual stage must be extracted in the agreement that will be made. It is possible to change the agreement that will cause the change of the main matters which have been agreed upon and negotiated in the pre-contractual stage, yet if there is no change then the parties must obey the agreement reached in the pre-contractual stage. Since the pre-contractual agreement binds the parties legally, it cannot be neglected without a clear reason. If there is a pre-contractual agreement not extracted in the agreement and one of the parties has a bad faith on that agreement, the parties in loss will not be able to ask for any accountability on their loss. The default cannot be made as the cause of action since there is no clause in the agreement violated by one of the parties.

## Summary

The fast technology advancement causes several industries in Indonesia to develop, one of the developed aspects is commerce. The commerce which was used to be conducted directly or conventionally has developed into an online commerce or commonly referred as e-commerce. E-commerce has positive impacts, namely making transaction more practical and enabling the buyers to make price comparison with other merchants, yet it also has negative impact which is the products ordered by the buyers may be different with those in the e-commerce display or defect. It happens because the seller does not have a good faith in providing detailed explanation of the products which will be purchased by the buyer.

<sup>13</sup> M. Muhtarom. Asas-Asas Hukum Perjanjian: Suatu Landasan dalam Pembuatan Kontrak. *Suhuf*. Vol 26 No. 1 May 2014. p. 54

<sup>14</sup> Wahyu Hanggoro Suseno. 2008. *Kontrak Perdagangan melalui Internet Ditinjau dari Hukum Perjanjian*. Surakarta: Fakultas Hukum Universitas Sebelas Maret. 2008. p. 48

In the e-commerce transaction, the seller and buyer make a commerce transaction agreement which must fulfil the conditions of a valid agreement in Article 1320 of the Indonesian Civil Code. In Article 1338 paragraph (3) of the Indonesian Civil Code, it is stated that an agreement must be implemented under the principle of good faith. The principle of good faith in an agreement must exist since the agreement is agreed, in which the principle of good faith emerges during the negotiation of the agreement contract. It is necessary because in the initial agreement if someone makes an agreement without a good faith, it will inflict a financial loss to one of the parties involved in the agreement.

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