

## IMPLEMENTATION OF PRINCIPLE OF BALANCE AND JUSTICE IN TERMINATING THE OPERATIONAL COOPERATION AGREEMENT

Fauzie Yusuf Hasibuan  
Lecturer of Postgraduate - Universitas Jayabaya

### Abstract

The guarantee of legal certainty for the parties to implement the operational cooperation agreement would require formal ties on the certainty of the legal status of the parties. Through an agreement between *PT. Telekomunikasi Indonesia, Tbk (TELKOM)* with *MITRA* parties incorporated into Alcatel Concorcium there are clauses of rights and obligations of parties such as sanctions, restrictions, terms of agreement and some others. At the level of implementation there are still problems causing one of the parties disadvantaged, including the termination of cooperation agreements made unilaterally by *Telkom*. In reality, the operational agreement between *MITRA* and *TELKOM* does not comply with the elements in the principles of equilibrium and equity, as there are unbalanced elements of the advocacy effort that benefits *TELKOM* and disadvantage *MITRA* party, and internal dispute resolution procedures are limited only through option of the dispute forum at *BANI* which has not been effective and tends to harm either party. An operational agreement made by the parties to an authentic deed may be a solution to legal protection for those who feel disadvantaged, since the process of authentic deed is carried out before a Notary Public as a state official who can direct the parties to accept and apply the principle of balance and the elimination of harmful exoneration clauses of one of the parties to the agreement to which they will agree, among others, the possibility of a litigation settlement; as well as the perfect evidentiary power of the consequences of an authentic deed to ensure justice.

**Key words:** Principle of Balance, Justice

### INTRODUCTION

Justice and order will be achieved if the function of law as infrastructure of social control based on the principle of legal certainty can be implemented well by all levels of society, one of which is legal certainty in the law of agreement. The principle of legal certainty in the treaty applicable in Indonesia shall be governed in Book III of the Civil Code, hereinafter referred to as Book III of the Civil Code, in particular, the provision of Article 1338 paragraph (1) of the Civil Code which affirm that "All valid agreements made valid as a law for those who make it. "

This Agreement is valid if it meets the requirements of the validity of an agreement under the provision of Article 1320 of the Civil Code which states:

"For the validity of an agreement four conditions are required:

1. agreement for those concerned
2. ability to make an agreement
3. certain terms
4. legalized cause

Thus any agreement whatsoever is made so long as it is not contradictory to the provision of Article 1320 of the Civil Code, shall apply as a law to the parties making it; applicable as a law means that the agreement has a binding force based on the principle of *pacta sun servanda*. The binding force of a treaty means that the treaty is binding on the parties that make it to fulfill the obligations and obtain the rights in accordance with what has been agreed upon in the agreement.

Rights and obligations that have been agreed upon in all types of agreements are commonly referred to as achievement. Such achievement should be met (granted) and accepted by both parties in the agreement under the agreement. This is based on the provision of Article 1233 of the Civil Code which states that: "The binding is born out of an agreement or by law." This provides a basis in the agreement made by both parties, that the binding arises because of an agreement between the two. The resulting binding is intended to give something, to do something, or to do nothing in accordance with the provision of Article 1234. Civil Code.

As with other agreements which have clauses which have been agreed and set forth in the agreement such as the purpose of the agreement, the scope of the agreement, the rights and obligations of the parties, the timeframe and the amount of the budget (capital), to the settlement of disputes in the agreement, then all are presented in writing by agreement. By this the Operational Agreement becomes the focus of discussion in the research that has similar characteristics by pouring the clauses mentioned above while still putting forward the principles contained in the provisions of Book III of the Civil Code. However, in the implementation of these operational agreements various obstacles and problems that can harm each side are still found.

One example of a case of an operating agreement whose overall deeds are either a parent agreement, its changes and terminations only made under the hands of an Agreement on the Provision of Telkom-Multimedia Access Services between *PT. Telekomunikasi Indonesia, Tbk (Persero)* hereinafter referred to as *TELKOM* with the Alcatel Concorcium hereinafter referred to as *MITRA*, as stated in the Cooperation Agreement on the Provision of Telkom-Multimedia Access Service Number: PKS.81 / HK.810 / UTA-00/2001 dated April 20 2001; the amendment has been made several times, namely the first amendment made on May 31, 2002 found in Letter Number: K.TEL.91 / HK810 / UTA-00/2002, the second amendment was made on May 12, 2003 in Letter Number: TEL .91 / HK820 / D02-A-10610/2003, and the Third Amendment was made on 11 August 2004, in Letter Number: TEL.543 / HK.820 / D02-A10610 / 2004. And hereinafter referred to Telkom-Multimedia Access Service Operation Agreement.<sup>1</sup>

In the Telkom-Multimedia Access Operations Provisioning Agreement, *TELKOM'* party does not perform their duties properly, even *TELKOM* breaches against clauses agreed by the parties, resulting in losses suffered by *MITRA* Party, both financial loss and a substantial loss of immersion, as at the time of the agreement it is agreed upon that both project financing in the provision of Telkom-Multimedia Access services utilizes bank credit facilities, which must be gradually returned by *MITRA* on a profit basis in the execution of the agreement. As a result of the losses experienced by *MITRA*, the obligations of *MITRA* party in relation to the return of banking credit facilities is quite disturbed even can be said to be stopped. When *MITRA* demands its losses to *TELKOM'*, *TELKOM* only replaces a small portion of the loss that should be the responsibility and the obligation of *TELKOM* party to indemnify, even the *TELKOM* party determines condition unilaterally that a small part of the compensation will shall be awarded to *MITRA* if *MITRA* party agrees to make the termination of the agreement before the term of the agreement expires, with one of the clauses therein that after the termination agreement is signed by both parties, the *MITRA* shall not claim a substantial part of the remaining loss which actually should be the responsibility of *TELKOM* party . Based on the above explanation it is clear that the *TELKOM* party is doing things that are inappropriate and violate the principles of making a treaty, especially the principle of balance and justice that must be met in making an agreement or in the implementation of the agreement.

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<sup>1</sup> Telkom-Multimedia Access Service Agreement PKS.81 / HK.810 / UTA-00/2001 dated April 20, 2001 and its amendments.

## DISCUSSION

### 1. The principle of balance in the process of creating and terminating the operational cooperation agreement made unilaterally

Particularly concerning the operational cooperation agreement which becomes one of the cases in this study, the agreement is a cooperation agreement made by two parties to bind each other based on the written agreement as outlined in the deed under the hands of *PT. Telekomunikasi Indonesia, Tbk (TELKOM)* with Alcatel Consortium (*MITRA*) and stipulated under the provisions of the Agreement contained in Book III of the Civil Code, hereinafter referred to as Book III Civil Code, Article 1338 paragraph (1) stating: "All legally-made agreements shall apply as laws to those who make them." The procedure of freedom exchanged by reality is influenced by the position and the power of the interests of the parties so that the bonds are both wrongly applied and tends to suppress the weaker party in the process of making the agreement. In article 1320 of the Civil Code, the legacy is an agreement that must be interpreted as the awareness of the parties to the application of contracted justice for the parties. However, in the implementation there are still various obstacles and problems that cause one party to feel disadvantaged, so that a solution is needed in providing legal protection to achieve justice and legal certainty in the implementation of the operational cooperation agreement.

In its implementation several violations are found disadvantaging *MITRA*, among them are as follows:

1. Tariff change unilaterally made by *TELKOM*;
2. Violation of the provisions of Article 33 paragraph (4) and paragraph (5) of Cooperation Agreement, Number: 81 / HK.810 / UTA-00/2001 dated April 20, 2001;
3. Efforts of *TELKOM* party to accelerate the sale of Speedy ALCATEL up to 30.304 (thirty thousand three hundred four) SSL, with the intention that if the program is successfully sold out entirely, *TELKOM* may sell products other than Speedy ALCATEL products;
4. Disclosure of ALCATEL Speedy Products by *TELKOM* unbeknown to *MITRA*;
5. Network migration speedy ALCATEL out of agreed area in agreement;

Such acts in the Covenant Law are known as *wanprestasi* which are a denial of the provisions of Article 1234 of the Civil Code of achievement, which determine that each engagement is to give something, to do something, or to do nothing. Default performed by *TELKOM* is declared legitimate according to the provisions of legislation due to *TELKOM* reason not to fulfill its performance not because of *Force Majeure* which has been determined based on the provisions of Article 1225 of Civil Code. *TELKOM* actually undermines its performance due to the intention of *TELKOM* itself that intentionally violates the terms agreed in the Telkom-Multimedia Access Procurement Agreement.

Considering that there are three forms of default as regulated in the Law, one of them is to fulfill the performance that is not good (not full) then the breach committed by *TELKOM* is classified into the form of default, because *TELKOM* has fulfilled some of its achievement by paying some compensation to *MITRA*, therefore *MITRA* as an aggrieved party may sue *TELKOM* party to fulfill some of its achievements in the form of loss payment based on concrete calculation which has been agreed in one of Telkom-Multimedia Access Procurement Agreement that should be accepted by *MITRA*.

In this case *TELKOM* can be positioned as a defaulting debtor, while *MITRA* as creditor has the right to demand compliance with compensation. The right to claim the compensation can be sought by *MITRA* by doing a negation (negligence) to *TELKOM* which is positioned as a default

debtor, since it is determined if the agreement made is not specified regarding the period of prosecution of the indemnity if either party defaulted. In fact, however, the efforts made by *MITRA* in terms of claiming its right to be fulfilled by *TELKOM* are always deadlocked, as *MITRA* is limited to the provisions stipulated in the termination of the agreement, *TELKOM* determines the unilateral conditions that a small portion of the compensation will be granted to *MITRA* if *MITRA* agrees to make the termination of the agreement before the term of the agreement expires, with one of the clauses therein that after the termination agreement has been signed by both parties, *MITRA* shall not claim a substantial portion of the remaining losses which shall be liable to *TELKOM*.

In addition, the dispute settlement procedure confines *MITRA* financially, that is determining the settlement to *BANI* which in fact requires considerable cost if the settlement path in *BANI* is still being pursued. Another alternative taken by the *MITRA* in order to provide certainty in the process of completion is by taking the path of lawsuit in the District Court class IA Bandung, but the effort can be said to be in vain because it stumbled provisions Absolute Complexity in handling cases, The District Court Judge is not authorized to adjudicate dispute resolution where in the Master Agreement the parties choose *BANI* as their dispute resolution institution.<sup>2</sup>

Based on the provisions in Book III of the Civil Code, the unilateral contract termination made by *TELKOM* in the agreement constitutes a fundamental violation of the provisions of Article 1338 paragraph (2) of the Civil Code.<sup>3</sup>; because of its unilateral nature without any agreement or in other words the element of coercion. Thus it is possible that *TELKOM* has ignored the principle of good faith in the agreement set forth in the provisions of Article 1338 paragraph (3) of the Civil Code.

Basically any agreement based on bad faith in its execution is always a denial of the contents of the agreement, in other words the occurrence of breach made by one party. Unilateral termination or unilateral coercion to make termination made by *TELKOM* is possible as an effort to discharge its responsibility to fulfill the achievements that should be accepted as *MITRA*'s rights in this agreement. Unfortunately, however, the understanding of the parties, especially *MITRA* party regarding the contents of the agreement made by both, becomes an excuse for *TELKOM* to make them the meaning of the terms of the agreement.

These incidents are good in the case of *TELKOM*'s violations concerning the implementation of clauses of agreement and the imposition of the will in termination of the agreement or in other words categorized as "misuse of the situation" because *MITRA* is pressured to pay its obligation to the financing institution (*PT Bank Mandiri, Tbk*) with the implementation of the Procurement of Telkom-Multimedia Access Service, was forced to accept payment of a small compensation from *TELKOM* with the requirement to sign the termination of the agreement.

This indicates that in the presence of such condition, it can be said that the Service Procurement Agreement of Telkom-Multimedia Access has not been able to provide adequate and effective legal protection against the parties especially *MITRA* party. This is possible because the layman's understanding of the agreement law of both parties, especially the *MITRA* party is positioned as a weak party because a small part of the provisions in the agreement is determined unilaterally by *TELKOM*. Understanding in general is not performed and attracted by *MITRA* or *TELKOM* to:

- 1) Application of the theory of the three stages in making an agreement, covering:

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<sup>2</sup> Decision Number 529 / PDT / G / 2011 / PN.BDG dated March 29, 2012, which decides and states that Bandung State Court is not authorized to examine and adjudicate cases.

<sup>3</sup> Article 1338 Paragraph (2) of the Civil Code which states that: "A treaty shall not be withdrawn other than by mutual agreement, or for reasons which by law are sufficient"

- a) Pre-contractual stage, namely the existence of supply and acceptance. The significance of this stage for *MITRA* and *TELKOM* parties has an effect on the general provisions as well as the overall clauses that will be applied based on the agreement in the agreement, previously understood carefully from both parties which are then agreed upon;
  - b) the contractual stage, that is the existence of a suitability statement between the parties. This stage is carried out in the hope that the principle of equality and obligation between *TELKOM* and *MITRA* will be implemented, although the agreement is made by applying several standard clauses but opens opportunities for fair negotiation between the two.
  - c) post-contractual stage, namely the implementation of the agreement. In this stage, there needs to be awareness both from *MITRA* and *TELKOM* to always implement their rights and obligations as agreed and set forth in the agreement. The most important thing is both *MITRA* and *TELKOM* still uphold the principle of good faith contained in the provisions of Article 1338 paragraph (3) Civil Code during the implementation of the agreement.
- 2) Any written agreement made only under the hand is vulnerable to the occurrence of the denial of one party to what is agreed upon, especially the denial of the truth that those who make it.
  - 3) The importance of observing and applying the fundamental and generally accepted principles in the implementation of the Telkom-Multimedia Acces Service agreement between *TELKOM* and *MITRA*, is intended that the implementation of the agreement can run well, as well as minimize the problems that occur, particularly the denial of the contents of agreements made by *TELKOM* as described above.
  - 4) Noting and understanding the general dispute resolution procedure in the agreement.

The most fundamental principle applied in the covenant is the general principle of law, the principle of "*Lex semper intendit quod convenit rationi*"<sup>4</sup> the meaning is that the law must follow and agree on the rational. In addition to this being based on the provisions of Article 1320 of the Civil Code, their agreement (the parties) binding themselves is an essential principle of the treaty law, which is also commonly referred to as the principle of *consensualism*, which determines the "existence" of the treaty. The principle of freedom of contract is closely related to the contents of the Telkom-Multimedia Acces Service agreement between *TELKOM* and *MITRA*. The said freedom is to determine the content and to determine the parties to the agreement of Procurement of Telkom-Multimedia Access Services between *TELKOM* and *MITRA*, but must still comply with the provisions of Article 1320 Civil Code.

## **2. Legal Protection Alternatives Through Authentic Acts for Disadvantaged Parties in the Process of Making and Termination of Unilateral Cooperation Operation Agreement.**

Any form of written agreement other than to be made under the hands may also be contained in an authentic form, including the Procurement Agreement of Telkom-Multimedia Access between *TELKOM* and *MITRA*, the provisions concerning authentic deed contained in Article 1868 Civil Code which states that "An authentic deed is a deed which is made in the form prescribed by law by or in the presence of the authorized public official for it in the place of the deed made. " Therefore, if an agreement between *MITRA* and *TELKOM* is to be poured into an authentic form, it must be made before a public official, a notary authorized to make an authentic deed of all deeds,

<sup>4</sup> *Lex semper intendit quod convenit rationi* means the law always intends what is agreeable to reason, cf. *Black's law dictionary*, fifth edition, St Paul Minn, West Publishing Co., 1979, p.. 822.

agreements and statutes required by laws and / or by which concerned to be expressed in an authentic deed.<sup>5</sup>

This notary is not placed in a legislative, executive or judicial institution. Notary is expected to have a neutral position, so that if placed in one of the three state agencies then the notary can no longer be considered neutral. With such a neutral position, the notary is expected to provide legal explanation to the public as his client in terms of making the deed desired by his client. In the case of taking legal action for his client, the notary also must not side with his client, since the duty of the notary is to prevent the occurrence of the problem and provide legal protection for the communities concerned.

In carrying out his position, the notary is not subject to the applicable laws and regulations of the civil service, and the notary is not paid by the government. Notary gets his income from the honorarium obtained from the parties who have received notary services.<sup>6</sup> Notary in his position who performs part of the government's task of making authentic deeds for the benefit of society, in general should not refuse his ministry duties. A notary not only make authentic deeds, but also as impartial adviser and the one trusted, especially in matters involving private law.

Speaking about the protection of the community through every activity undertaken by a notary in carrying out his position cannot be separated from the existence of a social institution that shelter it. This community institution known as "*Notariat*" arises from the needs of the interaction of fellow human beings, who desire the existence of evidence for him concerning the relationship of the civil law that exists and / or occurs among them; an institution with its officers assigned by public authority (*openbaar gezag*) to where and when the law requires such or desired by the public, to make written evidence of authentic power.<sup>7</sup> As stipulated in Article 1 of the UUJN, that a Notary is a public official authorized to make an authentic deed and other authority as meant in the Articles of the UUJN, and it can be seen how exactly the authority and responsibility of a notary in protecting the law against public interest, especially in the civil world through the authentic deed made and can be accounted for by the notary concerned.

Legal protection of the community can be specifically seen in the form of authenticity of a deed in which there are acts, agreements and interests of society in everyday life. For example, in the case of two or more individuals in a society commits a legal act in the form of an agreement or agreement by pouring it into an authentic deed, and if the act of law is only poured into the deed under the hand then when a problem occurs it will be more difficult in the case of a proof compared to an authentic deed made by a notary who has the most perfect proof power. The authentic deed has the most perfect evidentiary power, where in case of a dispute between the parties concerned, the authentic deed may be a strong evidence by the parties and the juridical consensus of the parties can not avoid the demands of the contents of the deed made.

The Procurement Agreement of Telkom-Multimedia Access Services between *TELKOM* and *MITRA*, if poured into the authentic deed has advantages that can be felt by the parties, the advantages include; the authentic deed of its form shall be determined by the Act; in making authentic deeds it is more possible to apply the principle of equilibrium and the elimination of the exclusionary clauses which may harm either party in the agreement; the possibility of a maximal litigation settlement; as well as the perfect proof power that authentic deeds possess.

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<sup>5</sup> Article 15 paragraph (1) UUJN.

<sup>6</sup> Muhammad Adam, *Notaris dan Bantuan Hukum*, Sinar Baru, Bandung, 1985, hlm.14.

<sup>7</sup> G.H.S. Lumban Tobing, *Peraturan Jabatan Notaris*, Erlangga, Bandung, 1991, hlm. 2.

## CONCLUSION AND RECOMMENDATION

### 1. Conclusion

The termination of operational cooperation agreement of Telkom-Multimedia Access Service made between *MITRA* and *TELKOM* can be said to not fulfill the element in equality principle and fairness principle, because there is coercion element and tend to benefit *TELKOM* side and harming *MITRA*. This is proven by simply substituting a small portion of the loss which should be the responsibility and the obligation of *TELKOM* to compensate, even the *TELKOM* party unilaterally determines that a small portion of the compensation will be given to *MITRA* if *MITRA* agree to make the termination of agreement before the term of the agreement expires, with one of the clauses therein that after the termination agreement is signed by both parties, *MITRA* may not sue most of the remaining losses suffered by *TELKOM*. As internal dispute settlement procedures and restriction can only be addressed at *BANI* and this has not run effectively and is likely to harm either party.

The use of Authentic Deed as an alternative of legal protection for the aggrieved party in the Agreement of operational cooperation Procurement of Telkom-Multimedia Access Services made between *MITRA* and *TELKOM* is one of the efforts in providing legal protection to those who feel aggrieved because the authentic deed has advantages compared to the deed under the hand, such advantages include the authentic deeds of the form determined by the Act; in making authentic deeds it is more possible to apply the principle of equilibrium and the elimination of an exonerative clause which may harm either party in the agreement; the possibility of a litigation settlement; as well as the perfect proof power that authentic deeds possess.

### 2. Recommendation

A more specific rule needs to be established in addition to existing legislation regarding the arrangement of an operational cooperation agreement held by *TELKOM* which is one of the State-Owned Enterprises; this is intended to provide more adequate legal protection to the parties, so that the implementation can run well. It is expected to increase legal certainty and realize the principles of Good Corporate Governance in State-Owned Enterprises of the Republic of Indonesia especially *TELKOM* which has become public company (*Tbk.*) (Go Public). Establishment of a national-scale Independent Institution authorized to resolve a dispute over a specific dispute agreement in the implementation of an Operational Cooperation Agreement should be considered. This is done in order to open a dispute settlement that not only can be done internally by related institutions or *BANI*, but can also be done externally by involving law enforcers with procedures established by the prevailing laws and regulations.

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