

# Creating Certainty, Benefits, and Justice in Contract Law for Tourism Investment in Indonesia

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## ABSTRACT

The tourism industry has an essential role in the development of a country. Creating a good contract did not guarantee it would be appropriately executed (default). The conformity of contract law principles can be used as a basis for settlement. These principles are related to one another, cannot be separated, applied proportionally, and serve as a binding framework for the contents of the contract. Thus, law enforcement in resolving contract problems can be realized, the creation of certainty, benefits, and justice for the parties. This is by Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia: "The State of Indonesia is a constitutional state." This research discusses: How to realize the certainty, benefits, and justice of contract law in tourism investment in Indonesia using normative juridical research methods.

**Keywords:** *Benefit, Certainty, Contract Law, Justice*

## 1. INTRODUCTION

The Government and Local Governments encourage domestic and foreign investment in the tourism sector through national, provincial, and district/city tourism development master plans. Investment has an essential role in the development of the tourism industry. The development of the tourism industry can increase economic growth, improve people's welfare, eradicate poverty, overcome unemployment, preserve nature, the environment, and resources, promote culture, elevate the nation's image, foster a sense of love for the homeland, strengthen national identity and unity, and strengthen the friendship between nations.

In running a tourism business, the role of the contract is significant both in the contract drafting phase and the contract implementation phase. In the contract drafting phase, it is to regulate the rights and obligations of the contracting parties. Meanwhile, in the contract implementation phase, it is a guideline in implementing the contents of the contract as referred to in Article 1338 paragraph (1) of the Civil Code (Burgerlijk Wetboek=BW). The contract applies as a law for the parties who make it. If a problem arises, it can be used as evidence to prove the rights and obligations of each contracting party.

The purpose of making tourism investment contracts in Indonesia is the same as the legal objectives, i.e., certainty, benefits, and justice.

In the implementation, sometimes the contract has been made based on the principles and provisions of the applicable law, there are still defaults that cause harm to one of the parties.

The settlement process will tend to be based on the principle of legal certainty, and this is in line with the principle of *pacta sunt servanda* and Article 1338 (1) BW. Therefore, the principle of utility and justice is neglected as a legal goal and the contract's purpose. The purpose of the law, according to Gustav Radbruch in the theory of legal objectives, includes three principles, that is the principle of legal certainty (*rechtmatigheid*), the principle of legal justice (*gerechtigheid*), the principle of legal expediency (*zweckmatigheid or doelmatigheid or utility*).

To overcome these problems is done by applying the harmony of the contract of law principles. Because all of these principles are interrelated, they cannot be separated, applied simultaneously, take place proportionally and somewhat, and serve as a binding framework for the contents of the contract. Thus, it is hoped that the ideal and desired application of the law can be realized.

From the description above, the formulation of the problem that becomes the subject of discussion in this study is: How to create certainty, benefits, and justice in contract law on tourism investment in Indonesia?

## 2. RESEARCH METHOD

This research is normative law research (juridical normative) using a statutory approach and concept approach. The statutory approach is carried out by reviewing the laws and regulations regarding tourism investment contracts in Indonesia. The conceptual approach is made by examining the principles of contract law and the principles contained in the theory of legal objectives. The data used are secondary data obtained from primary, secondary, and tertiary legal sources.

## 3. RESULT AND DISCUSSION

### 3.1 *Tourism Investment in Indonesia*

In accelerating national economic development through the tourism sector, it is necessary to increase investment to process the economic potential of tourism into natural tourism economic strength by using capital originating from within the country and from abroad. For this reason, the Government and Local Governments encourage domestic investment and foreign investment in the tourism sector by the national, provincial, and regency/municipal tourism development master plans.

Investment is carried out based on the following principles: legal certainty, candor, accountability, equal treatment and does not discriminate against a country of origin, fair efficiency, sustainability, environmentally friendly, and others. The objectives of organizing investment in tourism businesses are the same as those of investment in general, which is: To increase national economic growth; create jobs; promote sustainable economic development; improve the competitiveness of national business; increase national technological capacity and capability; encourage the development of the people's economy; cultivate potential economy into real Economic strength by using funds originating both from within the country and from abroad and improve the welfare of society [1].

The investment must be a part of the implementation of the national economy and placed as an effort to increase national economic growth, create jobs, increase sustainable economic development, increase national technological capacity and capability, encourage the development of people's economy and realize the welfare of society in a competitive economic system.

The purpose of implementing investment can only be achieved if the supporting factors that hinder the investment climate can be overcome, such as through improved coordination between central and regional government agencies, the creation of an efficient bureaucracy, legal certainty in the investment sector, highly competitive economical costs, and conducive business climate in the field of employment and business security. With the improvement of these various

supporting factors, it is hoped that the realization of investment will improve significantly [2].

Tourism funding is a shared responsibility between the Government, Local Governments, entrepreneurs, and the community. The management of funds is carried out based on justice, efficiency, transparency, and public accountability.

In this regard, the Government and Local Governments are obliged to: provide tourism information, legal protection, as well as security and safety to tourists; create a conducive climate for the development of tourism business which includes the opening of equal opportunities in doing business, facilitating, and providing legal certainty; maintain, develop, and preserve national assets that serve as tourist attractions and potential assets that have not been explored; as well as supervising and controlling tourism activities in the context of preventing and overcoming various negative impacts on the community as a whole [3].

### 3.2 *The Role of Contracts in Tourism Investment in Indonesia*

The tourism business includes various things, which is doing this business requires a contract. In making tourism investment contracts, it is guided by the provisions of contract law, including investment contracts in Indonesia which are regulated in the Investment Law, and its implementing regulations as general provisions in investment. And the Tourism Law as a special provision. This rule is in line with the principle of *lex specialist derogat lex generali*.

### 3.3 *Principles of Certainty, Benefits, and Justice in Tourism Investment Contracts in Indonesia*

In the design of tourism investment contracts, must pay attention to and apply the principles of contract law, namely: the principle of freedom of contract, the principle of consensual, the principle of *pacta sunt servanda*, the principle of good faith, the principle of personality. It also fulfills the conditions for a valid contract as regulated in Article 1320 BW: the parties' agreement, the parties' skills, particular objects, and lawful causes. In implementing tourism investment contracts, it must pay attention to and apply the principle of good faith as stated in Article 1338 paragraph (3) BW, which reads: "Agreements must be carried out in good faith."

If a problem arises regarding a tourism investment contract, the ideal solution is to reflect the three principles of the theory of legal objectives as proposed by Gustav Radbruch, and the law must contain 3 (three) identity values, which is as follows:

1. The principle of legal certainty (*rechtmatigheid*), this principle is reviewed from a juridical point of view;
2. The principle of legal justice (*gerechtigheit*), this principle reviews from a philosophical point of view, where justice is equal rights for all before the court;
3. The principle of legal expediency (*zwechmatigheid or doelmatigheid or utility*).

Legal certainty in a normative contract is when it is made with certainty because it regulates clearly and logically. It will not cause doubt because of the existence of multiple interpretations so that it does not conflict or cause a conflict of norms. The contract is a law for the parties that contains the rules that serve as guidelines in carrying out the contents of the contract. The existence of rules and their implementation creates legal certainty.

The legal benefit is the principle that accompanies the principles of justice and legal certainty. The benefits of the contract need to be considered because the parties expect benefits in carrying out the contract. Justice is indeed one of the central values, but expediency is also critical. So in law enforcement, the comparison between benefits and sacrifices must be proportional.

Legal justice, according to L.J Van Apeldoorn, should not be considered the same as equalization. Justice does not mean that everyone gets the same share [4]. It means that justice requires that each case be weighed separately, meaning that what is fair to one person is not necessarily fair to another.

Satjipto Rahardjo formulated the concept of justice to create justice based on the values of balance on equal rights and obligations. Fence M. Wantu said, "fair is essentially putting things in their place and giving to anyone what is their right, which is based on the principle that all people are equal before the law." [5].

Some scholars propose ideas about justice based on contracts include J. Locke, JJ. Rousseau, Immanuel Kant, and John Rawls. These scholars realize that the business community will not run without a contract that gives birth to rights and obligations. With a contract, it is hoped that each individual will keep his promise and carry it out. Therefore, there is a relationship between justice and a contract that is binding, so forming a contract must be based on justice. The purpose of making a contract is not only when desired at that time occurs, but also hopes in the future realized through related legal actions [6]. The issue of fairness is reciprocally related to business activities. In practice, although the principle of freedom of contract is put forward to reach an agreement on forming a contract. It still causes many legal problems, especially those related to the implementation of the contract itself. It is still unable to accommodate balance

and protection between the parties, resulting in not guarantee fairness in contracting.

In understanding it, the principle of proportionality cannot be separated from the basic principles of contract law [7]. This understanding is necessary to know how the principle of proportionality works with other principles of contract law. These principles are not separate, but in many ways filling and complement each other. This approach aims to create a proportional contractual relationship between business people, as a pattern of *win-win solution* that a symbiotic relationship of mutualism. In principle, the contract is made to give trust to the parties of different interests. Through the contract, it is hoped that the goals of the parties can be achieved. Contracts in their achievement cannot be separated from benefits, certainty, and justice.

For parties who fail to carry out something that has been agreed upon, then the other party can use the authority of the judiciary to carry out the contract even to obtain compensation or other reparation that is permitted by law" [8]. Considering the above, it is hoped that the purpose of making a contract, that is, the creation of expediency, justice, order, and legal certainty, can be realized. The contract contains the meaning of "a promise must be kept" or "a promise is a debt." With a contract, it is hoped that each individual will keep his promise and carry it out [9]. When problems arise regarding contracts, justice seekers certainly really want to be resolved fairly. In order to uphold justice, the settlement must be by its true purpose, namely to provide equal opportunities for litigants. Thus the ideal solution must fulfill these three principles. However, sometimes there is a particular emphasis on one of the dominant aspects. It does not mean that the decision has ignored other related principles. These three principles are closely related to make the law a guide to behavior in every legal action. However, if the three principles are related to reality, there is often a conflict between justice and legal certainty or legal certainty against benefits. Every case cannot be generalized, and it can change from one principle to another, which is deemed relevant to be stated in the legal considerations. In making legal considerations, it must be with good reasoning, and this is what makes the reason to prioritize certain principles without leaving other principles, of course. Thus the quality of the settlement can be assessed from the reasons and legal considerations used in the case. Based on the description above, if problems arise in the field of contracts, efforts must be made to resolve them by applicable regulations, considering the harmony of all principles of contract law. Because all of these principles are interrelated, applied simultaneously, take place proportionally and somewhat, and serve as a binding framework for the contents of the contract. Thus, it is hoped that the ideal and desired application of the law can be materialized.

#### 4. CONCLUSION

To create certainty, benefits, and justice in the law of tourism investment contracts in Indonesia. In drafting tourism investment contracts, must pay attention to and apply the principles of contract law, that is: the principle of freedom of contract, the principle of consensual, the principle of *pacta sunt servanda*, the principle of good faith, the principle of personality and the provisions of Article 1320 BW, i.e., agreement of the parties, the skills of the parties, particular objects and lawful causes. Moreover, in implementing tourism investment contracts, they must pay attention to and apply the principle of good faith as stated in Article 1338 paragraph (3) BW.

The settlement process is based on three theoretical principles of legal objectives. It is the principle of legal certainty (*rechtmatigheid*), the principle of legal justice (*gerechtigheit*), the principle of legal expediency (*zwechmatigheid* or *doelmatigheid* or utility) proportionally and by the principles of contract law. Because all of these principles are interrelated, they cannot be separated, applied proportionally, and used as a binding framework for the contract.

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#### REFERENCES

- [1] Law of the Republic of Indonesia Number 25 of 2007 regarding Investment, Article 3 (2).
- [2] *Ibid*, Explanation section.
- [3] Law of the Republic of Indonesia Number 10 of 2009 regarding Tourism, Article 23.
- [4] L.J. Van Apeldoorn, *Pengantar Ilmu Hukum, translate of. Oetarid Sadino*, Jakarta: Pradnya Paramita, 1993, page. 11.
- [5] Fence M. Wantu, *Mewujudkan Kepastian Hukum, Keadilan dan Kemanfaatan Dalam Putusan Hakim di Peradilan Perdata*, Legal Dynamics Journal, (Gorontalo) Vol. 12 Number 3, September 2012, page. 484.
- [6] Fauzie Yusuf Hasibuan, Dissertation, *Harmonisasi Prinsip Unidroit Kedalam Sistem Hukum Indonesia Untuk Mewujudkan Keadilan Berkontrak Dalam Kegiatan Anjak Piutang*, Jakarta: Program Doktor Ilmu Hukum Pascasarjana Universitas Jayabaya, page. 42.
- [7] *Ibid*, page. 229.
- [8] Soejono Dirdjosisworo, *Hukum Bisnis*, Bandung: Mandar Maju, 2003, page. 28.
- [9] Reimon Wacks, *Jurisprudence*, London: Blackstones Press Limited , 1995, page. 191.