

Legal Review Of Contract Design Obligations Based On The Principle Of Good Faith And Negotiation Responsibility

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ABSTRACT

The principle of good faith is a fundamental doctrine in Indonesian contract law, applying not only during the performance of a contract but also at the pre-contractual stage, particularly in negotiation and contract drafting. This study analyzes the regulation, application, and legal obligations arising from the principle of good faith before a contract is concluded, including the duties of disclosure, confidentiality, and serious negotiation. This research employs a normative legal method using statutory and conceptual approaches. The findings indicate that violations of good faith during negotiations may result in legal liability through tort based on the doctrine of culpa in contrahendo. Thus, the principle of good faith functions as a corrective mechanism to contractual freedom and as a protective instrument for weaker parties within contractual relations.

Keywords: Contract Law, Good Faith, Legal Liability, Negotiation, Pre-Contractual Stage

1. Introduction

Contract law is one of the principal pillars of civil law because it governs legal relationships and economic transactions between parties. In the Indonesian legal system, the principle of freedom of contract, as provided in Article 1338 of the Civil Code, grants the parties the autonomy to determine the content, form, and terms of an agreement. The development of modern business activities has led to the increasingly widespread use of written contracts, both in conventional commercial relations and digital transactions. Nevertheless, freedom of contract cannot be understood as absolute, since in practice there are often disparities in bargaining power, abuse of circumstances, and lack of information disclosure that may lead to unfairness.

In this context, the principle of good faith functions as a corrective principle that limits contractual freedom so that it remains consistent with honesty, propriety, and fairness. This principle is relevant not only at the stage of contract performance, but also at the pre-contractual stage, particularly during negotiations and contract drafting. At this stage, good faith requires the parties to act honestly, disclose material information, maintain confidentiality, and demonstrate a genuine intention to negotiate fairly. The development of modern contract doctrine and international instruments, such as the UNIDROIT Principles of International Commercial Contracts, also confirms that legal obligations may arise even before a contract is finally concluded. (Adolf, 2024)

Violations of good faith at the pre-contractual stage may result in legal liability, either in the form of tort liability or, in certain circumstances, breach of contract where the legal elements of an agreement have already been fulfilled. Accordingly, the contract drafting stage cannot be regarded merely as a free and consequence-free domain, but rather as a phase that also generates normative obligations for the parties. This issue has become increasingly significant in contemporary business practice, including electronic transactions, standard-form contracts, memoranda of understanding, and other preliminary agreements.

Although the principle of good faith has been widely discussed in Indonesian legal scholarship, most studies still focus on the performance of contracts after the agreement has been concluded. Studies that specifically examine the application of good faith in the contract drafting process, particularly in relation to pre-contractual obligations such as the duty to disclose, duty of confidentiality, and duty to negotiate seriously, remain relatively limited. In addition, comparative discussion between civil law and common law approaches to negotiation liability has not yet been sufficiently developed in the context of Indonesian law.

Based on this background, this research aims to analyze the application of the principle of good faith in contract drafting in Indonesia and to examine the legal obligations and forms of negotiation liability arising at the pre-contractual stage before the contract is concluded. This study is important in providing normative clarity regarding the limits of contractual freedom while strengthening legal protection for parties in a weaker bargaining position during the formation of contracts. Violations of good faith in the pre-contractual stage can give rise to legal liability through Unlawful Acts or even Breach of Contract if the elements of an agreement have been fulfilled. This demonstrates the importance of in-depth study to determine the normative limits and responsibilities of the parties in the contract drafting process. (Safrin Salam, 2017). This research aims to analyze how the principle of good faith is applied in contract drafting in Indonesia and to examine the legal obligations and forms of negotiation liability arising at the pre-contractual stage before the contract is concluded.

2. Research Methods

This research is a normative legal study using a legislative approach and a conceptual approach. The legislative approach is used to examine legal provisions related to the principle of good faith in Indonesian contract law, while the conceptual approach is used to construct a theoretical framework regarding pre-contractual obligations and negotiation responsibilities. The data used is secondary data derived from legislation, literature, and scientific journals. Data collection was carried out through a literature study, then analyzed descriptively to describe the applicable legal norms and prescriptively to formulate normative solutions regarding the application of the principle of good faith in contract design.

3. Results and Discussion

3.1 Results of Legal Analysis

3.1.1. Normative Basis and Dual Dimensions of Good Faith

The first analytical finding is that Indonesian contract law provides an explicit normative anchor for good faith in Article 1338 paragraph (3) of the Civil Code, but the article does not expressly limit good faith to the performance stage. Doctrinally, good faith has two dimensions. Subjective good faith concerns honesty, sincerity, and the inner intention of the parties; objective good faith refers to fair, proper, and reasonable conduct judged by external standards. This dual structure allows good faith to operate not only after the contract has been concluded but also during its formation, because negotiation conduct may already create justified expectations that deserve legal protection. Doctrinally, the application of good faith encompasses two main dimensions, each of which has a significant influence on the nature of legal liability: (Noho et al., 2023)

a) Subjective Good Faith.

This dimension concerns the internal attitude, intention, and honesty of the parties. It primarily applies during the pre-contractual stage and the formation of the agreement, where parties are expected to negotiate sincerely and refrain from concealing material facts. (Yuanitasari & Kusmayanti, 2020)

b) Objective Good Faith.

This dimension refers to externally measurable standards of conduct, such as fairness and propriety. Its application focuses on the performance stage of a contract, requiring parties to act in accordance with moral norms and general standards of decency as mandated by Article 1338 paragraph (3) of the Civil Code.

The extension of good faith to the pre-contractual stage is a development derived from modern doctrine and jurisprudence. Although the Civil Code adopts a closed system that does not explicitly regulate negotiations, courts and contemporary legal scholars acknowledge that the obligation to act in good faith arises from the moment negotiations begin. This recognition is based on the understanding that negotiations represent the meeting of the parties' wills, which creates legitimate expectations deserving of legal protection. (Roida & Cahyaningsih, 2025)

3.1.2. The Principle of Good Faith as a Limitation on the Freedom of Contract

The main principle in contract law is the Freedom of Contract (*Beginsel van Contractsvrijheid*), which grants the parties autonomy to regulate their own interests (Article 1338 paragraph (1) of the Indonesian Civil Code). However, in modern practice, especially in relation to standard-form contracts or digital transactions (e-commerce), this freedom often leads to an imbalance in bargaining power. As a result, the freedom of contract must be interpreted in a limited manner (Budi, 2025). The principle of good faith functions as a corrective mechanism that restricts the freedom of contract. This limitation is manifested in two ways:

a) **Legal Limitation:** In exercising the freedom of contract, the parties may not violate laws, morality, or public order (Article 1337 of the Indonesian Civil Code).

b) **Ethical Limitation (Internal Correction):** Good faith requires the parties to act honestly and fairly even before the contract is formed. Without good faith, this freedom may be misused for exploitation or deception. The law protects weaker and good-faith parties from stronger parties acting in bad faith.

Contract drafting is not only subject to the formal requirements of Article 1320 of the Civil Code but is also bound by the substantive requirements of the principle of pre-contractual good faith, which ensures that the negotiation process proceeds transparently and honestly.

3.1.3. Pre-Contractual Legal Obligations: Duty to Disclose and Duty of Confidentiality

Subjective good faith in the stage of contract drafting may give rise to two main legal obligations that must be complied with by the parties:

a. **Obligation Disclosure Information (Duty to Disclose)**

This obligation requires each party to disclose material facts known to them that significantly influence the other party's decision to enter into or continue the contract. The information disclosed includes relevant technical, financial, and legal risk aspects.

Violations of this obligation may be categorized as: nondisclosure (concealment of information) and misrepresentation, which occurs when a party provides information that is false or misleading.

In the context of e-commerce, the duty to disclose is particularly crucial, such as the obligation of sellers to honestly disclose the condition of goods, unclear terms and conditions, or hidden costs. Failure to disclose may result in a defect of consent in the contract (fraud or mistake) and can trigger legal liability. (Whitakers, s & Zimmerman, R, 2000)

b. **Obligation Confidentiality (Duty of Confidentiality)**

During negotiations especially in major projects such as mergers, acquisitions, or joint ventures—the exchange of sensitive information such as know-how, trade secrets, or the financial data of the other party is common. The principle of good faith requires each party to maintain confidentiality by not disclosing the confidential information received and by limiting its use, ensuring it is not used for purposes outside the intended negotiation, even if the negotiation fails. To reinforce this obligation, parties often enter into a separate Non-Disclosure Agreement (NDA). However, even without an explicit NDA, the principle of good

faith already gives rise to confidentiality obligations based on propriety, and violations may be prosecuted under tort (Act against the law /PMH).

c. **Obligation Negotiation Seriously (Duty to Negotiate Seriously)**

This obligation prohibits sham negotiations, in which a party negotiates without genuine intent to reach a contract but only for secondary purposes (such as delaying, gathering competitor information, or preventing the other party from negotiating with a third party). If negotiations are terminated abruptly without justifiable reasons, particularly when the other party has incurred significant costs (reliance interest), such conduct may constitute a violation of the duty to negotiate seriously and be considered an act of mala fide. (Wayan Agus Vijayantera, 2023)

3.2 Discussion

3.2.1. Comparative Perspective: Civil Law and Common Law / Perspektif Perbandingan: Civil Law dan Common Law

Civil law systems generally accept broader pre-contractual responsibilities because good faith is treated as a foundational principle of private law. That approach makes it easier to recognize culpa in contrahendo when negotiations create protected reliance. By contrast, common law systems—especially English law—have traditionally resisted a general duty to negotiate in good faith. The House of Lords in *Walford v Miles* held that a bare agreement to negotiate in good faith is inherently difficult to enforce because it lacks the certainty required by English contract doctrine. Even so, common law does not leave parties entirely unprotected; liability may still arise through specific doctrines such as misrepresentation, promissory estoppel, confidentiality obligations, or express lock-out agreements. This comparison shows that Indonesian law, as part of the civil law family, has stronger conceptual space to develop pre-contractual liability based on good faith than the classical common law model does.

The application of the principle of good faith is increasingly important in the practice of drafting pre-contract documents and has also been widely recognized in international contract law instruments.

3.2.2. Good Faith in Memoranda of Understanding (MoUs)

In business practice, the principle of good faith becomes operational through preliminary documents such as memoranda of understanding, letters of intent, term sheets, and non-disclosure agreements. These instruments clarify which matters are already binding and which remain provisional. An exclusivity clause, confidentiality clause, break-up fee clause, or obligation to continue negotiations within a specified period can strengthen legal certainty and reduce disputes regarding pre-contractual conduct. When an MoU contains sufficiently definite rights and obligations, breach may be framed as breach of contract; where the document only records mutual understanding without final commitment, unlawful act remains the more appropriate basis. Thus, prudent drafting of preliminary documents is not merely a technical exercise but a practical manifestation of good faith.

Memoranda of Understanding (MoUs) are often used in the pre-contractual stage. The legal force and form of liability for breach of an MoU are greatly influenced by the principle of good faith:

- a) **Breach of contract or tort:** If the MoU contains specific obligations that must be fulfilled (e.g., the obligation not to negotiate with other parties/exclusivity) and meets the requirements for a valid agreement (Article 1320 of the Civil Code), any violation can be prosecuted as a breach of contract. However, if the MoU only contains an understanding of intent and the breach occurs during the general negotiation stage, the lawsuit will be based on unlawful acts (PMH) due to a breach of good faith.
- b) **Implied Obligations:** Good faith reduces implied obligations in the MoU, such as the obligation to maintain confidentiality of information exchanged during negotiations, which must be complied with even if the main contract is canceled.

3.2.3. Relevance of International Instruments

International instruments reinforce the argument that negotiations are not legally neutral. The UNIDROIT Principles provide that each party must act in accordance with good faith and fair dealing and expressly recognize liability for negotiating or continuing to negotiate without intent to reach agreement. The CISG, while not directly regulating all aspects of pre-contractual liability, treats good faith as an interpretive standard in international trade. These instruments are important for Indonesian scholarship because they offer persuasive guidance for developing contract doctrine in a manner responsive to modern commercial practice. They also support the view that Indonesian courts and scholars need not read Article 1338 paragraph (3) narrowly, but may treat good faith as a principle with formative, interpretive, and corrective functions from the beginning of contractual dealings. The principle of good faith is also a fundamental principle in international commercial contract law and international trade, as stated in:

- a) UNIDROIT Principles of International Commercial Contracts (PICC): The UNIDROIT Principles explicitly stipulate that legal responsibility arises from the negotiation process, and the parties have an obligation to act in good faith and deal fairly.
- b) Convention on the International Sale of Goods (CISG): Although it regulates the execution of contracts, the CISG also recognizes good faith as a general standard in the interpretation and application of the instrument.

Conclusion

The principle of good faith in contract law applies not only at the implementation stage, but has also developed into a legal obligation since the pre-contractual stage. During the negotiation phase, the parties are required to disclose material information honestly, maintain confidentiality, and negotiate in good faith. Violation of these obligations may give rise to legal liability through Unlawful Acts (PMH) based on the culpa in contrahendo doctrine. Thus, good faith serves as a limitation on the principle of freedom of contract and protects the weaker party from potential unfairness in the contract drafting process. Stricter regulations on pre-contractual responsibilities are needed to provide legal certainty in negotiations. Legal practitioners and business actors are advised to draft pre-contractual documents such as MoUs or NDAs more clearly so that good faith obligations can be applied consistently. In addition, increasing understanding of the importance of good faith from the outset of a contractual relationship needs to be continued in order to prevent disputes in the future.

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