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REMEDIES FOR BREACH OF PRE-CONTRACTUAL DUTY TO DISCLOSE: PERSPECTIVES OF AVOIDANCE OF CONTRACT FROM INTERNATIONAL CONTRACT LAW

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REMEDIES FOR BREACH OF PRE-CONTRACTUAL DUTY TO DISCLOSE: PERSPECTIVES OF AVOIDANCE OF CONTRACT FROM INTERNATIONAL CONTRACT LAW

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ABSTRACT

It is common for parties to withhold certain information during the formation of a business contract that it deems detrimental in deciding the contract's terms. In practice, this non - disclosure leads to many parties to a contract to feel aggrieved and ultimately decide to avoid the contract. As a preventive measure, principles of international contract law set a duty of disclosure to the parties. However, there is no specific explanation on what essential information that should be disclosed. The writing of this thesis focuses on two questions under the realm of international contract law, which examines (1) the circumstance that allows an aggrieved party to avoid a contract due to a breach of duty to disclose and (2) the remedies available to an aggrieved party in case of a breach of duty to disclose.

This thesis takes the form of a doctrinal research that uses normative juridical legal research approach, and the research will then be dissected using a qualitative method. The findings of this research confirm that avoidance as a remedy is granted when a party breaches its duty to disclose certain information. It is the prevailing view that material information that may impact the substance of the contract, should be disclosed. Failure to do so can amount to mistake or fraud, which are grounds for avoidance. Further, the UPICC also provides remedies other than avoidance in cases of breach of duty to disclose, including but not limited to adaptation or rectification of the contract, and damages.

***Keywords**: Breach of Duty to Disclose, Remedies, Avoidance, International Contract Law.*

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The Author recognises that this thesis may be flawed and is far from being perfect. The Author thus welcomes any constructive criticism that may improve the quality of this research and thesis. It is the Author's earnest hope that this thesis may serve as a valuable contribution for the development of International Contract Law. Once again, thank you to all those who have supported the Author throughout the long and arduous journey of writing this thesis and completing this degree.

Bandung, 30 January 2023

Shaunelee Alcinia Yanni

6052001074 – The Author

TABLE OF CONTENTS

CHAPTER I
INTRODUCTION

1.1 BACKGROUND

Freedom of contract is a fundamental principle in contract law. It affirms that parties are free to contract and determine what will be agreed.[1] In the context of business contract negotiations, the principle of freedom of contract is fundamental for business actors to decide freely to whom they will offer their goods or services and by whom they wish to be supplied, as well as allowing them to freely agree on the terms of individual transactions. Indeed, this principle of freedom of contract is in line with the principle of good faith and fair dealing when negotiating or more commonly known as "good faith and reasonable standards of fair dealings." Particularly in international contract law, this principle confirms that a party to a negotiation must not 'intentionally or negligently mislead the other party as to the nature or terms of the proposed contract either by seriously misrepresenting a fact, or by omitting to disclose a fact which, in view of the nature of the parties and/or the contract, ought to have been disclosed'.[2]

It is not uncommon to find in practice that one party to a business contract does not disclose certain information related to the business transaction that is being carried out. This practice, commonly known as non-disclosure, often causes the other party of the business transaction to feel aggrieved and decide to avoid the contract.[3] However, not all acts of non-disclosure can be considered a breach of the principle of good faith. For instance, suppose a Japanese company manufactures and develops a technological product and sells them to an Indonesian company. While negotiating, the Indonesian company states its need for a state-of-the-art technology product, and the Japanese company promotes its product as such. Due to this advertisement, the Indonesian company decides to purchase the product and enters into a sales contract with the Japanese company. At the stage of contract execution,

[1] International Institute for the Unification of Private Law, The UNIDROIT Principles of International Commercial Contracts, (UNIDROIT, 2016), pg. 7.
[2] Id., pg. 18.
[3] Id., pg. 106 – 107.

the Indonesian company discovers that the Japanese company has more advanced technology than the product actually sold. The Japanese company did not disclose this information during the negotiation process on the grounds of trade secrecy. Would the Japanese company's act of not disclosing certain information, which it regards as trade secrets, be considered a violation of the principle of good faith as well as fraud? In another scenario, suppose that during the negotiation stage, the Japanese company fails to disclose information about its national regulations related to the transaction to the Indonesian company. Given the transaction's international scope and the difference in nationality between the parties involved, could the Japanese company be considered to have acted in bad faith under international contract law, by not disclosing information that the Indonesian company should have been aware of or taken due care to ascertain?

To overcome these challenges, business and legal practitioners are increasingly relying on rules and standard observed in international contract law. This is due to the growing globalisation of trade, which often creates barriers to executing international trade transactions because of differences in legal systems between countries. International contract law is the concept of a new *lex mercatoria* found in international commerce.[4] As the name suggests, international contract law consists of a set of fundamental principles of contract law governing international commerce.[5] These principles constitute international commercial contract law as an autonomous body of general principles governing contractual obligations, rather than national contract law on an international scale.[6]

The UNIDROIT Principles of International Commercial Contract or UPICC is a significant tool in the current climate of international contract law. The general principles and rules governing international contracts are predominantly contained within the UPICC, established to standardise laws and regulations in global trade.[7] As a tool for harmonisation, the principles of contract law outlined in the UPICC can

[4] Folke Schmidt, The International Contract Law in the Context of Some of Its Sources, 14 Am. J. Comp. Law 1 (1965), pg. 3.
[5] Id.
[6] Id., pg. 36-37.
[7] Huala Adolf, Dasar-Dasar Kontrak Internasional (3rd edn, PT Refika Aditama, 2010), pg. 97.

be utilised to interpret or supplement domestic legislation and act as a blueprint for national legislators.[8]

In addition to the UPICC, another noteworthy international contract law instrument is the United Nations Convention on Contracts for the International Sale of Goods (CISG). It is widely recognised that the CISG offers general guidelines for international sale of goods and purchase contracts and aims to resolve disputes in such transactions.[9] As international contracts fall under the scope of the CISG provisions, its rules are akin to the UPICC, and interpretation of one can aid in interpreting the other.[10] In their use, the UPICC and CISG are expected to provide relevant legal arrangements and solutions for international trade transactions. Both the UPICC and CISG are expected to furnish pertinent legal provisions and solutions for international trade transactions. Therefore, in international trade transactions, it is especially important to consider international contract law and the principles outlined in the UPICC and CISG. This ensures a clear and objective basis for conducting business with parties from diverse legal backgrounds and helps to prevent disagreements and disputes.

In international contract law, non-disclosure may in particular circumstances be classified as fraudulent conduct. The UPICC designates fraud as an act that pertains to the validity of a contract, such that the presence of fraud can be a reason for avoiding a contract (grounds for avoidance).[11] In the UPICC, fraud is described as a false statement of fact or law presented before or during the initial stages of the contract, with an intention of inducing the other party to enter into a contract.[12] In addition to inducing, such false statements are devised to mislead the other party

[8] International Institute for the Unification of Private Law, supra no 1, pg. 1.
[9] Stefan Vogenauer, Commentary on the UNIDROIT Principles of International Commercial Contracts (2nd edn, Oxford University Press, 2014), pg. 11.
[10] United Nations Commission on International Trade Law, Hague Conference on Private International Law, International Institute for the Unification of Private Law, UNCITRAL, Hague Conference and UNIDROIT Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales (United Nations, New York, 2021), pg. 2.
[11] International Institute for the Unification of Private Law, supra no 1, pg. 106 – 107.
[12] Ulrich G. Schroeter, Defining the Border of Uniform Contract Law: The CISG and Remedies for Innocent, Negligent, or Fraudulent Misrepresentation, 58 Vill. L. Rev. 553 (2013), pg. 584.

for personal gain and disadvantage the aforementioned.[13] Hence, establishing the fraud in UPICC requires the fulfilment of the element of intent or an 'intent to deceive.'[14] More specifically, the UPICC outlines actions that can be classified as fraud, including the explicit or implicit representation of false information or failure to disclose true facts. If fraud is deemed to be present in the contract, the contract can be avoided as there was no agreement reached between the parties from the outset,[15]

It should be noted that in determining the validity of a contract, the principle of good faith also needs to be observed. As one of the universal and fundamental principles of contract law, international contract law requires that the parties' behaviour throughout the life of the contract, including the negotiation process, must be in accordance with the principle of good faith. The principle of good faith is so fundamental that the UPICC itself prohibits any deviation from the parties' obligation to act in good faith. One breach of the good faith principle established in the UPICC occurs when a party intentionally deceives the other party during negotiations regarding the nature or terms of the proposed contract, either through serious misrepresentation of a fact or omission of a fact that should have been disclosed considering the parties and/or the contract's nature.[16] Through the formulation of this rule, it can be inferred that the breach of the notion of good faith is intrinsically linked to the presence of fraud in contract formation.

In another circumstances, the failure to disclose information in practice is not only linked to fraud but maybe due to negligence. Certain circumstances of the negotiation process may lead to an erroneous understanding of the terms of the negotiated contract. This leads to "*mistake*" as another issue that affects validity and rises other ground for avoidance.[17] Referring back to the scenario above, suppose that the contract was negotiated and signed at the end of 2022. However, the latest

[13] Michael Joachim Bonell, Policing The International Commercial Contract Against Unfairness Under The UNIDROIT Principles, 3 Tul J Int'l & Comp L 73 (1995), pg. 75.
[14] Id.
[15] Stefan Vogenauer, supra no 2, pg. 356, 504.
[16] Bonell, supra no 13, pg. 75.
[17] International Institute for the Unification of Private Law, supra no 1, pg. 101.

and most advanced technological product of the Japanese company was presented in the middle of 2023 during the contract execution stage. Meanwhile, during the negotiation process, the Japanese company had marketed its sold technological product as state-of-the-art, as it had only had this marketed product in stock at that time. This is because it is generally understood that in the absence of a patent (or other means of protecting intellectual property rights) or a specific agreement to that effect, there is no obligation for the negotiating parties to keep confidential the information that they exchange during the negotiation.[18] On this basis, the Japanese company thus interpreted the Indonesian company's demand for state-of-the-art technology as referring to the most advanced product available at the time of contracting, rather than product that was currently going under research and development process and would be introduced in the near future. However, the Indonesian company had a different interpretation of the state-of-the-art requirement, understanding it to mean the most advanced product at the time of the contract's execution. Would it be correct to classify the Japanese company's action as grossly negligent and, thus, terminating the Indonesian company's right to avoid the contract?

The UPICC associates the term "negligence" with the concept of "mistake", which is discussed in detail in Chapter Three, Section Two of the UPICC on grounds of avoidance. Under its principles, UPICC adopts a rather restrictive interpretation for the grounds to avoid a contract on the basis of mistake and imposes high threshold for the alleged aggrieved party to avoid a contract. In fact, the UPICC only grants the right to avoidance of contract should there be a 'relevant mistake'.[19] The mere difference in interpreting the expectations of both parties are not considered to be relevant.[20] As the UPICC puts it "*the fact that a reasonable person would consider the circumstances erroneously assumed to be essential is however not sufficient, since additional requirements concerning both the mistaken and the other party must be*

[18] Stefan Vogenauer, supra no 2, pg. 366.
[19] International Institute for the Unification of Private Law, supra no 1, pg. 1.
[20] Id., pg. 101-102.

met if a mistake is to become relevant."[21] Above all, even if a right to avoidance could be granted, the UPICC does not grant such right if the circumstances on which that party relies afford, or could have afforded, a remedy for non-performance.[22] In light of this view, avoidance of contract may seem to be an extreme choice for the Indonesian company to resort to in case of the Japanese company alleged 'mistake' of breach of duty to disclose.

As outlined above, a breach of the principle of good faith is fundamental ground to avoid a contract. The fulfilment of the principle of good faith itself is often associated with the obligation to disclose relevant and important information to the contracting parties before the contract is concluded. Therefore, failure to disclose information during the pre-contractual stage, which is founded on the principle of good faith, could render an imperfect agreement between the parties. There is currently no succinct and detailed explanation as to which essential information should be made known to contracting parties, causing ambiguity around the limits of breaching the duty to disclose. Consequently, the author intends to analyse the breach of duty to disclose and the available remedies under international contract law, besides contract avoidance. Therefore, this research is presented with the title "**REMEDIES FOR BREACH OF DUTY TO DISCLOSE: PERSPECTIVES OF AVOIDANCE OF CONTRACT FROM INTERNATIONAL CONTRACT LAW**."

1.2 RESEARCH QUESTIONS

Given the foregoing background, this research aims to examine the following questions:

1. When does a breach of duty to disclose entitle an aggrieved party to avoid its contract under international contract law?
2. What remedies are available to an aggrieved party in case of a breach of the duty to disclose under international contract law?

1.3 OBJECTIVES AND BENEFITS OF RESEARCH

[21] Id.
[22] Id., pg. 105.

A. RESEARCH OBJECTIVES

The author aims to achieve the following objectives in this thesis:

1. To understand the extent of a breach of the duty to disclose that allows an aggrieved party to avoid its contract under international contract law.
2. To identify the available remedies for an aggrieved party in the event of a breach of the duty to disclose under international contract law apart from contract avoidance.

B. RESEARCH BENEFITS

a. THEORITICAL BENEFITS

This research aims to contribute to the understanding of duty to disclose and its remedies, particularly avoidance of contract, under international contract law.

b. PRACTICAL BENEFITS

This research aims to enhance the interpretation of the UPICC and legal knowledge related to the duty to disclose and fundamental aspects of contract avoidance in the context of international contract law. The anticipated benefits include a better understanding of the subject and its practical implications.

1.4 RESEARCH METHODS

A. RESEARCH APPROACH

The author will employ normative juridical legal research approach in this study. The normative juridical method emphasizes research aimed at obtaining legal knowledge through studies based on existing positive law norms. Secondary data and library materials are used as primary data in normative juridical study. As a result, the legal sources explored in this research include laws and regulations, as well as international contract law instruments such as the UPICC and CISG.

B. DATA COLLECTION METHOD

The author will be using qualitative data. As a result, the data source is based on a literature study that was carried out by collecting data on books in the library center as well as through online searches. In general, these sources can be divided into two categories: primary legal sources and secondary legal sources, which will be explained below:

a. PRIMARY LEGAL SOURCES

Primary legal sources are sources of law in the form of relevant laws and regulations, official records or minutes of legislative proceedings. In this instance, the author relies upon the UNIDROIT Principles of International Commercial Contracts and the United Nations Convention on Contracts for the International Sale of Goods as relevant laws and regulations. In addition, as official records, the author will use the UPICC Commentary and the CISG Digest. The analysis will include a review of minutes of the drafting process, namely the CISG *Travaux Preparatoires.*

b. SECONDARY LEGAL SOURCES

Secondary legal sources are legal sources obtained from materials related to primary legal sources which include literature in the form of related books, legal journals or articles, and the doctrine of good faith and fair dealing.

C. DATA ANALYSIS METHOD

All data sources obtained for this research will be thoroughly analysed using qualitative methods, and the results of the analysis will be presented descriptively to answer the objectives and problems raised in this research.

1.5 SYSTEMATICS OF RESEARCH

This thesis is divided into five chapters that is arranged as follows:

CHAPTER I – INTRODUCTION

This introductory chapter will provide an overview of the research process, covering key aspects such as research background, research questions and objectives, research methods, and the systematic approach used within this thesis.

Additionally, this section will briefly discuss the fundamental principles of good faith and freedom of contract under International Contract Law and relevant issues concerning duty of disclosure in practice, to provide essential context for readers.

CHAPTER II – GROUNDS FOR AVOIDANCE OF CONTRACT UNDER INTERNATIONAL CONTRACT LAW

This chapter provides a thorough examination of the legal implications of a "defective" consent and its relationship to the right to avoid contracts in international contract law. The aim of the chapter is to provide readers with an outline of the fundamental principles of contract avoidance. Additionally, the author will elaborate on each available ground for parties to avoid a contract, including, but not limited to, fundamental breach of contract, mistake, fraud, gross disparity, and other grounds. This chapter serves as the basis and context for the entire thesis.

CHAPTER III – BREACH OF DUTY TO DISCLOSE UNDER INTERNATIONAL CONTRACT LAW

This chapter explores how international contract law regulates the duty to disclose and the extent to which such a duty is imposed on negotiating parties prior to the conclusion of a contract. Subsequently, this author investigates breaches of this duty, the potential causes of such breaches, and their legal implications on both the contract and those involved. Following on from the previous chapter, this chapter examines the circumstances under which a breach of the duty of disclosure constitutes either mistake or fraud in international contract law. The author's examination will be based on the UPICC, the UPICC Commentary, and the doctrine of good faith and fair dealing. Additionally, this research will feature case studies concerning the practice of duty to disclose from various countries to add to our overall understanding.

CHAPTER IV – THE REMEDIES FOR BREACH OF DUTY TO DISCLOSE UNDER INTERNATIONAL CONTRACT LAW

Building on the previous chapter, this section will explore the remedies available to the aggrieved party in cases of breach of duty to disclose amounting to

mistake or fraud under international contract law, other than avoidance of contract. Although the remedies available for a breach of the duty of disclosure may be broadly similar in certain countries, the implementation and practice in each country may lead to a different result. Lastly, the author will analyse the appropriate remedies for breaches of duty to disclose and their practical implications in different circumstances.

CHAPTER V – CONCLUSION

Based on the preceding chapters' findings, the author will draw conclusions from the thorough analysis of the aforementioned problems encountered in this section. Subsequently, the author will provide suggestions and recommendations to facilitate the further development of International Contract Law, taking into consideration the latest practical developments concerning the duty to disclose.