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DIFFERENCES IN INDONESIAN AND COMMON LAW LEGAL TRADITIONS AND NEW PARADIGM OF TYPES OF BUSINESS CONTRACTS

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Abstract. Two legal traditions , Indonesian legal law and common law, are frequently studied by academics and legal practitioners. Without diminishing the importance of other legal traditions such as socialism, marxism, Islamic law, etc., these two major traditions often interact in a global trade process. The common law tradition, or known as the Anglo-Saxon tradition or Westminster tradition, is commonly adopted by commonwealth countries and the majority of states in the United States. Meanwhile, Indonesian law tradition originated from the civil law tradition, also known as the continental or Roman tradition, is the applied official law in Indonesia. The collision of legal tradition differences between the parties can not be avoided, as a result of global trade. The legal system of both traditions is complicated as every element of them should be understood, including the principle, method, sources of law, judicial system, style of the practitioners, duties of the court, and ownership of an object. Due to global trade and legal tradition differences between the parties, the adoption of law, harmonization of business contract, and Court of Arbitration should be the middle grounds used as a final step to settle disputes. The adoption and harmonization of law, especially in a business contract, is not recent in the Law of Indonesia. However, only a few practitioners have learned and understood it. Recently, business contracts have a new paradigm, shifting from a win-lose concept to a formal relation contract. A complex business contract based on win-lose concept is considered to no longer maintain the company "healthy" in the performance and profit of the parties. With this awareness, the paradigm of business contracts is changed by the spirit of empathy, win-win solution, solidarity, and shared interests of the parties.

Keywords: common law; justice system; harmonization; business contract paradigm.

I. INTRODUCTION

Indonesia is an attractive country from the point of view of foreign investment or from the point of view as a destination country for marketing global industrial products. As an investment destination country, Indonesia has a lot of mineral natural resources, marine fishery products, fresh water fishery products, plantations, agriculture, animal husbandry and so on. From the point of view of being a destination country for the global industrial market, Indonesia is also a country with great potential with several economic indicators such as economic growth of 5.31% **[1]**. GDP per capita USD 17,233.00, large population, relatively low annual inflation and others, is a country that is in great demand by the global industry in marketing its products **[1]**. As a result of high economic attractiveness, there is a lot of interaction between the Indonesian government and the governments of other countries (G to G), and Business to Business (B to B), where legal systems and regulations also experience interactions where there are differences between civil law business contracts adopted by Indonesia, namely civil law and on the other hand the civil law system business contract based on common law .In the institutions of the Indonesian legal system, one of the legal sources used is the Civil Code (burglijk wetboek) which originates from the Roman legal system, which, as has been explained, is different from the common law legal system. The differences are not only in the sources of law used but also in methods, systems of justice, styles of practitioners, due process and property rights. common law legal tradition, the legal doctrine is the new lex mercatoria, which in Indonesian means new trade law. Broadly speaking, the New Lex Mercatoria can be interpreted as customary international commercial law or some say it is the law of international trade harmonization **[2]**. The New Lex Mercantoria is the breath of the United Nations Conventions on International Sale of Goods (CISG) and the general principles of international contracts in the Principles of International Commercial Contracts (UNIDROID) which are used as a source of law for business contracts between countries and as dispute resolution. The existence of disparities in methods, systems, sources of law and the number of countries that adhere to it, giving the impression that there is superiority of common law in business disputes makes the legal community have the impression that common law is superior, considered more perfect, more rational and more acceptable in terms of making and settlement of the dispute.

In its development, the common law tradition of business contracts has not been without criticism from its adherents. Criticism from adherents is of value spirit content of the contract itself. In a traditional contract, it is considered to be biased towards the interests of the company which acts

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as a buyer and puts the other party's company as a party that needs to be pressured. Therefore, Harvard Business Law in its journal in September - October 2019, sees that business contracts with complex transactions need to change the concept of contracts with a new methodology. In terms of theoretical or aspired legal facts (das sollen) and laws that occur and develop in society (das sein), gaps often occur. The gap that occurs due to the fact of theoretical law or what is aspired to, has a gap with the law that develops in society in society. Because in the name of investment growth in Indonesia, the Indonesian government should make regulations that are able to harmonize the development of business contracts in accordance with other legal traditions. Recent developments have also occurred in countries that adhere to the common law tradition, where the spirit of the contract has changed from a win-loose spirit to a vested and interest spirit of the parties. Thus, it is very likely that this new spirit contract system will soon become a reference in the development of global business contracts and in Indonesia.

II. RESEARCH METHODS

The research method used is descriptive and juridical-normative analysis with literature studies from several sources, authors of books on the civil law system, business contracts, study material from the internet with accredited sources and journals issued by university law faculties in the United States and other countries that adhere to common law **[3]**. Researcher uses the normative legal research in this research to analyze the data because the normative legal research has the interpretation of hermeneutic character., which is defined as the process of changing from something that unknown to be known and understand **[4]**. Futhermore, the normative legal research is conceptual as it appears on the rules and regulation in society and it also studies the law as norm **[5]**.

III. RESULTS AND DISCUSSION

In this section numbers will be explained, results and discussion, the author will divide it into several sub-sections which will be explained further.

Table 1. Differences between Indonesian Law and Common Law

	Indonesian Civil Law	**Common Law**
Principle	General to special	Special to general
Source of law	Codification & Legislation	Precedents & Stare decisis
Justice System	Inquisitorial	Adversary system
Practitioner Style	Think in terms of regulations	Think in terms of groups, precedents & improvise
Judicial Process	Implement & interpret laws	Make court decisions on the basis of interpretation of laws
Property Rights	The legal owner is the same as the beneficial owner	The legal owner can be different from the beneficial owner

Principle Difference

The principle of common law is to follow the method of induction reasoning, so in induction reasoning is drawing things that happen that are specific and then drawing general conclusions. For example, when a New York state court adjudicates a unilateral contract termination dispute between company X and supplier company Z, if a Los Angeles court ever makes a judicial decision regarding a unilateral contract termination dispute between company A and supplier company B, then the state court's decision Los Angeles can be used as a source of law for court decisions in the state of New York and even other American states, except for the state of Louisiana, which still adheres to civil law. Another example is a dispute at the London Court of International Arbitration between company K and company M in debt restructuring issues, so a London court decision can apply as a source of law in the Singapore International Arbitration Center and other world arbitration courts that adhere to common law. It can be concluded that court decisions in this legal system are binding on one another. In the Indonesian civil law system, the method of reasoning is reversed by induction, namely by the method of deduction, where general things are made to draw out special things. For example, in the dispute over coal mining company S failing to pay the rental fee for company M's heavy equipment rental company, the judge will look for general matters through legal norms to be used as a source of legal rulings on the dispute between the two companies (specifically). Another thing about this civil law system is that courts are not bound by one another. Because of differences in methods of reasoning, the development of common law is faster and more dynamic than the Indonesian civil law system. The development of common law law itself has now introduced a new legal science, namely legisprudence, in which this knowledge studies judges and their decisions, because it is realized that judge's decisions are a source of law for decisions in future courts.

Codification and precedent & stare decisis

Codification and laws are sources of law in courts that adhere to Indonesian civil law, where legislators refer to codified regulations, therefore lawyers always refer to sources of codification in the form of legislation in disputed cases. In contrast to courts that adhere to common law, in this court the legislator tries to draw sources from decisions of courts of the same level or higher courts in substantially the same cases. Therefore, it can be said that in common law lawyers seek decision documents from courts that try disputes that are substantially the same or look for distinguishing facts that distinguish similar cases in order to win a case (precedents and stare decisis). In other words, the source of these two traditions is different in finding the legal source. The terms precedent and stare decisis have differences. Precedent can be defined Precedent refers to a court decision that is considered as authority for deciding subsequent cases involving identical or similar facts, or similar legal issues. Precedent is incorporated into the doctrine of stare decisis and requires courts to apply the law in the same manner to cases with the same facts **[5]**. It can be concluded that precedent is the

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authority to decide cases that are the same or similar in terms of law and are incorporated in the stare decisis doctrine and require the court to apply the same law to cases with the same facts. Meanwhile, stare decisis is that the judge's decision must be the same as the decision of a higher court, which previously tried similar or the same legal cases. The difference between precedent and stare decisis lies only in the structure of the court that decides, where as stare decisis is the jurisprudence of a higher court that must be obeyed by a lower court. Criticism of adherents of the Common Law tradition to adherents of the Indonesian civil law tradition. Adherents of Indonesian civil law to place the law as the main reference is an act that is dangerous because the laws are the result of the work of theorists which are not impossible to be different from reality and out of sync with needs. Another possibility is that as time goes by, the law is no longer appropriate to the existing circumstances, requiring court interpretation.

Inquisitorial and adversary systems

The Indonesian civil law inquisitorial justice system requires the professionalism of judges in assessing and deciding cases, because in this system, there are the following requirements:

1) An understanding of the codification of judges
2) The activeness of judges in finding legal facts
3) Separation and categorization of disputes that are relevant and not.
4) Assessment of evidence
5) Mastery of drawing conclusions based on deduction
6) Judges are not allowed to ask questions and make decisions outside of the disputed matter.

The six factors above become the dominant factors in the process of making a quality decision. The adversary system approach can be defined as follows An approach to conflict that sees negotiation as combat; the tougher and more aggressive negotiator wins, and the more conciliator one loses. The adversarial approach lends itself to competition between negotiators **[6].** From this definition, it is the aggressiveness of lawyers in competing and arguing that will win cases. The judge here evaluates the rational opinions expressed by competing lawyers and matches the precedents that have occurred in making court decisions. It is clear from this definition that the competence of lawyers who play a role in winning litigation cases is played by the parties to the dispute not by the judge's assessment, the parties determine who the witnesses are and what evidence is presented. The two parties are theoretically equal in court **[6].**

Practitioner Style

The real difference between the legal practitioners of these two civil law systems is that, in the Indonesian civil law system, practitioners think within the scope of disputed legislation **[7]**, practitioners try to draw correlations between laws and disputed issues. From the source of the argument, Indonesian civil law practitioners always memorize laws and draw correlations with the cases they face. Common law practitioners, think in terms of groups and their particular legal relationships **[8]**, prioritize precedents and improvise aggressively on rational arguments to convince judge, as mentioned in letter c. From the source of the argument, the style of practitioners in this tradition is more concerned with the documentation of previous judge's decisions on similar or the same issues to be used in disputes. Common law lawyers, in an effort to win cases, are always looking for similarities and differences in evidence (distinguishing evidence), the use of other disciplines outside the science of law, the logic of a case and jurisprudence. So the conclusion is that the style of common law practitioners does not always refer to codification and legislation, using a broader horizon in court.

Judicial process

The judicial process in the Indonesian civil law system, the court interprets and applies the law, therefore the court does not create the law because the law already exists in the law itself and jurisprudence is a secondary source of law. Whereas in common law, the court is a process of making a source of law or creating a guide to become the primary source of law in resolving the same problem in the future, for use by other courts.

Property Rights

In Indonesian civil law there is no distinction between legal owner and beneficial owner, while in the common law tradition it is clearly distinguished. An example of a distinction in the common law tradition is that Mr. Rudy and Mrs. Mary are cousins. They agreed to buy a house in the name of Mrs. Mary jointly, Mr. Rudi Rp. 2,000,000,000 and Mrs. Mary Rp. 2,000,000,000. The beneficial owner in this case is Mr. Rudi by 50% and Mrs. Mary by 50%, but the legal owner is Mrs. Mary, because Mrs. Mary's name is a legally registered name as the owner, where Mr. Rudy is not recognized. In the Indonesian legal tradition, if there is a dispute between them, the legal owner is Mrs. Mary, who has the right to own the house, whereas in common law, there is an acknowledgment of Mr. Rudy's ownership. Ownership in Indonesian civil law grants cannot be withdrawn by the grantor but in common law there are two types of grants, revocable and irrevocable grants.

bilingual contracts

Judging from the legal sources of the Civil Code article 1320, an agreement becomes valid if there are 4 elements, it does not explain the use of the language required in making the agreement, but there are supporting regulations which explain that the use of a foreign language in an agreement is legal if it is used with Indonesian. In other words, Indonesian must still be included in business contracts, so Indonesian is mandatory. In Perpres 63 and Law 24/2019, it is emphasized that it is mandatory to use the Indonesian language where one of the subjects and objects is in Indonesia. But in reality, business contracts were found that were written only in foreign languages. In this case, these agreements were prone to being canceled by the courts, and there was already a precedent in canceling contracts using only foreign languages.

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Adopt a Business Contract

There are differences in the consensual principle and the reel principle among jurists in formulating contract law (book 3), the Civil Code (Burgerlijk wetboek), where the difference has so far not been able to perfectly accommodate the needs of society in terms of socio-economic facts. If the use of the starting point of one formulation will sacrifice the other, causing disparities **[9]**. Apart from differences in principle, the Indonesian civil law system does not provide clear instructions regarding agreements in detail, the existing codifications are too general. In contrast to common law which has a large collection of jurisprudence regarding agreements so that it can be used as a legal basis in making agreements. The following are some of the things that are not covered in Indonesian civil law but have begun to be implemented by Indonesian companies in making business contracts with foreign parties. The first is to avoid crippled contract conditions (hinken contract), the contents of a lame contract can be seen if one party benefits so much and the other party, on the other hand, gets little benefit. These limping contracts are usually the result of corruption and collusion **[10].** Second, in article 18 of Law No. 8 1999, contracts are only aimed at entrepreneurs, while buyers are in monopsony market conditions (Michael L. Corrado **[11]**). where buyers with a single or very small amount are able to dictate business/market transactions, so that sellers in an unbalanced position. Conditions of this type of contract also occur in monopoly and oligopoly markets. Several contracts have begun to adopt the contents of the contract, in accordance with the market conditions faced by each party. Third, distinguishing registered owners and beneficial owners in the ownership of objects where civil law does not distinguish ownership, only considers the legal owner to be legally registered. This has not yet been adopted by Indonesian law, but several agreements have begun to use this difference in ownership even though in Indonesian civil law, their legitimacy is still weak. Fourth, adopt a franchise contract. The definition of a franchise contract according to Cornell University Law School *a contract under which the franchisor grants the franchisee the right to operate a business, or offer, sell, or distribute goods or services identified or associated with the franchisor's trademark. In exchange, the franchisee makes one-time or periodical payments to the franchisor in the amount, terms, and conditions established in the franchise agreement (*Legal Law Institute, Cornell Law School **[12]**).

It can be concluded that this type of contract contains the phrase *services* and *trade marks* , both of which are intangible. These two intangible goods are not regulated in the Civil Code specifically in *franchising* , but already have a legal basis as a result of the adoption in the Minister of Trade Regulation Number 71 of 2019 concerning the Implementation of Franchising. Intellectual property rights are a concrete example of a *derivative form* of *a franchise* , which in this law is an adoption of *common law law* . Simply put, intellectual property rights are to obtain protection for intellectual property owned by a person, group or company, due to the creation of human intellectual creativity **[13]**. Several laws or bills of law, such as insurance laws, personal data protection, limited liability companies, freight forwarding, *E-commerce* and investment, are nuanced by adopting the *common law legal tradition.*

New Paradigm of Types of Business Contracts

The background starts with a case where Dell (buyer) and Fedex (supplier) have a win-loose negotiation nuance between the two trading parties. Dell felt that Fedex was not innovative and made improvements in Dell's document delivery. while on the part of Fedex, complying with Dell's request would result in cost overruns and Fedex's profits had already become small due to repeated tenders. But each party does not want to terminate the contract because for Dell breaking the contract will result in finding new suppliers at higher prices than what has been offered by Fedex so far, while for Fedex, terminating the contract with Dell will reduce the company's sustainable profits and unused devices. has already been built to serve Dell's orders so far. In short, Dell and Fedex agreed to get rid of the old contract which had the nuances of win-loose negotiations and start with a new contract called a formal relational contract with a new contract method called the vested methodology (Harvard Business Review, **[14]**), which had an impact on Dell. succeeded in reducing its costs by 67% and was able to reduce its production of defective goods and Fedex got better and continuous profits. The essence and process of a formal relational contract will be explained next. In the vested methodology, shared interests are required as one of the dimensions in the decision-making matrix. Some important notes in its implementation include:

1) The complexity of the work of the relationship between the parties making the contract. Simple goods and services transactional contracts are not required using this method.
2) There is an identification of the vision, goals and expectations of the parties that must be understood by each party.
3) Joint determination of the guiding principles from item 2 above.
4) Attitude and mindset of honesty, autonomy, loyalty, integrity and fairness of each party.
5) A system of contents and execution of contracts that are parallel/according to numbers 1 to 4

The five things above are the core of the preparation, making and execution of contracts with this method with their characteristics, all of which are discussed jointly between the parties. In the following HD matrix can describe how the type of contract is seen from the dimensions of shared interests with the dimension of sustainable profit.

A repressive contract is a contract in which one party fully controls and dictates the interests of the other party, in which the controlled and dictated party does not receive sustainable profits.

Rotten contract , the contract here *shared* low interest in each other, resulting in low sustainable profits. This

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contract must be discarded or terminated entirely because it does not benefit the parties.

Question mark contract , in this contract *the shared interest* of both parties is high in the sense that the parties already have an understanding of each other's interests but results in low profit sustainability. This type of contract must be thoroughly evaluated starting from the stage of determining the vision and interests *of* the parties, planning, making and implementing it. *The formal relation contract* is an ideal contract as experienced by Dell and Fedex, where this contract nourishes the parties' companies and generates sustainable profits by fulfilling *shared interests* that are understood by the parties.

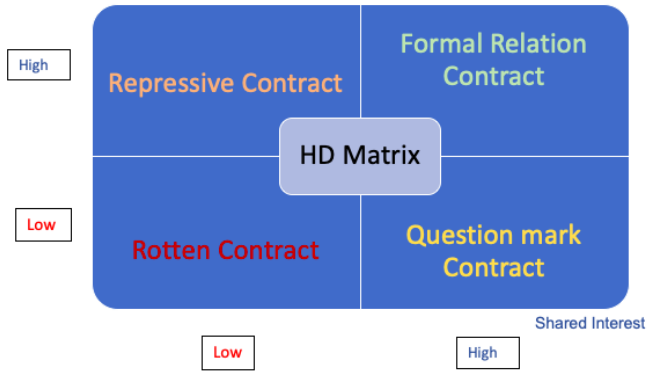

Figure 1. Sustainable Profit

After understanding this matrix, it can be concluded that contracts that bring benefits to the parties are *formal relation contracts* , which are very likely to become guidelines for business contracts in the future. The detailed steps of the *formal relation contract system* are as follows:

1) The first step is to create a foundation with the trust of each party (emphaty) in terms of: the wishes of the parties and detailed (specific) objectives.
2) Together explain the desired vision and goals
3) Adopt and create guiding principles to create a framework for each company with the spirit of: reciprocity, autonomy, honesty, loyalty, fairness, integrity, including anticipating problems that are not expected to arise in the future.
4) Align the expectations and interests of each party which are translated into responsibilities (rights and obligations) and the measurement of goods/services transacted in accordance with the guiding principles (number 2).
5) Implementation alignment. Parallel implementation is part of the adoption of the buddy system where this system is more developed in this type of contract by adding group formation.
6) The first group, the group that monitors the quality of relationships between parties (emotional bonding quality). The second group, an excellent team that monitors quality control, initiative transformation, continuous improvement and focuses on supervisory innovation ideas. Sustainability Group in workload monitoring, scheduling, recruiting and stockpiling. The Best Value team is in charge of billing, workload optimization, and operational efficiency.
7) All groups in charge of carrying out planning in accordance with the vision, goals (goals), results (results) and benchmarks as well as periodic evaluations.

In the formal relation contract and its methodology, the traditional thinking in a win-loose contract is no longer deemed necessary and is even considered dangerous for the parties if implemented. Respect from one party to another for the vision, goals and expectations of each party is highly respected and becomes the spirit of the contracts made and implemented

IV. CONCLUSION

Global trade is commonplace, including Indonesia. In this global trade, legal instruments between countries interact with each other in planning, making and executing contracts. The differences between Indonesian legal tradition and common law are clearly visible in the principles, sources, judicial system, judicial duties, and the results of decisions adopted by each country. The differences in sources of law between Indonesian civil law and international business private law are in principles, codification and jurisprudence, the judicial system, style of practitioner, judicial process and ownership of objects. The reasoning methods of the two traditions are also different, where the Indonesian legal tradition uses deductive reasoning methods and the common law tradition does the opposite. There is a need for new regulations in Indonesian civil law regarding the ownership of objects in which beneficial ownership is recognized other than registered ownership.The principle of the balance of benefits and obligations in the contents of the contract between the parties who make it is a requirement in the common law legal system. In the common law tradition, especially the UNIDROIT Principles of International Commercial Contracts, it is known that there are several obligations in making contracts where in the event of a dispute, the principles of the contract are assessed. The number of legal matters that cannot be accommodated in the civil law legal tradition adopted by Indonesia has resulted in the adoption of several common law laws both in business contracts, functional law and harmonization of business contracts. Legal harmonization based on UNIDROIT principles is needed, besides being able to answer the reduction of disputes in international business, the principles also contain many good elements. Business contracts can be classified in the spirit and profit dimensions into repressive, rotten, question mark and formal relation contracts. Complex business contracts in the long term with a win-loose mindset will result in losses for each party. The birth of a formal relation contract with its vested methodology is a new paradigm in contract making that results in good performance and sustainable profits.

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