Analysis of Breach of Contract Dispute Resolution Through Litigation and Non-Litigation Pathways

I Wayan Wahyu Wira Udytama
Faculty of Law, Universitas Mahasaraswati Denpasar, Denpasar, Indonesia
Kamboja Street, No.11A Dangin Puri Kangin, Denpasar, Bali, Indonesia 80233
wira.udytamafh@unmas.ac.id

Ni Nyoman Manik Gita Asrita
Faculty of Law, Universitas Mahasaraswati Denpasar, Denpasar, Indonesia
Kamboja Street, No.11A Dangin Puri Kangin, Denpasar, Bali, Indonesia 80233
nikgitaritaa28@gmail.com

Agus Adi Setyawan
Faculty of Law, Universitas Mahasaraswati Denpasar, Denpasar, Indonesia
Kamboja Street, No.11A Dangin Puri Kangin, Denpasar, Bali, Indonesia 80233
agusadisetyawan5225@gmail.com

Agung Diva Widya Noviyana
Faculty of Law, Universitas Mahasaraswati Denpasar, Denpasar, Indonesia
Kamboja Street, No.11A Dangin Puri Kangin, Denpasar, Bali, Indonesia 80233
agungdiva2211@gmail.com

Komang Sugiantari
Faculty of Law, Universitas Mahasaraswati Denpasar, Denpasar, Indonesia
Kamboja Street, No.11A Dangin Puri Kangin, Denpasar, Bali, Indonesia 80233
tarisugian858@gmail.com

Abdul Kadir Jaelani
Faculty of Law, Universitas Sebelas Maret, Surakarta, Indonesia
Ir. Sutami street, No. 36 Kentingan, Jebres, Surakarta, Jawa Tengah, Indonesia 57126
jaelaniabdulkadir@staff.uns.ac.id

***Abstract*—An agreement is a meeting of the parties' desires and is then an expression of the parties' desires. However, if there is a deviation from the principle of good faith in the contract, an action called default arises. Default means the failure to fulfill or negligence as written in an agreement and carried out by one of the parties in the agreement. Based on this, writing aims to analyze the settlement of default disputes through litigation and non-litigation. Based on the results of the study, default disputes can be resolved through non-litigation and litigation, depending on the contents or clauses of the agreement that discuss the settlement of the dispute. Non-litigation means resolving disputes outside the courts, which adheres to the principle of a win-win solution, including negotiation, mediation, arbitration, and conciliation. Negligence often occurs in money lending transactions, such as when a debtor is late paying so that a fine is imposed or even has difficulty paying. When the parties to the agreement cannot fulfill the obligations described in the agreement clause, this is called default. Settlement of default disputes can be carried out through the courts (litigation), where the absolute competence of the court is the district court.**

***Keywords*— *Breach of Contract; Litigation; and Non-Litigation*.**

I. INTRODUCTION

According to the Great Dictionary of the Indonesian Language, a contract is an agreement with legal sanctions between two or more parties to do or not do an activity. Based on Article 1233 of the Civil Code, agreement is one of the causes of an agreement other than law. Furthermore, according to Article 1313 of the Civil Code, the parties who enter into the agreement will give rise to the term agreement.[1] The agreement itself has two forms, namely written like a contract and unwritten like an oral agreement. Of course, agreements are not

A. K. Jaelani et al. (eds.), *Proceedings of the International Conference on Cultural Policy and Sustainable Development (ICPSD 2024)*,
Advances in Social Science, Education and Humanities Research 869,
https://doi.org/10.2991/978-2-38476-315-3_89

simply made without certain criteria.[2] These criteria are based on Article 1320 of the Civil Code, referred to as valid conditions for an agreement, of which there are 4, namely agreement, capacity, a certain thing, and a lawful cause.[3] The first and second conditions are called subjective conditions, which if not met, the agreement can be canceled, while the third and fourth conditions are objective conditions, which if not met, the agreement is null and void by law. These legal conditions for an agreement play a crucial role in ensuring the validity and enforceability of the contract. Apart from the 4 legal conditions for an agreement, there are principles that form the basis of an agreement such as the principle of freedom of contract, the principle of consensualism, the principle of pacta sunt servanda, and the principle of good faith.

A contract arises because of an agreement or consent. An agreement is a meeting of the parties' desires and is then an expression of the parties' desires.[4] However, if there is a deviation from the principle of good faith in the contract, an action called breach of contract arises.[5] A breach of contract can also be called an omission, a broken promise, or negligence (violating an agreement).[6] A breach of contract can be understood as the premature or improper implementation of an obligation, resulting in the violating party being obliged to carry out or pay compensation. If one party is in default, the other party can request termination/cancellation of the contract agreement.

Default means failure to fulfill or negligence as written in an agreement and carried out by one of the parties in the agreement.[7] Meanwhile, according to Subekti, the forms and conditions that must exist so that the act is declared an act of default include (1) not doing what was promised to be done; (2) carrying out what was promised, but not as promised; (3) doing what was promised but late; and (4) doing something that according to the agreement should not be done.[8] Provisions regarding default include provisions regarding the emergence of the right to sue regulated in Article 1267 of the Civil Code, Article 1243 of the Civil Code regarding compensation schemes, Article 1238 of the Civil Code regarding statements of negligence in carrying out performance, and other provisions.[9] A person who should carry out performance in an agreement, which can be declared to have committed a default, has 4 (four) forms, namely not carrying out performance at all, carrying out performance but not as it should be, carrying out performance but not on time, or carrying out acts that are prohibited in a contract or agreement.

Dispute resolution is an integral part of the function of the legal system in dealing with conflicts between disputing parties.[10] Civil dispute resolution, especially breach of contract, is divided into two channels: litigation and non-litigation.[11] Litigation dispute resolution is a process carried out in court by following the trial procedures according to procedural law provisions. In this process, the disputing parties face each other in court, resulting in a judge's decision. Dispute resolution can also be resolved through non-litigation channels (outside the court), which are usually referred to as Alternative Dispute Resolution (ADR) in Indonesia, usually referred to as Alternative Dispute Resolution (from now on referred to as APS). Based on the background above, the object of this study is to determine the regulations for dispute resolution of breach of contract in litigation and non-litigation channels in Indonesian Law. This study aims to determine the regulations for dispute resolution of breach of contract in litigation and non-litigation channels in Indonesian Law.

II. LITERATURE REVIEW

A. Dispute

The legal system in Indonesia, in the context of codified regulations, adheres to the civil law system, with Pancasila as the ideology and source of all applicable State law in the country. However, in practice, Indonesia also adheres to the Anglo-Saxon legal system, which accommodates Judges' decisions and the results of the discussion of the judicial system in the Supreme Court as legal references.

The Code of Procedural Law comprises the rules that govern civil procedural law. In the regions of Java and Madura, procedural law is governed by Herzien Inlandsch Reglement ("HIR"), while Rechtreglement voor de Buitengewesten governs the other regions. Both codes of procedure still adopt Dutch colonial law. However, only civil procedural law applies, as the criminal law procedure has been replaced by Law No. 8 of 1981 regarding Criminal Law Procedure. In dispute in the Big Indonesian Dictionary, dispute means opposition or conflict, and conflict means opposition or conflict between people, groups, or organizations against one object of the problem. Disputes usually start when one party feels disadvantaged by another party.[12] The regulation is silent on litigation funding. However, we have seen informal parties fund the litigation cases in civil litigation disputes. Claimants and Defendants are allowed to arrange a contingency fee or conditional fee, provided it is agreed upon in writing in a settlement agreement. After the Panel issues a decision, both the Claimant and the Defendant must comply with the Panel's ruling.

Feelings of dissatisfaction will surface if there is a conflict of interest. Formal dispute resolution develops into an adjudication process consisting of processes through courts/litigation and arbitration/arbitration and informal conflict resolution processes based on agreements between the disputing parties through negotiation and mediation. The judicial institution is one of the conflict resolution institutions that has played a role. However, the decisions given by the court have not been able to create satisfaction and justice for both parties to the dispute.

Court decisions tend to satisfy one party and not satisfy the other party. The court will win the party that can prove that he has the right to something.

On the other hand, if a party is unable to provide evidence that it has a right to something, then that party will undoubtedly be defeated by the court, even though, in essence, that party has the right. In this context, dispute resolution through the courts requires 'formal proof,' regardless of the parties' ability to provide evidence. Winning or losing is the final result the parties will reap if the dispute is resolved through the courts.

B. Breach of Contract

Breach of contract is a term taken from the Dutch wanprestatie, which means failure to fulfill an obligation or performance in an agreement.[13] Based on the meaning of KBBI, default is a condition where one party (usually an agreement) performs poorly due to negligence. Default, as explained in Article 1238 of the Civil Code, is a condition in which the debtor is declared negligent by a letter of instruction, by a similar deed, or based on the power of the obligation itself, namely if this obligation results in the debtor being considered negligent by the passage of the specified time. If there is a default, the negligent party must provide compensation for costs, losses, and interest. The consequences or sanctions of default are contained in Article 1239 of the Civil Code, which explains that every obligation to do something or not to do something must be resolved by providing compensation for costs, losses, and interest if the debtor does not fulfill his obligations. Reimbursement of costs is compensation for costs or money spent by one of the parties. Then, what is meant by compensation is compensation for losses that the negligence of the defaulting party has caused.

If there is a breach of contract, the negligent party must compensate the debtor for costs, losses, and interest. The consequences or sanctions of this breach of contract are contained in Article 1239 of the Civil Code, which states that every obligation to do something or not to do something must be resolved by providing compensation for costs, losses, and interest if the debtor does not fulfill his obligations.

Reimbursement of costs is compensation for costs or money spent by one of the parties. Then, what is meant by compensation is compensation for losses incurred from the negligence of the defaulting party. Furthermore, J. Satrio, in the Law of Contracts, explains that interest can be classified into three types. Moratoir Interest, namely interest owed because the debtor is late in fulfilling his obligations. Conventional interest, namely interest agreed upon by the parties. And Compensatory interest, namely all interest outside the interest in the agreement.

III. METHOD

The type of research used in this study is normative legal research, namely research based on library data as its primary data, which is secondary data in the form of legal materials.[14] Primary legal materials use laws and regulations, especially the Civil Code. Secondary legal materials consist of books, journals, research reports, and scientific articles. The legal materials obtained will be classified and analyzed using qualitative descriptive analysis. The provisions of specific articles in the Judicial Power Law and the Arbitration and APS Law in addition to others in the HIR procedural law are the focus of the study, as well as the settlement of disputes in litigation and non-litigation are examined and compared to see the material and methods that can contribute positively to settling business disputes in the context of investment. The effectiveness and effectiveness of the litigation and non-litigation concepts with each advantage/disadvantage, as well as the level of suitability with disputes and cooperation contracts, are examined to obtain arrangements that are conducive to investment development.

IV. RESULT AND DISCUSSION

A. Non-Litigation Breach of Dispute Resolution

Non-Litigation is a process of resolving cases, or disputes that are resolved outside the court.[15] Dispute resolution through litigation (court) is not the only way to resolve disputes that can be taken by the disputing parties. All matters that have been agreed upon are joint decisions of the disputing parties. The method of resolving disputes through non-litigation as previously mentioned can be described as follow[16]:

1. Dispute resolution through negotiation. To resolve a dispute, one way that can be taken is for the disputing parties to negotiate, which is a way to find a solution to the problem through deliberation to reach an agreement directly between the disputing parties, the results of which can be accepted by the parties.
2. Dispute resolution through mediation. Mediation is also a form or way of resolving disputes outside the courts. Unlike negotiation, the dispute resolution process through mediation can involve other people or third parties who become or act as mediators. The legal basis for mediation can be seen in Article 6, paragraphs (3), (4), (5) of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. Law Number 30 of 1999 regulates the legal provisions on mediation, a process of activity that continues the failure of negotiations carried out by the disputing parties. Article 6 paragraph (3) of Law Number 30 of 1999 states

that in the event of a dispute or difference of opinion between the disputing parties that cannot be resolved, then upon written agreement of the parties, the dispute or difference of opinion is resolved through the assistance of one or more expert advisors or a mediator

3. Dispute resolution through arbitration. Suppose the parties' efforts to resolve their dispute through negotiation and mediation are not achieved. In that case, the parties, based on a written agreement, can submit an attempt to resolve the dispute through an arbitration body. Dispute resolution through arbitration is a dispute outside the court that is binding and final. Based on the understanding above, three things underlie dispute resolution through arbitration. First, arbitration is a form of non-litigation resolution. Second, the arbitration agreement must be made in writing. Third, the arbitration agreement is an agreement to resolve disputes that is carried out outside the general courts.
4. Dispute resolution through conciliation. As with mediation, conciliation is resolving disputes outside the court between the disputing parties by involving a neutral and impartial third party. Mediators and conciliators serve as facilitators to communicate between the disputing parties so that a solution can be found that can satisfy the parties themselves. It is just that a conciliator's role is limited to taking actions such as arranging the time and place of the meeting of the disputing parties, directing the topic of discussion, carrying messages from one party to another if the message cannot be delivered directly or the parties do not want to meet directly. Meanwhile, mediators, in addition to being able to do the things that conciliators do, also suggest solutions or proposals for resolving disputes, which theoretically are outside the authority of the conciliator in terms of using conciliation or mediation.

B. Litigation Breach of Dispute Resolution

Default is often considered as a breach of promise or injury that comes from the word wan (Dutch), which means absence, and the word Prestasi (Dutch), which means obligation. It can be concluded that default is a poor performance or an obligation not fulfilled by the person who agreed. It can also be said to be the absence of achievement.[17] The definition of achievement in Article 1234 of the Civil Code is an individual who makes a delivery of something, does or does not do something. Default or breach of promise occurs in the context of an agreement between several parties.[7] It is related to Article 1338 to Article 1431 of the Civil Code, which regulates obligations based on agreements or obligations.

Meanwhile, Article 1352 to Article 1380 of the Civil Code regulates obligations from the law. There are many cases where a person's mistake or forgetfulness cannot be used as an excuse for not carrying out obligations according to the agreement. Sometimes, the agreement also does not provide precise details about when a party must be considered in default. Negligence often occurs in money lending transactions, such as when a debtor is late in paying so that he is subject to a fine or even has difficulty paying. When the parties to the agreement cannot fulfill the obligations described in the agreement clause, this is called default. Default dispute settlement can be done through the courts (Litigation).[18] Litigation is a dispute resolution process in which the parties bring their cases to court, and the resulting decision has binding legal force.

Breach of contract occurs after the agreement is formed, which can be classified into four situations[2]:

1. For something capable of being done, he does not do it.
2. Doing something that is promised but not by what was promised.
3. Being late in doing something that is promised.
4. Doing something that is prohibited in the contract.

Breach of contract in a contract can lead to significant consequences. These may include bearing legal costs, replacing losses, transferring risks, and even contract cancellation.[19] Settlement of all types of civil disputes (including breach of promise or breach of contract) in the Court is regulated by the provisions of civil procedural law, namely HIR. The Court has the authority and power to examine, try, and decide all civil cases, both civil and criminal cases. What is meant by resolving disputes through litigation is a court proceeding in which the power to control and make decisions belongs to the judge. In the process of the trial, the parties to the case will face each other to defend what is their right.

Elements of Breach of Contract[1]:

1. Mistake The statement of the existence of a mistake must first meet several requirements, namely:
   a. Must be able to avoid the act that is intended to be done and;
   b. The person who committed the act can be blamed, namely that the person who committed the act can think about the consequences of his actions. The consequences of the act can be predicted or not, solely to know the possible consequences that can arise; the consequences are known through objective and subjective elements. From the objective element, can the standard conditions of the consequences be

predicted, and from the subjective element, are predictions or assumptions of the consequences made through expert assessment?

2. Negligence is an act carried out by a person who knows the possibility of a consequence that can harm another party. Determining negligence has occurred is problematic because it must be proven. After all, it is not uncommon for provisions regarding when the achievement is carried out not to be determined.
3. Gap is an act that is intended and known. Therefore, when a gap occurs, the intention or intent is not needed to cause harm to others, as long as the person who committed the act knows what he is doing but still does it, that is enough. In simpler terms, a 'gap' is an action that is done knowingly, even if it can cause harm to others.

The easiest way to state that someone has committed a breach of contract is if a particular person/party does something prohibited by the agreement. According to Article 1238 of the Civil Code, a breach of contract is considered to have been committed if there has been a letter of instruction or a deed similar to the letter of instruction.

Principles of Contract[17]:

1. Principle of Consensualism This principle is called something that is agreed upon, which is necessary in agreeing. This definition is considered inappropriate because the meaning of the principle of consensualism regarding the formation of a contract is when an agreement is made. So, a contract will be formed if it has been agreed upon by the parties, even though the contract has not been executed at that time at that time. So, when the parties agree, rights and obligations will arise for the parties. It is also commonly said that the contract already has an obligatory nature; that is, it has created obligations for the parties to carry out the contract.
2. The Principle of Freedom in Contracts: This principle, perhaps the most liberating in contract law, is based on article 1338 paragraph 1 BW. It states that all legally formed agreements will be enforced as a law for the parties entering into the agreement. The essence of this principle is the freedom of the contracting parties to make a contract, both in content and other provisions, as long as certain conditions are fulfilled and the contract is executed in good faith.
3. Principles of Contract Binding: This principle underscores the serious nature of contract execution. All parties who have formed a contract are bound to execute and fulfill it. The agreements and promises made in the contract are as binding as the Law itself, in line with Article 1338 paragraph 1 of the Civil Code.
4. The principle of good faith Article 1338, paragraph 3 of the Civil Code states that good faith must be used in carrying out a contract. Good faith is not a requirement for a contract to be considered valid; it is only required in the execution of a contract, not in the formation of the contract.

Breach of contract has serious consequences. It is essential to confirm whether there is a breach or negligence, and if disputed, it must be proven before a judge. Filing a lawsuit related to breach of contract begins with a summons from the court bailiff, either verbally or in writing, which the debtor cannot easily deny.

Settlement of default through the courts follows civil law procedures. In this settlement, compensation or collateral seizure can be imposed if necessary by Article 227 of the Civil Procedure Code. The court process begins with filing a lawsuit in the district court, which is the first instance court. The trial includes reading the lawsuit, replication, duplication, examination of evidence, and the imposition of a verdict by the panel of judges. Non-litigation alternatives include arbitration and Alternative Dispute Resolution (ADR). Before choosing litigation or non-litigation, the judge may propose mediation or agreement to the parties involved.

V. CONCLUSION

There are two paths to settling default disputes: non-litigation and Litigation. Non-litigation means resolving disputes outside the Court, adhering to the principle of a win-win solution, which includes negotiation, mediation, arbitration, and conciliation. Furthermore, the legal basis for resolving disputes outside the Court is regulated in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. Litigation is the settlement of disputes in Court, where the absolute competence of the Court is the district court because it is related to civil cases. The settlement of all types of civil disputes (including breach of promise or default) in Court is regulated by the provisions of civil procedural law, namely the Civil Code and the Civil Procedure Code. In resolving disputes in Court, the length of time required tends to be long, significantly impacting the increasing expenditure used. This underscores the pressing need for a more efficient justice system. Therefore, the author hopes that the regulator can revise the court proceedings to be in accordance with the principles of simple, fast and low-cost justice.

REFERENCES

[1] M. Emirzon, Joni. Sadi Is, "Hukum Kontrak: Teori dan Praktik." Kencana, p. 168, 2021. [Online]. Available: https://books.google.com/books?hl=en&lr=&id=VMI0EAAAQBAJ&oi=fnd&pg=PA1&dq=hukum+kontrak+&ots=gM-YOIxi5K&sig=GZrPak2h2UskoHj1GVYoz6Y48fQ.
[2] R. Christiawan, Rio. Wulandari, "Hukum Kontrak Bisnis." Sinar Grafika, p. 83, 2023. [Online]. Available: https://books.google.co.id/books?id=QYnmEAAAQBAJ&printsec=copyright&source=gbs_pub_info_r#v=onepage&q&f=false
[3] I. W. A. Vijayantera, "Kajian Hukum Perdata Terhadap Penggunaan Perjanjian Tidak Tertulis Dalam Kegiatan Bisnis," *J. Komun. Huk.*, vol. 6, no. 1, pp. 115–125, 2020.
[4] I. Parmitasari, "Peran Penting Negosiasi dalam Suatu Kontrak," *J. Literasi Huk.*, vol. 3, no. 2, pp. 50–62, 2019.
[5] P. C. Tiodor, M. Tjahyani, and others, "Pembuktian Wanprestasi Perjanjian Utang Piutang Secara Lisan," *Krisna Law J. Mhs. Fak. Huk. Univ. Krisnadwipayana*, vol. 5, no. 1, pp. 27–39, 2023.
[6] E. R. Sari, "Penyelesaian Wanprestasi Sewa Menyewa Tanah dengan Sistem Pembayaran Panen di Desa Kedaton 1 Kecamatan Batanghari Nuban Kabupaten Lampung Timur," IAIN Metro, 2022.
[7] H. S. Salim, *Hukum kontrak: Teori dan Teknik Penyusunan Kontrak*. Sinar Grafika, 2021.
[8] M. T. Pangestu, *Pokok-Pokok Hukum Kontrak*. CV. Social Politic Genius (SIGn), 2019.
[9] I. Isman, "Kumulasi Gugatan Antara Perbuatan Melawan Hukum Dan Wanprestasi," *J. Yudisial*, vol. 14, no. 1, pp. 57–78, 2021.
[10] S. Muhammad, "Hukum Kontrak (Segi Pengayaan Hukum Perikatan)." Bandung, CV Mandar Maju, 2012.
[11] D. R. R. Sejati, "Penyelesaian Sengketa Wanprestasi Secara Alternatif Melewati Badan Arbitrase Nasional Indonesia (BANI)," *Indones. J. Law Justice*, vol. 1, no. 3, p. 12, 2024.
[12] N. M. T. Dewi, "Penyelesaian Sengketa Non Litigasi Dalam Penyelesaian Sengketa Perdata," *J. Anal. Huk.*, vol. 5, no. 1, pp. 81–89, 2022, doi: 10.38043/jah.v5i1.3223.
[13] S. Prayogo, "Penerapan Batas-Batas Wanprestasi Dan Perbuatan Melawan Hukum Dalam Perjanjian," *J. Pembaharuan Huk.*, vol. 3, no. 2, p. 280, 2016, doi: 10.26532/jph.v3i2.1453.
[14] P. M. Marzuki, "Penelitian Hukum," 2013.
[15] G. P. S. RM, *Arbitrase dan Mediasi di Indonesia*. Gramedia Pustaka Utama, 2006.
[16] D. R. I. Hapsari, A. A. S. Ilmiawan, and E. Samira, "Non-litigation as An Environmental Dispute Resolution Mechanism in Indonesia," *Indones. Law Reform J.*, vol. 2, no. 1, pp. 55–66, 2022.
[17] R. Subekti, "Jaminan-Jaminan untuk Pemberian Kredit menurut Hukum Indonesia," 1991.
[18] Kementrian Keuangan Republik Indonesia, "Arbitrase- Dan-Alternatif-Penyelesaian-Sengketa." 2022. [Online]. Available: https://www.djkn.kemenkeu.go.id/
[19] J. A. Helewitz, *Basic Contract Law for Paralegals:[Connected EBook with Study Center]*. Aspen Publishing, 2024.