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THE PRESENCE OF PENALTY CLAUSE UNDER EMPLOYMENT AGREEMENT

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Abstract

The research has the objectives of identifying and analyzing the presence of penalty clause under Employment Agreement from Employment Law perspective and identifying as well as analyzing the implementation of penalty clause under Employment Law by Mediator on Employment within their recommendation. This is a normative and empirical research. The data is obtained from library and field research by way of document review and interview of the subject of research. The data are analyzed qualitatively while the result is presented descriptively. The result research shows that the presence of penalty clause under Employment Agreement is not regulated explicitly under Employment Law, but since one of the aspects of Employment Law is subject to Civil Law through Employment Law, the provision of Contract Law regulated under Book III of The Indonesian Civil Code remains applicable. In this regard, Civil Law must be deemed as law in general, unless otherwise determined by Employment Law. A mediator's recommendation on Employment Law does not fully implement penalty clause which is presence in The Employment Agreement since it is considered as contradictory to the reasonableness and justice. Mediator prioritizes good faith principle over pacta sunt servanda principle in providing their recommendation.

Keywords : *employment agreement; good faith; pacta sunt servanda; penalty*

Abstrak

Penelitian ini bertujuan untuk mengidentifikasi dan menganalisis adanya klausa penalti berdasarkan ketenagakerjaan dari perspektif ketenagakerjaan dan identifikasi serta menganalisis penerapan klausul penalti berdasarkan Undang-Undang Ketenagakerjaan oleh mediator ketenagakerjaan sesuai rekomendasinya. Ini adalah penelitian normatif dan empiris. Data diperoleh dari penelitian kepustakaan dan lapangan dengan cara melakukan kajian dokumen dan wawancara subjek penelitian. Data dianalisis secara kualitatif sedangkan hasilnya disajikan secara deskriptif. Hasil penelitian menunjukkan bahwa adanya klausa penalti berdasarkan perjanjian ketenagakerjaan tidak diatur secara eksplisit dalam Undang-Undang Ketenagakerjaan, namun karena salah satu aspek dari Undang-Undang Ketenagakerjaan adalah subjek pada hukum perdata melalui Undang-undang Ketenagakerjaan, ketentuan hukum kontrak yang diatur dalam Buku III KUHP Indonesia tetap berlaku. Dalam hal ini, hukum perdata harus dianggap sebagai hukum secara umum, kecuali ditentukan lain oleh Undang-undang Ketenagakerjaan. Rekomendasi mediator berkaitan Undang-Undang Ketenagakerjaan tidak sepenuhnya menerapkan klausula hukuman yang ada dalam perjanjian ketenagakerjaan karena dianggap bertentangan dengan kewajaran dan keadilan. Mediator memprioritaskan prinsip itikad baik atas prinsip pacta sunt servanda dalam memberikan rekomendasinya.

Kata Kunci: *itikad baik; penalti; perjanjian kerja; pakta sunt servanda*

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I. Introduction

One of the issues of employment in Indonesia at present is the flare of work agreements containing clauses with threat of punishment. In employment practice, these clauses are often referred to as *penalty* clauses. The penalty forms which are usually accommodated in work agreements are indemnification in the certain amount times a month salary if a worker resigns before the termination of work agreement, not due to a certain condition such as illness or any other reasons determined in working agreement or detention of school diplomas.

Such type of work agreements are usually drafted in a standard form which form and content are determined unilaterally by entrepreneurs as the party which social and psychological lives are higher than the worker. There are two possibilities when a worker is proposed with such agreement format: *take it or leave it*.

In the beginning of the worker's work period, since he/she is in a desperate condition, he/she feels like there is no other choice but to accept the content of agreement with penalty clause. When the worker resigns, he/she feels that such clauses are not

fair since they are burdensome and hard to comply with.

For entrepreneurs, the incorporation of penalty clauses in work agreement is intended to avoid workers from resigning therefore they serve as warranty for the binding implementation, the worker is obliged to do something which is the engagement that is not complied with. Therefore such penalty clauses in an agreement are intended to protect the interest of entrepreneurs from suffering loss incurred by workers.

Penalty clauses from entrepreneur point of view is intended to cause workers to comply with the content of work agreement/exercise his/her obligations. The stipulation of penalty clauses serves as the indemnification for loss suffered by entrepreneurs for the incompliance with or the violation of agreements.

Penalty clauses in agreements, including work agreements, thus have two intentions namely first, to drive debtors to satisfy their obligations and second to hold creditors harmless from verification on the amount of loss they suffer due to the amount of loss that has to be verified by creditors.²

² Ridwan Khairandy. 2013. *Hukum Kontrak Indonesia dalam Perspektif Perbandingan*. Yogyakarta: FH UII Press, hlm. 53-54.

According to Subekti, engagement with penalty must be differentiated from voluntary engagement in which debtors may choose among several performances. In an engagement with penalty, there is only one performance that must be done by debtors. If a debtor does not implement or has default on implementation of such performance, he/she must comply with provisions stipulated as penalty.³

In practice, penalty clauses is relatively considered as unfair for workers since these clauses are consequences that are hard to comply with. Several cases pertaining to penalty clauses have begun to be questioned, one of which took place in Special Region of Yogyakarta.

In Special Region of Yogyakarta between 2012-2015 there were 21 case reports with regard to penalty clauses in work agreements which were considered as burdensome for workers filed to Private Ombudsman (LOS) of Special Region of Yogyakarta (DIY). Several cases among them were settled in mediation stage which mediator was City/Regency Manpower Service.

Manpower Law and its Regulations do not accomodate the

content of work agreement related to penalty clauses, therefore they are left to parties concerned to regulate. In work agreements there is a service relationship, there is someone who orders people around, there is also someone who is being ordered around. There are people who have larger access to resources compared to others. The chance of exploitation with all of the modification is also relatively large.

The presence of countries (or government as state aspect) as mediator in industrial relation dispute thus becomes important. Amicable industrial relation dispute settlement is basically categorized into settlement groups conducted by disputing parties by involving a third party. This dispute settlement involves a mediator if viewed from the method of settlement is a settlement by way of *win-win solution*. Mediation therefore can be considered as the best settlement method since it will maintain harmonious relation of parties involved.⁴ Such opinion can be accepted since meditation settlement is informal, mediator's recommendation is based on meeting

³ Subekti. 1984. *Hukum Perjanjian*. Jakarta: Intermasa, hlm. 12.

⁴ Sehat Damanik. 2007. *Hukum Acara Perburuhan*. Jakarta: Dss Publishing, hlm. 41.

point during the opinion hearing of the disputing parties involved.⁵

With regard to penalty clauses incorporated in work agreement, if there is a dispute on its presence, there is mediation domain to settle it since it is included in right dispute. It becomes an issue since penalty clauses are not regulated under Employment Law or laws and regulations which are its implementing regulation. Mediator cannot decline dispute applied to him/her under the reason that there is no regulation for it. Article 13 paragraph (2) of Law Number 2 of 2004 even states that in the event parties in mediation do not reach agreement, mediator must issue recommendation in writing. Therefore mediator's recommendation pertaining to penalty clauses in work agreement is important to be taken into account through research.

Based on issue background above the issue can be formulated as follows: first, How is the presence of penalty clauses in work agreement in Employment Law perspective? and, second, Does employment mediator stipulate penalty clauses which are contained in work agreement in its advice when settling industrial dispute related to such matter?

⁵Susanti Adi Nugroho. 2009. *Mediasi sebagai Alternatif Penyelesaian Sengketa*. Jakarta: Telaga Ilmu Indonesia, hlm. 30.

II. Method

This research is descriptive in nature since it describes legal issue in the level of theory and practice.⁶ This research is a normative legal research with secondary data from various sources. Various principles, norms and value system are studied in this research. Normative research was done to answer the first issue. This research is also an empirical research since it requires primary data through field research. Empiric research was done to answer the second issue.

The research was done through biblical research to obtain secondary data through documentary study on various legal entities. Field research was also done to obtain secondary data through interviews using interview guidance for respondents and interviewees.⁷ Research result data was analyzed using qualitative method. Analysis result was presented descriptively.

III. Analysis and Discussion

A. The Presence of Penalty Clauses in Work Agreement from Employment Legal Perspective

An agreement is an event where a person promises to another person

⁶ Moh. Nazir. 1988. *Metode Penelitian*. Jakarta: Ghalia Indonesia, hlm. 63.

⁷ Soerjono Soekanto dan Sri Mamudji. 2002. *Penelitian Hukum Normatif*. Jakarta: Gramedia Pustaka Utama, hlm. 18.

or where two people promise each other to do something. From such event, a relation between such two people emerges which is called engagement.

Engagement is a legal relation between two people or two parties, based on which one of the parties is entitled to demand something from the other party, and the other party is obliged to comply with such demand. As a legal relation it is regulated and acknowledged by the law therefore in the end it will incur a certain legal cause. In legal relation between two parties there are rights attached to one party and obligations to the other. Rights and obligations of these parties can be defended before the court.

Therefore such agreement can cause engagement between two people who draft it. In its form, such agreement is wording series which contain promises or readiness uttered or in writing. Engagement is an abstract definition, while agreement is a concrete matter or an event.⁸

Agreement therefore issues an engagement. Agreement is a source of engagement, it is even one of the most important sources which produces engagement. Engagement produced by agreement is indeed intended by two people or two parties

who draft an agreement. If two people draft an agreement, then they intend to cause an engagement between them on the promise that has been provided.

In an engagement there are two parties that are the subjects of engagement which are debtor and creditor. Creditors are the party that has the right upon on the implementation of performance and debtors are the party that has the obligation to implement a performance. Performance is an engagement object. Performance is debt or obligation that has to be implemented in an engagement.

Article 1234 of the Civil Code provides performance clarification in the form of providing something, doing or not doing something. Performance as engagement object must satisfy certain requirements as follows: it must be certain or at least can be determined, the object is allowed by the law, performance must be possible to be implemented.

Therefore performance must be certain, does not contradict the halal clauses. Such performance must be satisfied by debtors. To satisfy performance means to pay engagement content implementation in full. It is this performance

⁸Subekti, *op.cit.*, hlm.1-3.

satisfaction that is the objective of each engagement.

There are various methods of engagement in the community. Based on certain characteristics, engagement can be classified based on its source, content, performance nature, etc. One of performances that are present in the community is engagement with penalty. One of engagements with penalty can be viewed in work agreement. Several work agreements for instance incorporate the clause “in the event prior to the termination of work period a worker resigns such worker must pay a certain nominal amount or several times a month wage” and many others.

Work agreement with penalty clauses is not new in the community. It is not so hard to find work agreement with penalty clauses, as mentioned by an interviewee from Yogyakarta Labor Alliance.⁹ Work agreement with penalty clauses is relatively easy to be found in a standard agreement which content is determined by one of the parties whose bargaining position in such legal relation is higher than the other party. In enterprenur work agreement, the enterprenur’s bargaining power,

due to his/her excellence in the filed of economy and his/her physical condition, is more dominant compared to the worker . Subordination is a relation with condition abuse risk.

Indeed not all standard agreements have condition abuse, however at least the bargaining power imbalance potentially causes condition abuse. In work agreements, it is highly possible due to the weak bargaining power, causing no other option than to accept the requirements determined by entrepreneurs. There are only two options for workers when proposed with such agreement: take it or leave it. The same is true when workers have to face entrepreneurs who propose work agreement with clauses containing penalty engagement therein.

Engagement with penalty is an engagement in which a debtor, for implementation warranty engagement, is obliged to do something if the engagement is not satisfied. According to an interviewee from Apindo, such penalty stipulation is usually intended as indemnification for loss suffered by creditors due to the incompliance or violation of agreement.¹⁰

⁹ Interview with Mr. “Y”, Interviewee from Aliansi Buruh Yogyakarta, dated 3 Agustus 2016.

¹⁰ Interview with Mr. “X”, Interviewee from Apindo Yogyakarta, dated 6 Agustus 2016.

This engagement with penalty has two purposes, namely first, to drive debtors to satisfy performances and second, to hold creditors harmless from verification of amount of loss he/she suffers, due to the loss that has to be verified by creditors. .

This is why penalty contained as clauses in work agreement are usually relatively large compared to the capability of worker to satisfy them. With such large penalty workers are expected to think it through before violating the content of agreement. If penalty is not material workers will not be driven to satisfy performances.

Engagement with penalty must be differentiated from voluntary engagement or alternative engagement. In voluntary or alternative engagement there are more than one obligation or performance in which debtors may choose among several types of performance. Satisfaction of one of such performances hold debtors harmless from obligation to further performance, and engagement terminates. Nevertheless, debtors cannot insist that creditors accept part of one good and part of another good from two goods which constitute engagement objects.

In voluntary or alternative engagement the choosing right is on

the debtor, if this right is not expressly provided to the creditor. For instance X has to collect money in the amount of one hundred rupiah from a farmer, which money has not been paid in a long time. X drafted an agreement with such farmer stating that such farmer will be held harmless from his debt if he delivers his horse or a quintal of his rice to X.¹¹

In voluntary or alternative engagement, if one of the goods that were promised is annihilated or can no longer be delivered, such voluntary engagement becomes pure engagement. Pure engagement is the simplest form of engagement in which if in each party there is only one person, while something that can be demanded is only one thing, and demanding can be done immediately. On the contrary, if such both goods are missing and the debtor is guilty of the lost of one of such goods, then he/she is obliged to pay the price of the last missing good.

In voluntary or alternative engagement, if the choosing right is on the creditor and there is only one missing good, then if it happens not due to the fault of debtor, the creditor must obtain the existing good. On the contrary, if the lost of one of the goods is due to debtor's fault, then the

¹¹ Subekti, *Ibid.*, hlm. 53-54.

creditor may demand the delivery of the existing good or the price of good that is missing. If both goods are annihilated due to the debtor's fault then the creditor may demand the delivery of one of the goods or according to his/her choice.

In engagement with threat of punishment, there is only one type of performance that must be done by the debtor. If the debtor defaults the implementation of his/her performance, he/she must satisfy the provision that is stipulated as the penalty. This is why in engagement with threat of punishment, the penalty is usually very material since it is indeed intended to drive the debtor to satisfy his/her performance.

The same is true for work agreement with penalty clauses, as they relatively ease entrepreneurs if in the future they must file law suit for the loss due to worker's act which is threatened with penalty. It is not easy for entrepreneurs to verify the loss suffered due to such condition. For such purpose usually in penalty clauses it is already determined what act has to be performed by workers or the amount of loss that must be paid by workers to entrepreneurs.

In Civil Law, engagement with penalty is not extraordinary, some experts even place it as part of

various engagement groupings or classifications. Different from Civil Law, in Employment Law, the presence of penalty clauses are accommodated explicitly. Employment Law regarding agreement only regulates definition, parties, form, type, legal requirements, content and the termination of work agreement.

With regard to the content of work agreement, Article 54 of Employment Law only states that at least work agreement drafted in writing contains :

- a. Name, company address, and business type;
- b. Name, gender, age and address of worker;
- c. Position or type of work;
- d. Place of work;
- e. The amount of wage and method of payment;
- f. Work requirements which contain right and obligation of entrepreneur and worker;
- g. Commencement and period of agreement validity ;
- h. Place and date of when the work agreement is drafted; and
- i. Signatures of parties to work agreement.

In Employment Law, particularly on work requirements, penalty clauses are not regulated.

According to an interviewee at the Manpower Service, such penalty clauses are up to parties namely entrepreneurs and workers to regulate in terms of the content of right and obligation in the work agreement. This means penalty clauses in work agreements are a form of contract freedom principle.¹²

With contract freedom principle parties are entitled to determine among other things the content of agreement. However, such contract freedom is limited with halal clauses, which regulate that such freedom cannot contradict the law, public order and decency and the threat of being null and void. In Employment Law it is stated explicitly that work agreement cannot contradict company regulation, joint work agreement and the law.¹³

According to an interviewee from Apindo, a halal case is related to the legality of the agreement. In a work agreement with penalty, despite the content is determined unilaterally by entrepreneurs it is usually offered to workers to consider and accept. Despite its standard nature, in this type of work agreement there is still an agreement. This means there will be no defective therein since workers

are provided with the freedom in drafting an agreement and there is also no abuse of condition therein since entrepreneurs have described the consequences if a worker accepts the work agreement with penalty.¹⁴

According to researcher's opinion, work agreement with penalty is related to the content of agreement which can be accepted, however it cannot be attributed to the halal case. Halal case is related to the legality of agreement with threat of null and void on its violation. Work agreement with penalty has been agreed by parties regardless of who drafted the agreement content and its standard nature, an agreement that was drafted legally binds parties just like the laws.

The emerged issue is when work agreement content which has been agreed upon and does not violate contract freedom principle as well as *pacta sunt servanda* principle is considered as unreasonable and unjust. *Pacta sunt servanda* principle causes parties to be obliged to respect what has been agreed upon. What has been agreed as an agreement must be upheld and respected. Not just parties, third party such as the judge must respect such agreement.

¹² Interview with Mr. "Z", Interviewee from Disnakertrans DIY, dated 9 Agustus 2016.

¹³ Mustaqim. 2014. *Hukum Hubungan Industrial Ketenagakerjaan*. Yogyakarta: Mata Padi Presindo, hlm. 18.

¹⁴ Interview with Mr. "X", Interviewee with Apindo Yogyakarta, *op.cit.*

It becomes an issue when what has been agreed upon including penalty clauses becomes something that is considered as unreasonable and unjust. For this purpose another agreement law principle needs to be viewed namely goodwill. In the Civil Code it is stated that an agreement must be implemented with goodwill. Goodwill in Book III of the Indonesian Civil Code is related to agreement implementation, not at the pre-contractual stage.

Goodwill in agreement implementation is objective. Goodwill in objective sense is related to the content and implementation of agreement. Agreement content must be reasonable and equity, the same is true for the implementation. This is different from goodwill in subjective sense which emphasizes honesty or inner mood of someone when he/she is drafting an agreement. With goodwill in objective sense, it is important to question will agreement content which is unreasonable and inequitable bind parties just like the law or still put forward contract freedom principle and its penalty through *pacta sunt servanda* whatever the content of the agreement is, so long as it has been agreed by parties?

Through goodwill, the judge can affect agreement content if it is

considered as unjust, by adding, subtracting or amending the content of agreement. This means if there are penalties in work agreement that are considered as unreasonable and irrational then the judge can intervene by affecting the agreement content.¹⁵

Employment Law indeed does not regulate explicitly such Agreement Law principles. Employment Law only regulates legal requirements of work agreement. Work agreement's legal requirements which are regulated together with their penalties are the same as what is stipulated in Article 1320 of the Civil Code.

Legal principle is the basic thought behind legal regulation which is concrete, therefore it does not have to be made explicit since it is abstract in nature. This legal principle has an important role, since in addition to developing legal system it also balances one principle with the other. In order to avoid disorder contract freedom principle for instance needs to be limited by goodwill principle. Therefore *pacta sunt servanda* principle can be read: only agreements with goodwill can bind parties just like the law.

This is acceptable since on the one hand one of employment law's feet still steps on private law domain

¹⁵ Ridwan khairandy, *op.cit.*, hlm. 144-147.

despite the other foot has begun to take a step to public law. Its civil nature is in the legal relation between worker and entrepreneur which is sought in work agreement. Civil law in this matter must be considered as public law unless employment law stipulates otherwise. Since employment law through Employment Law does not regulate the same, its incompleteness is filled in by the Civil Code. In the Civil Code such Agreement Law principles have been accommodated.

Therefore despite not being stated explicitly, Employment Law does not prohibit penalty clauses in Work Agreement. It is just that in accordance with its function, goodwill principle can limit penalty implementation if it is considered as unreasonable or unequitable and irrational. This is an expression of *pacta sunt servanda* principle in which a legally drafted agreement binds parties just like the law. Performances in work agreement are not only what are promised by parties. Parties to work agreement are obliged to implement what is required by laws and regulations, appropriateness and fashion.¹⁶

B. Whether Penalty Clauses Contained in Work Agreement are Implemented by Mediator in his/her Advice when Settling Industrial Relation Dispute

In an engagement with penalty, penalties are usually material, even too material for debtors. Article 1309 of the Civil Code states that the judge is provided with the authority to alleviate such penalty, if the agreement has partly been satisfied. Therefore so long as debtors have begun to start exercising their obligations, the judge is free to alleviate penalty, if he/she considers it as too material.

In the event debtors have not satisfied their obligations whatsoever, while the judge considers the penalty as too material, the judge can use Article 1338 paragraph (3), which requires all agreements be implemented with goodwill. This goodwill principle is an important principle in agreement law. Goodwill principle according to Article 1338 paragraph (3) is related to agreement implementation, which means an agreement implementation must respect reasonableness and decency norms. The measurement used in assessing agreement implementation is objective in the sense that agreement implementation must walk on the right track.

¹⁶ F.X., Djumaldji. 2006. *Perjanjian Kerja*. Jakarta: Sinar Grafika, hlm. 43.

Article 1338 paragraph (3) intends to provide authority to the judge to supervise agreement implementation in order to avoid violation of reasonableness and decency. This means that the judge is free to deviate from agreement content according to its letter, when according to implementation of such letter it will contradict the goodwill.

Therefore if Article 1338 paragraph (1) can be viewed as a requirement or demand of legal certainty (the promise is binding), then paragraph (3) must be viewed as a justice demand. This in practice will cause a pull out since the law always pursues two purposes: to guarantee certainty and satisfy justice demand. Legal certainty desires that what is promised must be kept, however the demanding of fulfillment of promise does not leave justice and reasonableness norms. Therefore in demanding promise fulfillment one must be fair.

Adherence to comply with agreement content drafted by parties is related to *pacta sunt servanda* principle. The concept of contract freedom becomes significant base that parties to a contract have autonomy right to determine their own bargaining and demand the satisfaction of what they have agreed

upon. With the consensus of parties, contract binding power emerges just like the law. What is stated by someone in a legal relation becomes the law for them. This principle becomes the power of contract that is binding. This is not only a moral obligation, but also legal obligation which implementation must be complied with. As consequence the judge as well as third party cannot intervene the content of such agreement. In positive law, such doctrine is adopted by Article 1338 paragraph (1) of the Civil Code which states that all agreements drafted legally apply as the law for those who draft them.

The standard for goodwill is objective standard in which parties cannot act in unreasonable and inequitable manners. Parties to the contract's behavior must be tested on the bases of unwritten objective norms which are developed in the community. Such norms are said to be objective since behavior is not based on opinions of parties themselves, however such behavior must be in accordance with public opinion on such goodwill.

The judge by using goodwill principle can reduce or add obligations incorporated in the agreement. All agreements must be

implemented with goodwill which causes the judge to have the power to prevent an agreement implementation which offends justice sense. Therefore, in addition to certainty on the binding of an agreement in normal condition there is alertness to prevent implementation which will rape justice sense. The power to prevent these excesses is placed in the hand of the judge, which if necessary, is authorized to eliminate contractual obligations.

In practice work agreement between entrepreneur and worker is not implemented due to error both intentionally and by default. To prevent workers from being in default which causes loss for entrepreneur, penalty clauses are accommodated to drive workers to avoid default. Penalty provision to some extent is considered as material for workers and considered as unreasonable and unjust.

In the Civil Code an opportunity for the judge to intervene agreement content which is considered as unjust is provided, therefore it becomes interesting if the case related to penalty takes place on work agreement considering in industrial relation if there is a dispute it can be settled through several institutions

namely bipartite, tripartite in Industrial Relation Court.

Settling industrial relation dispute on tripartite level becomes important to discuss since right dispute settlement is performed by a mediator who is an institution officer in charge of employment field.¹⁷ There are three important requirements that must be taken into account in order for mediation to become effective, i.e mediator must be from outside the company, the mediator is trusted by both parties, and parties must be open minded as well as have the intention to settle the issue.¹⁸

Mediator is not the judge in the real sense, since his/her advice is a suggestion, therefore it can either be accepted or declined by parties. Nevertheless if parties agree to accept the mediator's advice then a joint agreement will be drafted and recorded and registered at the court to be executed.

Right dispute settlement, among other things, is if such dispute is related to the provision of right that has been accommodated in work agreement. Therefore the dispute on

¹⁷Lalu Husni. 2005. *Penyelesaian Perselisihan Hubungan Industrial melalui Pengadilan dan di Luar Pengadilan*. Jakarta: Raja Grafindo Persada, hlm. 63.

¹⁸Marlin M. Volz dan Eduard P. Goggin dalam Uwiyono. 2001. *Hak Mogok di Indonesia*. Jakarta: Pascasarjana Universitas Indonesia, hlm. 262.

penalty in work agreement becomes mediator domain in settling it at tripartite stage. The issue is mediator in performing his/her function on one hand must take into account the provision of the laws and work agreement, on the other hand he/she provides opportunity to base his/her recommendation on various considerations, such as justice. It is highly possible that there is tug between legal certainty and goodwill as mentioned in the beginning. This means it depends on the mediator to implement penalty clauses in work agreement or not to implement since it is considered as unreasonable and unjust.

In P.T. "AB" for instance there was a case where a worker resigned before the termination of contract period and was unwilling to pay fine.¹⁹ In work agreement it is stated that if a worker resigns before work period terminates he/she must pay in the amount of 8 times one month wage. On mediation level, the mediator suggested that the worker be provided with the right to resign without paying anything since despite in work agreement there was penalty in the

form of fine when the worker resigns he/she remains honest by tendering resignation letter. Nevertheless in his/her recommendation he/she still stated that the worker was guilty since such worker did not satisfy the obligations agreed in work agreement, it is only that despite the worker was stated as guilty however the mediator did not recommend that the worker pay fine as stated in work agreement.

²⁰

Mediator has his/her own view on the meaning of goodwill in Article 1338 paragraph (3) of the Civil Code. Goodwill in agreement implementation is not related to honesty instead it is related to agreement content. In relation to mediator's attitude, initially he/she put forward *pacta sunt servanda* by stating the worker was guilty since the worker did not satisfy agreement content, however further goodwill was put forward more since the mediator considered worker as honest and has goodwill by informing his/her resignation to entrepreneur. Mediator in this matter interprets Article 1338 paragraph (3) of the Civil Code on goodwill as honesty, in which contract must be implemented honestly.

¹⁹ Wawancara dengan Bapak "K", representative of P.T. "AB" management, dated 25 Agustus 2016. The same information was also conveyed in an interview with "A", P.T. "AB" worker who had a case with the company.

²⁰ Interview with Mr. "D", Mediator who provided recommendation in such case dated 10 September 2016.

Agreement with penalty case also took place between P.T. "AC" and its worker. In work agreement articles it is stated that if a worker resigns before work period terminates he/she is asked to pay penalty in the amount of IDR 20,000,000.00.²¹ Mediator in his/her recommendation stated that the concerned worker was guilty since such worker did not satisfy obligations stipulated in work agreement, however the mediator did not recommend that the worker pay the IDR20,000,000.00 in accordance with what is stated in work agreement, instead the worker only paid IDR8,500,000.00. The mediator opines that money in the amount of IDR 20,000,000.00 is too large for the worker considering his/her income per month.²²

The worker in the opinion of parties states that mediator's recommendation should refer to halal case in the contract instead of goodwill implementation. Penalty clauses issue according to the worker, is related to agreement legality in accordance with agreement objective requirements. Such case should not

be associated to penalty of agreement implementation, instead it must be attributed to the legality therefore it is not associated to goodwill instead it must refer to halal case therefore it is considered as not in terms of its unreasonable and justice in implementing agreement instead such contract must be seen as having halal case or not.²³

In the case in "AD", there is a clause in work agreement which states that the worker's diploma is detained if the worker resigns prior to work period termination and he/she is asked to pay fine in the amount of IDR 800,000.00.²⁴ In his/her recommendation the mediator states that the worker does not pay fine and is only asked to make letter of apology and request that the detained diploma be returned to the worker.²⁵

Mediator in this matter stated that the worker was guilty since he/she did not perform by resigning prior to contract termination. On the one hand the mediator admitted that the agreement had to be implemented reasonably and justly,

²¹ Interview with Mrs. "M", representative of P.T. "AC" management, interview on 27 August 2016. The same information was also given by "S", the worker who had issue with P.T. "AC" related to penalty clause in work agreement.

²² Interview with "R", Mediator in such case, dated 10 September 2016.

²³ Interview with "S", Worker of P.T. "AC", dated 26 August 2016.

²⁴ Interview with "E", Representative of "AD", dated 29 August 2016. The same information was also obtained from "F", "AD" worker who had an issue related to penalty in work agreement.

²⁵ Interview with "T" Mediator in the case related to the concerned on 10 September 2016.

considering whether there are justice and reasonableness in the content of agreement. Agreement content is not merely determined by series of words composed by both parties, but is also determined by reasonableness and justice. Detainment of diploma is considered as unjust for workers to apply jobs in other places therefore penalty clause in the form of diploma detainment is not applied in his/her recommendation.

In the case of "AE", diploma was detained since the worker still has debt when she/he resigned from work and when he/she resigned there was a missing cellular phone therefore he/she had to replace it.²⁶ In work agreement it is stated that in the event a worker resigns but he/she has not satisfied his/her obligations then his/her diploma is detained until the concerned worker performs his/her obligations. Mediator in his/her advice states that the diploma detained by entrepreneur must be returned and the worker must pay his/her debt that has not been paid in full, he/she does not need to replace the missing cellular phone since there was no evidence that the worker took it. The interesting part here is that the

²⁶ Interview with "P" representative of "AE" management, dated 3 September 2016. The same information was also provided by "Q", Worker at such company on the same date.

mediator considers diploma detainment as unjust for the worker while if the worker has debt he/she still has to pay it back.²⁷ Between debts and diploma detention as threat of punishment there is imbalance. In this matter the fact shows that there has been tug between *pacta sunt servanda* and goodwill. Goodwill is used to limit contractual obligations if the content and implementation of work agreement contradict justice while agreement will be implemented in the event the content does not contradict reasonableness and justice. Goodwill function limits the acknowledgement however it cannot be implemented as is, only applied on very important reasons, only if it cannot be accepted due to injustice therefore it can be understood as exception of *pacta sunt servanda* principle.

Work agreement with penalty issue also took place at C.V. "AF". The worker resigned prior to work period termination and had not satisfied his/her obligations of finding a replacement.²⁸ During the time a replacement had not been provided then his/her diploma was detained.

²⁷ Interview with "U", Mediator in such case dated 10 September 2016.

²⁸ Interview with "O" representative of C.V. "AF" management dated 5 September 2016. "V", worker at such company also conveyed the same matter which was not different from separate interview on the same date.

Entrepreneur applies such clause since at the time the worker resigned it was considered that there was work that had not been completed and therefore to the concerned it was obliged that he/she find replacement and his/her diploma was detained as security. Entrepreneur in parties' opinion opines that parties must perform each party's obligation as promised. Entrepreneur in this matter has upheld contract freedom teaching. The drafted agreement caused a contract, what had been agreed would bind parties and such provision applies as the law for both parties. Therefore entrepreneur does not have to take account whether such content or performance is rational or appropriate. They are still bound to what has been agreed upon or promised in the beginning.

In his/her consideration the mediator states that diploma detainment is unreasonable since diploma is used to find jobs, the same is true for finding replacement, it is considered as not in accordance with work agreement which is individual in nature.²⁹ Despite his/her advice is not based explicitly on goodwill however in it applies goodwill doctrine in

contract implementation since it is related to reasonableness.

Reasonableness must be attributed to reasonableness that lives in the community., not only assessed by parties, but according to public opinion in the community. Therefore if someone expressively acts with goodwill he/she has to act in accordance with objective standard based on the existing community social fashion.

IV. Conclusion

The presence of penalty clauses in work agreement is not accommodated explicitly in Employment Law. It is just that legal principles and requirements of work agreement viewed in the provision of Employment Law which follows the provision of Book III of the Civil Code. In Book III of the Civil Code recognizes engagement with penalty. Therefore from Employment Law perspective there is no prohibition on the incorporation of penalty clause in work agreement.

Mediator does not apply fully penalty clause incorporated in work agreement, in the event it is considered as unjust for workers since it is considered as imbalance between worker's fault and penalty incorporated in work agreement. In this matter mediator does not only

²⁹ Interview with "W", Mediator in such case dated 19 September 2016.

view agreement consequence from legal certainty perspective through *pacta sunt servanda* principle which is defined as agreement binding parties just like the law, but also goodwill principle since he/she opines that penalty clause in work agreement which is imbalance with worker's fault is considered as irrational and unreasonable.

To entrepreneur, despite the absence of prohibition to incorporate penalty clause in work agreement in Employment Law, in determining penalty form entrepreneurs must be cautious to prevent loss for entrepreneurs themselves as what happened in diploma detainment, in which the diploma detained by entrepreneur was missing. The nature of penalty incorporated in work agreement should be drafted in such way rationally and reasonably in order to be in accordance with its function and allocation.

To workers, they had better be careful prior to agreeing to work agreement by watching closely the clauses stated in work agreement, considering work agreements mostly have standard forms which clauses are drafted by entrepreneurs. Agreements legally drafted bind parties just like the law. Therefore the worker as a party to the agreement

needs to be aware of the legal consequence.

To the government, it had better draft signs in the form of technical and operational guidance for mediator in settling cases which presence is not explicitly regulated in Employment Law such as penalty clause in work agreement. In Industrial Relation Settlement Law it is expressively stated that mediator in settling industrial dispute among others must be based on laws and regulations, therefore it will be confusing for mediator if the rules are vague or incomplete.

To mediator, it is recommended that he/she enrich and strengthen him/herself with sufficient comprehension on agreement law since even employment law's nature has public element, one of its feet still steps on private/civil law domain. Agreement law principles, agreement legal requirements and any other provisions are still based on provision of Book III of the Civil Code. The Civil Code is basically considered as public law when employment law does not specifically regulate the matter.

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