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Existence of Estoppel Doctrines in Common Law Contracts: Challenges and Opportunities for Civil Law-Based Lawyers

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Abstract

A basic concept of contract is an object of law that is often defined as an agreement made by parties to perform duties and obligations and receive rights in return. The legal positions of parties involved in a contract are governed by contract law that is complex. It covers principles, doctrines, rights, obligations, and access to remedy regarding any breach of the contract. The complexities of the contract law are further inevitably impacted by the system of the law within a country. The principles, regulations, and legal concepts in civil law countries generally rely heavily on written forms. In contrast, common law countries based the law on precedent cases or the developments of court decisions. This fundamental difference potentially causes either challenges or opportunities for the lawyers practising outside their jurisdiction, as the application of the concepts and doctrines used are different. This paper will discuss a distinguished difference in a doctrine of contract law adopted by the common law system like Australia, which is called Estoppel, that might remain less applied in civil law countries like Indonesia.

Keyword: Civil Law; Common Law; Contract; Estoppel Doctrines.

Introduction

A contract is an essential form of legal relations. It is also commonly defined as an agreement or set of promises that are enforceable by the law, in which the law will provide a remedy for a breach of contract.[1] Any aspect of society's life nowadays is inevitable from the implementation of contracts. A realisation of a reasonable expectation for certain conduct to be performed or a promise to be done is the fundamental purpose of contract law.[2] The complexity and versatility of contracts therefore make it essential to provide and protect the best interests of the parties bound by it. For this reason, the contract can be seen as an important aspect of the law that should be implemented properly. However, considering there are differences between legal systems in the world which include how contracts are formed and performed, challenges can arise for legal practitioners who practice outside their jurisdiction.

Nowadays contracts are widely formed between parties across countries since globalisation and the advancement of digitalisation encourage people to make agreements regarding the jurisdiction they have. Given the nature of the promise that any form of agreement contains, it is possible that disputes regarding breach of contracts may occur. This possible issue can become more complicated due to the

[1] Brian Coote, "The Essence of Contract Part 1," *Journal of Contract Law* 1, no. 2 (November 1988): 91–112.

[2] Jay M Feinmann, "The Duty of Good Faith: A Perspective on Contemporary Contract Law," *Hastings Law Journal* 66, no. 4 (May 2015): 937–51.

influence of the difference in doctrines that exist in common law and civil law countries.

The expectations of societies regarding how the law is developed and applied reflect how principles and legal doctrines can be applied differently by courts in different countries, in addition to identical linguistic expressions that might be interpreted differently.[3] These facts give a reasonable example of how the difference between doctrines that exist between legal systems in the world can be interpreted variously by lawyers or courts in making decisions. As a result, confusion may arise since the principles, doctrines and interpretation of the contract are fundamental in settling disputes in contracts. This is why it is important for lawyers in civil law countries to start acknowledging the existence of the estoppel doctrines in contracts in expectation of dispute settlements regarding contracts law can be done more seamlessly and reflects justice for the parties involved. This paper will discuss the principles known in contract theories and the differences in contracts between common law and civil law systems in Part II. Part III will discuss the doctrines of estoppel in the common law system and the implementation in context. Part V will conclude the paper and the discussions. The method used in this paper is based on library research (court cases, books and journal research).

A. Overview Of Contract Theories

1. Universal Contract Theories

In the basic understanding, a contract is an expression of the will of parties to be engaged in a legal relation. Therefore, contractual obligations are distinguished from obligations imposed by the law of tort because it is based on the freedom of will between the parties.[4] The fundamental thing about a contract is in the formation stage. The classical theory of contracts has provided requirements to be met in the formation of the contract. The formation stage of a contract is essential as it will remark the establishment of contractual relation that binds parties involved to perform their duty and accept their rights that are protected by the law and some doctrines support the performance of the contract recognised in common law as well.

a. Offer and Acceptance

An offer expresses willingness to enter a contract on specified terms. Any individuals who are considered capable before the law can make an offer and acceptance that are legally binding sets of rights and obligations. The offer and acceptance in a contract are crucial since they will make a clear statement for the parties to be bound by a promise. In terms of offer, there are things that need to be considered as contributing factors to the validity of it. This means that an offer may not last forever and normally ends due to a lapse of time, revocation by the offeror,

[3] "Some Reflections of Good Faith in Contract Law," *Oxford University Obligation Group*, 2012.

[4] Andrew Robertson, "On the Distinction between Contract and Tort," *SSRN Electronic Journal*, 2003.

rejection by the offeree, failure of a condition or contingency or death of the offeror or offeree.

In another point of view, acceptance also plays an important role in contract formation since a contract will only come into existence once the offer is validly accepted. The requirements of valid acceptance such as:[5]

- the acceptance must be made by the offeree or their agent;
- the acceptance may either be expressed or implied from conduct;
- the acceptance must correspond with the offer;
- the acceptance must express a clear decision; and
- the acceptance can be presumed if a party perform an action that signifies acceptance of the offer.

b. Consideration

Consideration is defined as something that must be done or a promise that must be fulfilled that has value in the eyes of the law. In the common law system, a promise must contain an exchange value for both parties *(quid pro quo).* Consideration can be provided in the form of a promise *(executory consideration*) or an act *(executed consideration*). The importance of consideration is significant in common law contracts because it determines the validity of a contract. However, it is necessary that a consideration should meet certain requirements to be considered effective and enforceable. Firstly, consideration must be sufficient. Sufficiency in consideration means that it must be something that the law deems valuable. As long as this requirement is met, the courts will not question whether the value of the consideration is proportionate to that of the promise it upholds between parties. Secondly, as the implication of the previous requirement, it is important for the consideration to be made based on the ability of the promisor to perform the promise. Lastly, to determine whether a consideration is valuable, detriment must be suffered by the promisee if the value is not fulfilled, and on the other side, the promisor will gain benefit from the detriment.[6]

c. Certainty

A further requirement of the contract formation is that it should be made based on certainty. A valid contract requires clear and complete terms that the parties intend to be bound by. The requirement that a contract be certain has three aspects:

1. The contract must be sufficiently complete. This indicates that the parties must agree on all terms they intended to specify themselves, rather than relying on third parties to set the terms, and the terms should cover all aspects that cannot be resolved by the court through implication.[7]

[5] Jullian Mellick and David Newlyn, "Contract Law," *Lexis Nexis Butterworths*, 2015.

[6] Jeannie Paterson and Andrew Robertson, "Principles of Contract Law," *Thomson Reuters (Professional) Australia Pty Limited*, 2020.

[7] Paterson and Robertson., *Loc.cit*.

2. The terms agreed by parties must be certain and clear in order for the parties to understand their right and obligations and the courts can enforce them.[8]
3. The promises made by the parties must not be illusory. A promise becomes illusory if one of the parties has complete power over whether to perform the promise or not.

d. Capacity

A contract will only be legally binding if it is made by a person who does not lack contractual capacity. A person who lacks contractual capacity can be categorized as someone underage, someone with mental impairments and someone who is intoxicated. However, there is uncertainty about common law rules that are considered to have been overlaid with legislation that varies between States and Territories in Australia, the distinction in this area between contracts that are:[9]

1. Binding on the minor, namely contracts for *necessaries*;
2. Binding unless repudiated *(voidable);*
3. Only binding if *ratified*; and
4. Of no effect *(void under statute).*

e. Formality

The common law system does not require a contract to be in a particular form, as a verbal agreement is still enforceable in the common law. However, contracts may be required to be made in written form to serve several purposes, such as providing reliable evidence.[10] The requirements for contracts to be made in particular types are principally aimed at protecting the interest of the vulnerable parties. In another point of view, a written contract is considered to be helpful for the parties since it can be reviewed by parties so that they are fully aware of their legal rights and obligations, and whether they accept to be bound by the contract. This can be seen from an English statute known as *The Statute of Frauds* in 1677. This statute provided that no action could be brought on contracts unless the agreement was made in writing and signed. The statute was intended to avoid fraudulent practices, such as fraudulent claims being made on the basis of false evidence.

2. Difference of Contracts in Legal Systems

The difference in the legal systems will influence how the law will be formed and implemented within the country, including the contract law. The common law recognises three fundamental obligations in contract, which are, the obligation to perform certain promises (the law of contract), the obligation to avoid causing harm to others in certain circumstances (the law of tort), and the obligation to restore certain unjust gains (the law of unjust enrichment). In comparison, civil

[8] Paterson and Robertson., Loc.cit.
[9] Paterson and Robertson., Loc.cit.
[10] Lawrence M Solan, "The Written Contract as Safe Harbor for Dishonest Conduct Symposium: Theory Informs Business Practice," *Chicago-Kent Law Review* 77, no. 1 (2001): 87.

law focuses more on written law as a primary source of the law. The characteristic of the common law makes it more possible to be dynamic compared to the civil law.[11] The fundamental principle for common law is the ability of the common law to modify its rules as they are being applied. The court, when deciding the case, may come up with the best solution for the dispute, that is based on a similar case that had been decided before.

B. Doctrines Of Estoppel In The Common Law System

1. Doctrines of Estoppel

The rise of promissory estoppel has been perceived as one of the most significant developments in contract law.[12] The doctrine of promissory estoppel is mainly based on detrimental reliance. This means that within the doctrine of promissory estoppel, there is a detriment experienced by one of the parties as a result of reliance on the promise made by the promisor. The promissory estoppel aims to provide remedies for this detriment. The doctrine of promissory estoppel stops a person from going back on a promise even if there is no formal contract made between the parties. The important thing that needs to be assured is that the disadvantages must be a result of the promise, an exchange value *(quid pro quo)* as in consideration will not necessarily have to exist to establish the legal relations between the parties.

The doctrine of proprietary estoppel is based on the promise made relating to property, in which the reliance on the promise causes detriment to another party. Proprietary estoppel acts as a medium to seek remedies for a party that needs to seek redress as they suffered a loss due to the promisor's assurance or conduct relating to property rights. Promissory and proprietary estoppel are within the equitable doctrine. The claim made based on the proprietary estoppel must be assured to show the existence of the promise, a reliance on the promise and a detriment caused by the reliance on the promise.

Estoppel by convention is commonly raised in commercial litigation in relation to both pre-and post-contractual understanding and the rights and obligations of the parties. This type of estoppel is unique in that, like estoppel by deed, it is based on a shared assumption or understanding between the parties. However, similar to estoppel by representation of fact, promissory estoppel and proprietary estoppel, its primary aim is to prevent damages resulting from reliance and a detrimental change of position of one of the parties. In essence, it dictates that when parties collectively adopt a shared belief or understanding of fact or law as the basis of a transaction, they must act in adherence to that belief during the transaction to prevent harm to one of the parties.

At common law, estoppel by representation was a rule of evidence, that in litigation between the parties to the estoppel, one of the parties would not be

[11] Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (United States: Harvard University Press, 2009).

[12] Jay M Feinmann, "Promissory Estoppel and Judicial Method," *Harvard Law Review* 97, no. 3 (1984): 678.

permitted to set up the disparity between the facts and the ones that the other party had been caused to assume to be the facts.[13] In relation to that, the existence of this estoppel is to stop or prevent the representer of fact from stating facts that are contrary to his representation that is relied upon by a representee.[14] As in estoppel cases, the court has the option to protect the claimant's reliance interest by giving compensation for the losses incurred due to their trust in the promise or representation in question. Alternatively, the court can also protect the claimant's expectation through a remedy that places the claimant in the position the claimant would have been in if the promise of the agreement had been fulfilled.

2. Implementation in Cases

This paper will provide examples of cases for each estoppel described in the previous section in Australian Court decisions. In the promissory estoppel, the implementation can be seen in the case of ***Saleh v Romanous (2010) NSWCA 274***. The overview of the case is about the development of two adjoining blocks owned by Saleh and his brother in which eight two-story townhouses would be bought and developed by Romanous. The agreed price would only make sense if the adjoining blocks were developed together. The development consent had been obtained from the neighbouring owner and Saleh promised that if the neighbouring owner did not want to build, the purchaser would get the deposit back. This promise raised a promissory estoppel that prevented Saleh from enforcing the contract against Romanous. The appeal raised by Saleh was dismissed and The Judge held that the respondent of the case, Romanous, who was the purchaser of the property, was entitled to recover the deposit based on the promise made by the promisor which was Saleh, the appellant, and the seller of the property.

In the doctrine of Proprietary Estoppel, an example can be found in the case of ***Walton Stores (Interstate) Ltd v Maher (1988) 164 CLR 387*** This case has raised a discussion of whether promissory estoppel and proprietary estoppel are unified equitable doctrines or whether each acts independently. In addition, the doctrine of Estoppel by Convention can be found in the case of ***Whittet v State Bank of New South Wales (1991) 24 NSWLR 146.*** The defendant which is the State Bank of New South Wales agreed to provide Mr. Whittet a $100,000 overdraft facility, secured by a mortgage on the family home owned by Mr. and Mrs Whittet. Mrs. Whittet, the plaintiff in this case, was concerned about risking the family home and wanted to ensure that the mortgage would not exceed $100,000 by pre-contractual negotiations. This was agreed verbally by the bank. The signed mortgage, however, secures present and future debts without limit. After the bank suffered substantial foreign exchange losses on Mr Whittet's behalf, the bank sought to recover those amounts under the mortgage. The court held that estoppel by convention can be raised from the pre-contractual negotiations if the proof is clear and convincing.

[13] Kevin Lindgren, "Estoppel in Contract'," *UNSW Law Journal* 12, no. 3 (1989): 153.

[14] Andrew Robertson, "Reliance and Expectation in Estoppel Remedies," *Legal Studies* 18, no. 3 (1998): 360.

C. Potentials and Challenges

1. Issue Arises from Contract Law Difference

The issue that can arise from the doctrines difference between common law and civil law countries is when lawyers, judges and law enforcers are applying the doctrines in court cases. The difference in the jurisdiction plays an important role in influencing the outcome of the court's decision. This can raise different perspectives on how the law can be applied and how fast the law of the contract can be changed. Referring to the previous cases provided, the doctrines implemented in the common law contracts cases are most likely different than what is implemented in the civil law countries. Lawyers and judges in civil law will base their legal opinions and court cases based on the regulation that the statute has provided. This certainly will be a challenge for the lawyers and judges from civil law countries who want to settle disputes made on the basis of common law principles and doctrines.

2. Overcoming the Issues

This challenge however can be an opportunity for lawyers who want to settle across jurisdiction disputes by expanding the contract law in civil law systems to be more adaptable with a common law approach. This can be achieved also by updating the law enforcers about the developments of the contract law that happen outside of the jurisdiction that they have. Practically, if the law enforcers become more familiar with the principles and doctrines of the common law contracts, it will provide certainty and assurance for people across jurisdictions to make contractual agreements, in various forms, especially in business transactions and important legal matters.

This can also be supported by drafting an International Private Law, such as in Indonesia, that can help ensure dispute settlements regarding private law, including in contract disputes.[15] This will eventually will contribute to providing legal certainty and replacing the outdated legal regimes that still exist in some fields of laws in Indonesia.

D. Conclusion

Contracts are the very fundamental legal relationship and serve as a cornerstone in commercial transactions. The law of contracts should always be adaptive, reflecting the development and dynamicity in society. The foundational principles such as in classical contract theory that contains offer, acceptance, consideration, certainty and capacity provide the solid framework for contract formation, while equitable doctrines such as promissory estoppel and proprietary estoppel serve as a guard and offer remedies to the promise that are made, and when reliance is placed upon them. As of right now, the developments in society keep

[15] Febriananingsih and Juliani, "The Urgency Of Developing A Regulation's Database Related To Private International Law," *Indonesian Law Journal* 12, no. 2 (2019): 17–34.

going rapidly as the developments of sophisticated technologies, there is a high possibility that the law of contract will be influenced and developed so that it can align with the needs of society. Despite the changes that may happen in the future, the fundamental principles of contract and doctrines such as estoppel should be taken into consideration as they provide legal certainty and predictability that have been standing through the test of time over centuries. To summarise the discussion, the difference between the two legal systems provided in the paper can then be an opportunity for legal practitioners to come up with a broader solution for disputes regarding contracts.

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