Chapter 1 A Brief History of Contract Law in Indonesia

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Before the Dutch ruled over the Indonesian Archipelago, each tribe or clan living on these islands were governed by their own Customary or Adat Law, which also included Contract Law. Although the rules differed one from the other, but they had 3 (three) features in common, which Prof. Van Vollenhoven described as "(1) communal, (2) cash and carry, and (3) concrete .

Different Laws for Different Groups of the Population.

In 1855 article 131 of the Netherlands Indies State Law (State Gazette No. 2 of 1855) legally divided the Indonesian population into three groups, i.e. :

(a) Europeans, including Japanese;
(b) Foreign Orientals; and
(c) Indigenous Indonesians.

Article 163 of that law ruled that :

(a) the Civil and Commercial Code applied to Europeans and Japanese;
(b) The Civil Code and the Commercial Code, except for those parts concerning personal law, marriage and inheritance, also applied to Foreign Orientals.
(c) Indigenous Indonesians were not governed by the so-called "European Laws", except in the case they legally obtained the same status as "Europeans" by Decision of the Governor-General.

Hence the Civil and Commercial Code never applied to Indonesians. Except in the most exceptional case, when an Indonesian request to the Governor-General was granted to be regarded as an European. This was possible only, in the case he had a Dutch education, married a Dutch or European woman, spoke Dutch at home with his wife and children, became a Christian and was completely living in a Dutch environment.

For the bulk of Indonesians, however, the Civil Code and hence Contract Law as contained in the Civil Code, never applied, and Indonesians have nothing to do with so-called European Law.

It was only since 1967, after the Foreign Investment Law was promulgated that the Company Law under the Commercial Code and the Contract Law under the Civil Code were made applicable to (indigenous) Indonesian citizens by Governmental Regulation, which later was confirmed by the courts through case law. Whilst the "European" Contract Law and Company Law were still a novelty for Indonesians, at the same time foreign elements (especially American legal principles and clauses) were introduced in the Investment Contracts between foreign investors and Indonesian businessmen. The use of the English language combined with the underlying English legal concepts of Contract – and Company Law resulted in a terrible mixture of rules and clauses in the Investment Contracts resulting in a state of confusion as to what the law really is, and how a clause should be legally interpreted by lawyers and judges.

That is why, especially with the dawn of electronically agreed contracts, coinciding with the globalization of commerce and investments in the 21st century, it is high time that Indonesia reforms and modernizes its Law on Contracts to the needs of Indonesians, as well as to those of the international business world.

Principles of Adat Law.

As mentioned above, contrary to the Western or European Law introduced by the Dutch into Indonesia, the local laws and customs adhered to by the hundreds of tribes and clans living in the island which became to be known as Indonesian Adat Law were more pragmatic, realistic and concrete, in contrast to the European Continental abstract way of legal thinking.

A contract in what by Prof. Van Vollenhoven was called Adatrecht or Adat Law was not seen as a legal relationship causing a number of rights and obligations to exists for the parties, but was regarded as an act by which on the basis of delivery of a physical token called "*panjer*" in Jawa (but which in other regions may have different names) one party (read person or family, group or clan) promises to another party to do or give something for or to the other party or to refrain from doing something.

By the handing over of this token, which may consist of a gift, a keris (weapon), cloths, food, cattle or money, a situation of imbalance is created, so that (in order to restore the balance and dignity of the receiving party) this party should perform what it has promised to do or to give.

The concept of balance is therefore very much the same as the bargain theory in the English law of Contract.

Until the party has performed its side of the contract, the respective party is regarded to be indebted (*berhutang*) to the party who has delivered the physical object, witnessed by a number of people of the community, and his dignity will not be restored until he/she/they has performed his/her/their part of the contracts.

The contract in Adat Law therefore becomes binding at the moment the object has been delivered and accepted, and not (like in European Law) at the

moment of mere oral or written acceptance/pledge, without a *panjer* having been delivered.

What is important in Adat Law, therefore, is not the promise or the acceptance, but the act of delivery of a physical object to the other party as evidence that the balance of the relationship between the parties have (temporarily) been disturbed, so that another act will be necessary to restore the balance again.

Usually of course in a traditional society, no problem of difference in place of delivery and performance exists, but with sea faring tribes like the Bugis of South Sulawesi there exist a number of rules of Conflict laws, as for instance the law of the conclusion or performance of the contracts shall apply and the conflicts arising out of the performance of the contract shall be decided by the judge and the law where the contract is to be performed.

The Amanna Gappa Code of the 17th century of the Bugis people even mentions that the captain of the ship shall be the judge and decide upon conflicts arising on the vessel, and the applicable law shall be the law of the captain of the ship.

Also, that no passenger shall be allowed to go ashore before his conflict is settled satisfactorily on board ship, because as it is said "any fire will die out where it was started".