

PRINCIPLE OF GOOD FAITH IN CONFIDENTIALITY AGREEMENTS OF TRADE SECRET INFORMATION

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ABSTRACT

This study aims to determine the category of agreement on confidentiality of Trade Secret Information in the perspective of contract law, Good Faith Criteria, and Legal Consequences for Disclosure of Trade Secrets in Confidentiality Agreement. Study results: (1). The category of confidentiality agreement based on its arrangement includes an anonymous regulated in the Civil Code; according to the method of preparation including standard agreements (determined unilaterally by the owner of the Trade Secret) based on the principle of freedom of contract; is a formal agreement, namely the confidentiality agreement occurs not only in an agreement but also stated in a deed (under the hand); and in written form, namely Confidentiality Agreement; (2). The criteria for good faith based on the doctrine of subjective good faith and objective good faith are not disclosing Trade Secrets but Law no. 30 of 2000 does not explicitly regulate so that the criteria for good faith relate to the obligation to keep confidential referring to Article 1338 paragraph (3) of the Civil Code and doctrine or expert opinion. The legal consequences of disclosing a Trade Secret give

rise to the right of the owner of the Trade Secret to take legal action, both litigation and non-litigation.

Keywords: *Good Faith, Confidentiality Agreement*

I. INTRODUCTION

Confidential information from a company is important to retain from being disclosed by other parties, including workers who work in the company concerned. Disclosure of these secrets is detrimental to the company as a trade secret, so it is necessary to guarantee confidentiality (Confidentiality Agreement) or Non-Disclosure Agreement (NDA) in the employment agreement.

The classic case concerning the disclosure of corporate secrets by workers stems from the case of Cohen versus Lindenbaum which was decided by the Dutch Hoge Raad in 1919. In that case, Samuel Cohen, a printing company owner, tried to spy on and steal the corporate secrets of a rival company owned by Max Lindenbaum. To ease his attempt, Cohen 'bribes' Lindenbaum workers to disclose his company secrets.

In the first tier, Cohen lost, but on the other hand at the appeals level, it was Lindenbaum who lost. At the appeal level, it was explained that Cohen's actions were not considered unlawful acts because it could not be shown an article of the Act that Cohen had violated. However, through the decision of the Hoge Raad (the Supreme Court of the Netherlands) on January 31, 1919, it was Lindenbaum who was declared the winner. Hoge Raad stated that the definition of an unlawful act in Article 1401 of Civil Code includes an act that violates the rights of others, is contrary to the legal obligations of the perpetrator, or is contrary to decency. This means that Hoge Raad is not solely based on the provisions of the law but also expands the meaning of unlawful acts, namely not contrary to good faith as a legal principle which if not implemented can violate the rights of others and is contrary to the legal obligation that every human being is obliged to have good faith as in accordance with morals or decency because it is a moral that must exist in the social life between individuals in society.

The application of good faith in the business world is closely related to efforts to appreciate the creations of other parties who use the results of their intellectual thoughts so that it is not easy to realize them because not every person has the ability to

make creations that have economic value. Therefore, in line with the reasons for the enactment of Law no. 30 of 2000 concerning Trade Secrets (hereinafter referred to as UURD), persons who succeed in realizing their ideas that have economic value need to get legal protection as a reward or incentive to encourage creation and innovation in the trade sphere in order to seize high productivity.

To maintain its confidentiality, the owner of a Trade Secret (company) can make efforts, including making a Confidential Agreement or Non-Disclosure Agreement (NDA) with employees. However, this does not mean that the confidentiality agreement is adhered to by the worker because it may occur that the worker does not have good faith and discloses the secret to an unauthorized third party so that the violation will result in legal consequences.

The category of a confidentiality agreement includes the type of agreement based on the arrangement, the method of establishment, the nature, and the form that is important to be analyzed from the perspective of contract law as it results in the governing provisions, the determination of the agreement as a condition for the validity of the agreement, the occurrence of the agreement, legal certainty relating to evidence.

The notion of good faith and propriety developed in accordance with the development of Roman contract law, which initially provided scope for contracts that had been regulated by law alone (judicial strict iuris which was derived from Civil Law). Contracts are based on bona fides that require the application of the principles of good faith and propriety in the making and execution of the agreement.¹

The provision of Article 1338 paragraph (3) states that "every agreement must be executed in good faith". This principle implies that the agreement between the parties must be based on honesty to achieve common goals. The implementation of the agreement must also refer to what is appropriate and should be followed in social interactions. This principle is a principle that must exist in every agreement, and cannot be waived even if the parties agree (immutable).² However, good faith as stated in Article 1338 paragraph (3) is difficult to be actualized in confidentiality agreements relating to Trade Secrets where the protection does not require registration it cannot

¹ Ridwan Khairandi, *Itikad Baik Dalam Kebebasan Berkontrak*, Jakarta: Pascasarjana UI, 2004, hlm. 131.

² Ery Agus Priyono, "Peranan Asas Itikad Baik Dalam Kontrak Baku (Upaya Menjaga Keseimbangan bagi Para Pihak)", <https://ejournal2.undip.ac.id/index.php/dplr/article/viewFile/1934/1257>, accessed on 25 October 2021, 20.15 WIB.

control the legality of ownership because no database can be used as a means to find out the quantity of the Trade Secret that is legally protected. In addition, the Trade Secret Law does not explicitly regulate the criteria for good faith as well and complicates proving the implementation of good faith in disclosing the Trade Secret.

On the contrary, the confidentiality agreement must be conducted in good faith hence it cannot be disclosed by unauthorized parties as legal consequences might occur in case of violation, where the trade secret owner who is aggrieved could take legal action either through litigation forums or courts or non-litigation (outside the court).

Based on the description of the background, the problems to be solved in this study are (1) How is the Confidentiality Agreement categorized under the Contract Law perspective? and (2) How are the Good Faith Criteria and Legal Consequences implied in the Disclosure of Trade Secrets?

The research method used is a normative juridical approach, which is a systematic, factual, and accurate description of the principle of good faith in a confidentiality agreement based on the legislation. Sources of data were obtained from secondary data, namely primary legal materials in the form of legislation relating to trade secrets, secondary legal materials in the form of expert opinions in the form of books or writings related to the object of discussion, and tertiary legal materials in purpose to explain primary legal materials and legal materials. Secondary material would be obtained from dictionaries, encyclopedias, and information from digital sources such as the internet, and others. Data analysis was carried out in a qualitative normative manner, starting from the norms of legislation through interpretation.

II. DISCUSSION

1. Confidentiality Agreement Category from a Contract Law Perspective

The categories in this paper are intended as a classification or categorization of trade secret information confidentiality agreements, namely, the arrangements, elements, nature, or form of the agreement. In general, an agreement begins with consent from

one of the parties to bind himself, then the other party provides consent of acceptance of the offer.³

In the perspective of civil law, confidentiality agreements are not regulated under the Civil Code yet, possess legality according to the principle of freedom of contract as regulated in Article 1338 paragraph (1) of the Civil Code which stated that "All legally executed agreements shall bind the individuals who have concluded them by law." The category of agreement based on its arrangement is stated in Article 1319 of the Civil Code which stated that " All agreements, whether or not known under specific titles, shall be subject to general regulations, which shall be the subject of this and the previous title". Thus, there are two kinds of agreements according to their names, which are, nominate (named) agreements and innominate (unnamed) agreements. A nominee agreement is an agreement that is subject to rule under the Civil Code, while an innominate agreement is an agreement that emerges, grows, and develops practically in society⁴ hence not regulated under the Civil Code. Therefore, the confidentiality agreement is categorized as an anonymous agreement or innominate agreement that is regulated under specific provisions of a subgeneric nature where general provisions contained in book III concerning Engagements remain valid as affirmed in Article 1319 of the Civil Code.

In the development of the legal studies doctrine, there are three elements in the agreement, namely⁵ (a) The essentialia element is an element that ought to exist in an agreement, as the absence of this element turned to the non-existence of the agreement. (b) The naturalia elements are elements that have been regulated in law, that would be regulated according to the law in case the parties in the agreement did not regulate it. (c) The accidentalia elements are additional elements that would bind in case the parties pledge to.

The essentialia element under a confidentiality agreement is defined as "trade secret information" that involves 2 (two) parties, namely, the trade secret owner (the company)

³ Yose Priyono dan Martin Roestamy, "Perlindungan Konsumen dalam Klaim Asuransi Pembiayaan Kendaraan Bermotor dikaitkan dengan Perjanjian Model Baku", *Jurnal Living Law*, Volume 7 No. 2, 2015.

⁴ Lannemey, "Akibat Hukum Pemutusan Perjanjian Franchise Secara Sepihak Oleh Franchisor Sebelum Berakhirnya Kontrak", *Lex Privatum*, Volume 3 No.1, 2015, hlm. 161, 163.

⁵ Hananto Prasetyo, "Pembaharuan Hukum Perjanjian Sport Entertainment Berbasis Nilai Keadilan (Studi Kasus Pada Petinju Profesional di Indonesia)", *Jurnal Pembaharuan Hukum*, Volume 4 No. 1, 2017, hlm. 67.

and the employee that obtains the obligation to not disclose and maintain that the Trade Secret is secured. The contents of the agreement are⁶ (a) The parties that are subject to the confidentiality agreement, (b) Legal relationship (employee/employee, employed party), (c) Description of information that is classified as confidential, (d) Provisions that ought to be exercised and obeyed in order to maintain the confidentiality of the information, (f) Identification of the conditions that might be excluded from the confidentiality agreement, (g) The validity period of the agreement, and (h) Responsibility to bear losses due to disclosure of the information by unauthorized parties.

Article 1 number (1) of the UURD states "Trade Secret shall mean information in the field of technology and/or business that is not known by the public and has economic values as it is useful in business activities and the confidentiality of which is maintained by its owner". While Article 3 paragraph (1) of the Law states:

“Trade Secrets shall be given protection if the information is confidential and has economic values and the secrecy of which is maintained with necessary efforts. Furthermore, Article 3 paragraph (2) explains “Information shall be secret (confidential) if such information is only known by a certain people or such information is not known by the public in general.



Figure 1: example of trade secret
Source: Slideplayer.info

Article 3 paragraph (3) explained that "Information shall be deemed to have economic values if the confidentiality of the information can be used to run commercial activities or business or can improve the benefit economically. Further, article 3

⁶ Anonim, “Menyiapkan Kontrak Kerja dan Perjanjian Kerahasiaan”, https://usahasosial.com/wp-content/uploads/2016/06/menyiapkan_kontrak_kerja_dan_perjanjian_kerahasiaan_2016JunWed00164374321, accessed on 15 September 2021, 11.32 WIB.

paragraph (4) stated that "The confidentiality of information shall be deemed to be maintained if the owner or the parties that control the information have taken necessary and appropriate efforts".

The scope of protection of Trade Secrets includes production methods, processing methods, methods of selling, or other information in the field of technology and/or business that has economic value and is not known by the public in general. Trade Secrets are all information held by individuals that are not publicly known in the field of technology and/or business. Trade secret information is valuable as it obtains beneficial to the owner in running the business, hence, efforts shall be endeavor in order to ensure the confidentiality of the information.⁷

The scope of trade secrets could be described as⁸ (a) Technical information, research and development that could be exemplified as follows: processes, compounds/mixtures, formulas, research and development, and information technology,⁹ (b) Information on the process of the production, for example, costs, information relating to specific production equipment, processing technology, specifications of the production process and equipment, (c) Information regarding suppliers, (d) Information on quality control, for example, sales and sales reports, information on competitors, customer information, results and reports of research on sales planning and marketing, (e) Internal financial information, for example, financial documents, internal financial blueprint, computer printed document, the margin of production, production costs, profit and loss data, and administrative information, and (f) Internal administrative information, for example, internal organization, fundamental decision-making, business strategy planning, and internal computer software of the company.¹⁰

⁷ Djoko Imbawani Atmadjaja, *Hukum Dagang Indonesia (Sejarah, Pengertian, dan Prinsip Hukum Dagang)*. Malang: Setara Press, 2016, hlm 244.

⁸ Anonim,

<http://repository.umy.ac.id/bitstream/handle/123456789/26117/6.%20BAB%20II.pdf?Sequence=6&isAllowed=y>, accessed on 5 September 2021, 20.00 WIB.

⁹ Rieska Nofianty, *Perlindungan Hukum Rahasia Dagang atas Informasi Bisnis Dalam Perjanjian Kerja Antara Toko Taman Parfum dengan Karyawan (Studi Toko Taman Parfum di Palembang)*, Skripsi FH Universitas IBA, 2013, hlm. 23-24.

¹⁰ Pitriani, "Analisis Hukum tentang Undang-Undang Rahasia Dagang dan Ketentuan Keterbukaan Informasi dalam Undang-Undang Perlindungan Konsumen", *Al-Qisthu: Jurnal Kajian Ilmu-Ilmu Hukum*, Volume 13 No. 2, 2015, hlm. 189.

Determination of the information as a trade secret is according to¹¹ (a) Degree of Confidentiality. The information shall be measured to the extent of being unaccustomed by the public in general that the owner of the trade secret information shall be able to prove that the information is not general information, (b) Involvement of the Workforce. There is a limit to the information that could be accessed by the employees of the company and the impact on the company as well as limits on the benefits that could be obtained by other parties in case of disclosure, (c) Degree of the confidentiality protection. Negligence leads the owner of the Trade Secret to lose rights, therefore the owner of the information shall undertake necessary and appropriate efforts to protect the Trade Secret, (d) Value of the information for competitors. There shall be reasonable measures as a perimeter in case of violation of the Trade Secret information that grants benefits to the competitors or results in profit loss for the owner of the information, (e) The degree of protection and commercial value of the information. The owner of the Trade Secret information shall be able to prove that the information is the result of his or her commercial value thinking and denote the necessary efforts taken in maintaining confidentiality, (f) The degree of difficulty in obtaining the information. There shall be a measure of the level of difficulty for other parties to obtain and possess the information as a result of the earnest effort taken by the owner of the information in maintaining the confidentiality of the information.

The fundamental theories of protection of trade secrets for developing countries such as Indonesia are¹² (a) Theory of Interest. The theory implies that the protection of trade secrets is part of respect for the rights of the society over the efforts of creativity in creating new things that could be used to escalate the net welfare of society and the common good. (b) Theory of Engagement. A trade secret is the object of an engagement that gives birth to rights and obligations between parties, both born out of an agreement or law that the principle of engagement could be used as the ground of the obligation in protecting trade secrets.

The naturalia element is Book III of the Civil Code concerning Engagement which is based on freedom of contract, implying that the parties could establish an agreement

¹¹ Elis Qomatul Lailyyah, *Kajian Hak Atas Kekayaan Intelektual Kekuatan Mengikat Klausula Rahasia Dagang Setelah Berakhirnya Perjanjian Kerja*, Skripsi Fakultas Hukum Universitas 17 Agustus 1945, 2018, hlm. 7.

¹² Ahmad M Ramli sebagaimana dikutip Sudjana, *Hukum Kekayaan Intelektual*, Tangerang Selatan: Universitas Terbuka, 2001, hlm. 18.

related to the object of the agreement, otherwise, the provisions in the Law shall be implemented. The *accidentalia* elements are supplementary elements added by the parties, for example, a confidential agreement of trade secret information that is not included for the purpose of performance appraisal or the legatee of the Trade Secret license is not allowed to utilize the sales method until 3 (three) years upon the date of the end of the license agreement.

The categories of agreements according to the nature of the agreement include consensual, authentic, and noun accord. A consensual agreement occurs upon consent between the parties, an authentic agreement that is established with mutual consent of the parties and the consignment of the object of the agreement, while a noun accord is an agreement that ought to be stated in a written deed, whether in an underhand deed that agreed by the parties or an authentic deed made by the authorized official. The form of a discreteness agreement is known as a Confidentiality Agreement or Non-Disclosure Agreement, which is a noun accord. However, the agreement is not required in form of an authentic deed made by a notary as it is adequate to be in form of an underhand agreement, affixed with an Rp.10,000,- stamp duty, and signed by the parties.

Agreement on confidentiality of Trade Secret information is made unilaterally through a predetermined agreement (standard agreement) that is established by the owner of the Trade Secret. Pitlo, as quoted by Mariam Darus Badruzaman, stated that the ground for the development of standard agreements (*eksemsi*) was social and economic conditions. Large companies and semi-government companies enter into cooperation in an organization, and their interests determine certain conditions unilaterally. "The opposing party (*wederpartij*) that generally has a sluggish (economic) position, either of his position or his ignorance, just accepts it".¹³ However, the agreement shall refer to the provision of the validity of the agreement as stated in Article 1320 of the Civil Code, namely (a) there must be a consent of the individuals who are bound thereby (*de toestemming van degenen die zich verbinden*), (b) there must be a capacity to conclude an agreement (*de bekwaamheid om eene verbintenis aan te*

¹³ Mariam Darus Badruzaman, *Perlindungan Terhadap Konsumen Dilihat dari Sudut Perjanjian Baku (Standar)*, Bandung: Bina Cipta, 2006, hlm. 8.

gaan), (c) there must be a specific subject (*de bekwaamheid om eene verbinten is aan te gaan*), and (d) There must be an admissible cause (*eene geoorloofde oorzaak*).¹⁴

The first and the second conditions are subjective conditions as they regulate the person or subject who entered into the agreement, for example, the parties entering into an agreement on the confidentiality of trade secret information shall not contain defects in determining their wills such as error, coercion or fraud, or the parties are incapable to enter into a confidentiality agreement as they are underage (not yet 21 years old) or under guardianship,¹⁵ while the last condition is an objective condition as it concerns the agreement or the object of the legal action that is carried out, for example, an agreement on confidentiality of trade secret information is not clearly detailed or in contrary to the legislation, decency, propriety, and public order. The two conditions have different legal consequences, where in the event of the unfulfillment of the subjective conditions, the agreement is cancelled (*vernietigbaar*), while the violation or absence of the objective conditions results in the agreement being null and void (*nietig*).

In the perspective of contract law, standard contracts or standard agreements are still valid in accordance with the agreement (over the first provision of Article 1320 of the Civil Code) as workers could decline to accept the confidentiality agreement but as a consequence, there would be no working agreement between the worker and the company (the owner of the Trade Secret). Thus, the weaker party (the worker) because of his position as the party that is "forced" to sign the agreement due to the need for work. Whereas in contract law, the parties shall have an equal position in implementing the principle of freedom of contract. The confidentiality agreement which is in the form of a standard contract remains valid as the worker signs the agreement as legal proof of consent or agreement.

In this regard, John Rawls' theory of justice explains that no one has a higher position among the parties to the agreement as the position of the parties is equal.¹⁶ The

¹⁴ Yulia Kumalasari, *Perlindungan Hukum Terhadap Pihak Pembeli Beritikad Baik Dalam Jual Beli Tanah Bengkulu*, Tesis Program Studi Magister Kenotariatan Fakultas Hukum Universitas Brawijaya, 2016, hlm 17.

¹⁵ Tami Rusli, "Asas Kebebasan Berkontrak Sebagai Dasar Perkembangan Perjanjian di Indonesia", *Pranata Hukum Jurnal Ilmu Hukum*, Volume 10 No. 1, 2015, hlm 24, 33. Lihat juga Muskibah dan Lili Naili Hidayah, "Penerapan Prinsip Kebebasan Berkontrak Dalam Kontrak Standar Pengadaan Barang dan Jasa Pemerintah di Indonesia", *Jurnal Refleksi Hukum*, Volume 4 No. 2, 2020, hlm. 175-194.

¹⁶ Taufik El Rahman, *et. al*, "Asas Kebebasan Berkontrak dan Asas Kepribadian Dalam kontrak Outsourcing", *Jurnal Mimbar hukum*, Volume 23 No. 3, 2011, hlm 594.

principle of justice according to Rawls consists of, **first**, the principle of equal liberty (equal liberty principle), **secondly**, the first section of the principle consists of (a) the "difference principle" and section (b) the "equal opportunity principle". The "principle of difference" in section (a) stems from the principle of inequality which is justified through controlled policies as long as it benefits the weaker groups of society (in this case, for example, workers in confidentiality agreements).

Meanwhile, the principle of equality of opportunity in section (b) requires not only the existence of the principle of the quality of ability alone but also the ground of the will and the need for these qualities.¹⁷ Therefore, the workers still obtain protection in case of the standard agreement leads to or includes a detrimental exoneration clause that is usually made in the agreement as an additional clause on the essential constituent (main) of the agreement.

Mariam Darus Badruzaman defines the exoneration clause as a clause that restricts the liability of business actors, against risks and negligence that must be borne. Furthermore, Mariam Darus Badruzaman stated that the exoneration clause is a clause that is included in the agreement, in which one of the parties avoids performing its obligation or responsibility to remunerate whether in partial or whole or limited compensation due to a default or unlawful act.¹⁸ Agreements consisting of exoneration clauses arise along with the development of the principle of freedom of contract as an exoneration clause contained in standard agreements or standard contracts as well as other agreements whose substance is negotiated beforehand by both parties.

2. Criteria of Good Faith and Legal Consequences for Disclosure of Trade Secrets in Confidentiality Agreement

Good faith is a universal principle that applies to each agreement¹⁹ as a doctrine derived from Roman Law, namely "*bonafide*". Therefore, the principle of good faith is indeed proximity to the civil law system rather than the common law system. *Fides* means an origin of a religious nature, as the trust of one person to another, or a belief in

¹⁷ Pan Mohamad Faiz, "Teori Keadilan Jhon Rawls", [https://www.academia.edu/11417626/ Teori_Keadilan_John_Rawls](https://www.academia.edu/11417626/Teori_Keadilan_John_Rawls), accessed on 3 Januari 2022, 22.00 WIB.

¹⁸ Mariam Darus Badruzaman, *Op. Cit.*, 2006, hlm. 47.

¹⁹ Tuti Haryanti, "Itikad Baik dalam Perjanjian Jual Beli dengan Metode Pembayaran *Cash on Delivery*", *Jurnal Ilmiah Penegakan Hukum*, Volume 8 No. 2, 2021, hlm. 117.

the honor and respect of one person to another. *Fides* required the existence of good faith in the treaties made by the Romans.²⁰ The principle of good faith is comprehended as one of the important and influential principles in contract law²¹ and is dynamic as it develops according to the legal rules while the legal rules change according to the progressive advancement of society.

In the beginning, Roman covenant law recognized only *iudicia stricti iuris*, agreements that were born from legal actions (*negotium*) which were rigorously and legally referred to as *ius civile* (a set of laws that governed the rights and obligations of Roman citizens). In the case of a judge dealing with a case, the judge shall decide according to the law and the content of the agreement. Afterward, an *iudicia bonae fidei* concept is established, a concept precepting from *ius Gentium* (natural law) that edifies a person in establishing and exercising agreements in a good faith. The doctrine developed along with the recognition of informal agreements as consensual agreements.²²

Good faith in Roman contract law refers to three forms of behavior of the parties in the contract, namely first, the parties shall adhere to their promises or words, second, the parties shall not benefit from actions that mislead one of the parties, third, the parties shall comply with their obligations and act as honorable and honest people, even though these obligations are not expressly agreed upon.²³

The principle of good faith shall be implemented during the pre-contract until an accord is reached and the contract is implemented, but in fact, a person's good faith is difficult to allege as a person's inner state could not be beheld with vision.²⁴ The principle of good faith includes subjective good faith (*subjectieve goede trouw*) that is related to cognition, that consciously aware of will that is contrary to good faith,²⁵ meaning that a conscious act is determined in the establishment of an agreement that refers to the owner of the Trade Secret as well as workers. In contract law, the notion of performing good faith refers to compliance with reasonable commercial standards of

²⁰ Ridwan Khairandy, *Op.Cit.*, hlm. 130-133.

²¹ *Ibid.*

²² *Ibid.*

²³ Wiryono Prodjodikoro, *Asas-Asas Hukum Perjanjian*, Bandung: Mandar Maju, 2011, hlm. 56.

²⁴ Teresia Dweyana Resa, "Asas Itikad Baik Dalam Kontrak Kerjasama Kegiatan Pertambangan di Indonesia, *Jurnal Ilmiah Living Law*, Volume 12 No, 2, 2020, hlm. 149.

²⁵ Mukti Fajar ND, , "Itikad Tidak Baik dalam Pendaftaran dan Model Penegakan Hukum Merek di Indonesia", *Jurnal Hukum Ius Quia Iustum*, Volume 25 No. 2, 2018, hlm. 226.

fair dealing, which is called acting in accordance with *redelijkheid en billijkheid* (reasonableness and equity) according to Dutch legislators. If a party acts in an unreasonable and improper manner then it would be a groundless defense of believing the conduct of being reasonable and inequitable.²⁶ Objective good faith (*objectief goeder trouw*) is an expression of public opinion for actions that are contrary to good faith.²⁷ Good faith in a subjective sense is equated with honesty, while in an objective sense it is equated with the meaning of propriety.²⁸

Equalization of the good faith behavior with adherence to objective standards limits the resilience of the concept of good faith, overrides external facts that point to the inappropriate manner, and potentially leads to unfair results. Standards for consideration of the performance in contract establishment, contract enforcement, or contract law enforcement shall be adaptable. The standard shall be made flexible with the idea of good faith which is essentially a broad concept. The notion of good faith is *a single mode of analysis comprising a spectrum of related factual considerations*.²⁹

Good faith is required as the law does not address future conditions,³⁰ hence good faith primarily functions: (a) The function of edifying that the agreement shall be interpreted in good faith (good faith as a general principle), as it must be interpreted as appropriate and reasonable, (b) The function of supplementing or complementing (*aanvullende werking van de goede trouw*), meaning that good faith could complement the contents of the agreement if the rights and obligations of the parties are not eloquently stated and (c) The function of limiting or eliminating (*beperkende en derogerende werking van de goede trouw*), means that the function could be applied only in case of the presence of an important reasons (*allen in sprekende gevallen*).

Trade secrets are protected if the information is confidential, has economic value, and the secrecy is maintained confidential through necessary efforts. Information is deemed to be confidential if the information is only known by certain parties or is not known in public in general. Information is deemed to have economic value if the

²⁶ Ridwan Khairandy, *Op.cit.*, hlm. 194.

²⁷ Mukti Fajar ND, et. al, *Loc.cit.*

²⁸ Siti Ismijati Jenie. "Itikad Baik Perkembangan dari Asas Hukum Khusus Menjadi Asas Hukum Umum di Indonesia". http://ugm.ac.id/id/berita/2066-pengukuhan_prof.ismijati_jenie_itikad_baik_sebagai_asas_hukum, accessed on 17 November 2021, 19.00 WIB. Lihat juga Barnabas Dumas Manery, "Makna Dan Fungsi Itikad Baik Dalam Kontrak Kerja Konstruksi", *Jurnal Sasi*, Volume 23 No.2, 2017, hlm. 141.

²⁹ Ridwan Khairandy, *Loc.cit.*

³⁰ Wiryono Prodjodikoro, *Loc.cit.*

confidential nature of the information can be used to carry out commercial activities or businesses that benefit economically. Information is deemed to be maintained confidential if the owner or the parties that control it have taken necessary and appropriate efforts.

In practice, the efforts that could be taken to maintain the confidentiality of Trade Secrets include (a) disclosing only to those who need to know on the basis of Trade Secret agreement, (b) designated a trade secret agreement for employees or third parties, (c) protect confidential data by generating a secret code, (d) keep confidential documents in a place that could not be easily accessed by employees or other parties, (e) include the word “secret” on the outside of the confidential document, (f) restricting employees’ access to other units or departments of a company, and (g) prohibit employees from working outside the specified working hours.³¹

Violation of the confidentiality agreement is the practice of the principle of bad faith, namely manner or behavior that contain the opposite motive of actions based on the principle of utmost good faith. Bad faith is an action consisting of bad intentions. Such actions are usually abetted by the intention of committing fraud, both in the execution and plotting stages. The aim is to deceive or mislead other parties, or to a certain extent intend to neglect or avoid the obligations that must be fulfilled. Pursuant to this rule, the conventional provisions regulated in Article 1338 paragraph (3) of the Civil Code also emphasize the importance of the principle of good faith in establishing and executing agreements.

UURD does not regulate the principle of bad faith, contrasting with Law No. 20 of 2016 concerning Trademarks and Geographical Indications, although it only relates to registration applications. The provisions of Article 21 paragraph (3) of the Law state that "An application is refused if it is submitted by an Applicant in bad faith", defines that an applicant who is reasonably suspected of registering his/her Mark with the intention to imitate, plagiarize, or follow the Mark of another party for the sake of his business and constructing conditions for unfair of business competition, confusing, or misleading consumers.

³¹ T. Imam Sjahputra dan Heri Herjandono, *Aspek – Aspek Hukum Rahasia Dagang (Trade Secret)*. Jakarta: Harvaindo, 2010, hlm. 28-29. Lihat juga Ni Kadek Ayu Sucipta Dewi. “Pengaturan Confidentiality Agreement Terhadap Perlindungan Rahasia Dagang.” <https://ojs.unud.ac.id/index.php/kerthasemaya/article/download/42284/25708>, accessed on 20 October 2021, 21.30 WIB.

The use of the principle of good faith in the application for registration cannot be applied to a Trade Secret as the protection of a Trade Secret does not require registration³² where the information contained in the Trade Secret is automatically protected as long as the confidentiality is not disclosed or published to the public. The principle of protection of trade secrets also differs from the protection of creations related to science, art, and literature (copyright) that did not require registration (declarative) as the protection is given to the first user (first to use) as long as the creation is original and already tangible. However, copyright could be still recorded (not registered) to obtain a certificate of ownership as proof of transcribed. While Trade Secrets absolutely do not require recording or registration as it would result in the disclosure of the information and the Trade Secrets will be forfeited. The absence of data on Trade Secrets results in no database regarding the quantity or type and amount of the protected Trade Secrets.

The obligation to execute contracts on the basis of good faith has been universally recognized in the principles of international contract law as contained in the preamble to the 1969 Vienna Convention which reads: The principles of free consent and good faith and the *pacta sunt servanda* rule are universally recognized. In addition, Article 1.7 of UNIDROIT (The International Institute for the Unification of Private Law) states that “each party must act in accordance with good faith and fair dealing in international trade, and the parties may not exclude or limit their duty.”³³ Prior to this, the principle of good faith is a universal principle that shall be implemented in each agreement, including confidentiality of trade.

The principle of good faith is not implemented in the event of a violation of the confidentiality agreement of trade secret information (delinquency), where the obligations agreed upon in the engagement are not fulfilled³⁴ or default on not performing/fulfilling the contents of the agreement in question as the respective term of

³² Bandingkan dengan Andry Setiawan et al, “Eksistensi Pendaftaran Rahasia Dagang dan Implementasi Perlindungannya (Studi di Kanwil Kemenkumham Jawa Tengah), *Jurnal Law & Justice*, Volume 3 No. 2, 2018, hlm 73, 76.

³³ Cindawati, “Prinsip *Good Faith* (Itikad Baik) dalam Kontrak Bisnis Internasional.” *Mimbar Hukum*, Volume 26 No. 2, 2014, hlm. 191.

³⁴ Abdul Kadir Muhammad, *Hukum Perikatan*, Bandung: Alumni, 2014, hlm. 241.

the delinquency, in English law, it is called the term "*default*". or "*nonfulfillment*" or "*breach of contract*".³⁵

The provisions for default (Article 1234 of the Civil Code) related to the agreement on confidentiality of trade secret information are (a) Article 13 of the UURD reads: "An infringement on Trade Secret takes place when a person deliberately discloses the Trade Secret or breaks the agreement, or the obligation, either written or not, to maintain the confidentiality of the relevant Trade Secret". (b) Law No. 13 of 2003 concerning Manpower Article 158 paragraph (i) "An entrepreneur may terminate the employment of a worker or labourer on the grounds that the worker/labourer has committed grave wrongdoings of unveiled or leaked the enterprise's secrets, which he or she is supposed to keep secret unless otherwise required by the State. (c) Decree of the Minister of Manpower No. 150/Men/2000 dated June 20, 2000 "Labourers who committed acts of revealing or divulging company secrets or defame the entrepreneur and/or the entrepreneur's family which should be kept secret unless otherwise for the interests of the State, the entrepreneur is permitted to perform termination of employment (PHK) for the labourers.

Default due to not performing the obligation to maintain confidentiality or disclosing the prohibited Trade by the employees is a violation. However, Article 15 of the UURD excludes the provision of disclosure that are not considered a trade secret violation if (a) the disclosure of the Trade Secret or the use of the Trade Secret is based on the interests for the security and defense, health, or safety of the public. For example, secrets for producing weapons or revealing the process of producing the anti-virus to cope with the COVID-19 pandemic, (b) the reverse engineering of a product that is produced from the use of the Trade Secret of another person is solely conducted for the interest of making further development of relevant products.

An example of a Trade Secret violation is the Hitachi Case (Bisnis Indonesia, Suwantin Oemar, 21 October 2008 JAKARTA):

PT Basuki Pratama Engineering filed a civil claim for compensation through the Bekasi District Court against PT Hitachi Construction Machinery Indonesia (HCMI) around Rp. 127 billion, for allegedly violating Trade Secrets. In addition to PT HCMI, another party named as the defendant, in this case, is Shuji Sohma, within his capacity as the former President Director of PT HCMI and the 10 other Defendants. The lawsuit was made in connection with the

³⁵ Munir Fuady, *Konsep Hukum Perdata*, Jakarta: Raja Grafindo Persada, 2014, hlm. 207.

violation of the Trade Secret regarding the use of "production methods and/or sales methods" of boiler machines without Plaintiff's consent. Defendants IV to Defendant X are former employees of PT BPE, which turns out that Defendants IV to Defendant X has worked at the defendant's company PT HCMI since their resignation from Plaintiff's company. Defendant, about three to five years ago, started producing boiler machines and used the plaintiff's production and sales methods that have been PT BPE's Trade Secrets. PT BPE's lawsuit was granted by a panel of judges. However, PT HCMI filed an appeal to the Supreme Court against the decision of the Central Jakarta District Court as former BPE employees who chose to change jobs only intended to seek and get a decent living and peace of mind at work and did not commit any violation of Trade Secret or BPE company regulations.

Analysis: the lawsuit has a solid ground in the case of efforts to maintain the Trade Secret have been agreed upon by the parties in the "*Confidentiality Agreement*",³⁶ workers are not allowed to work in the competing companies, even with the reason to acquire a decent life.

The legal consequence of violating the agreement on confidentiality of Trade Secret information is to arise the right to file a lawsuit through litigation or court that could be carried out through a civil law lawsuit, namely compensation in the form of giving commensurate achievements as the result of an act that generates a loss committed by one of the parties of the agreement/consensus that committed the crime.³⁷ O.W Holmes presents a theory, that there is an obligation to preserve an agreement as in case of neglecting it, the respective party shall be responsible for remuneration or compensation.³⁸ Article 1246 of the Civil Code states: "Compensation of costs, damages, and interests that the creditor may claim comprises of losses he had suffered and profits he would have enjoyed,....." so that the party that violates is obliged to pay compensation.³⁹

Default only occurs in contract law, and the issue of default shall be resolved through the legal mechanism of the respective agreement, considering that the issue of

³⁶ Bandingkan dengan Rizki Nur Annisa, *et. al*, "Urgensi Kontrak Kerja yang Berkeadilan sebagai Upaya Perlindungan Hukum Rahasia Dagang", *Jurnal Masalah-Masalah Hukum*, Volume 47 No. 4, 2018, hlm. 367- 372.

³⁷ Anonim, <http://repository.unpas.ac.id/34286/4/BAB%20II>, accessed on 5 September 2021, 11.32 WIB.

³⁸ Nyoman Samuel Kurniawan, "Konsep Wanprestasi Dalam Hukum Perjanjian dan Konsep Utang Dalam Hukum Kepailitan (Studi Komparatif Dalam Perspektif Hukum Perjanjian dan Kepailitan)", *Jurnal Program Magister Studi Ilmu Hukum Program Pascasarjana Universitas Udayana*, Volume 3 No. 1, 2013, hlm. 9.

³⁹ Anastasia Gerungan, "Perlindungan Hukum Terhadap Rahasia Dagang Ditinjau dari Aspek Hukum Perdata dan Pidana di Indonesia", *Jurnal Hukum Unsrat*, Volume 22 No. 5, 2016, hlm. 69, 79.

default often occurs not solely of the negligence of one of the parties of the agreement, yet also intended as a response of the prior default of the opposing party, notably in case of the implementation of reciprocal agreements.⁴⁰ However, violation of the Trade Secrets arises not only due to default but also over acts against the law according to Article 1365 of the Civil Code in conjunction with Article 14 of the UURD.

Acts against the law in Article 1365 of the Civil Code related to Trade Secrets means unlawful acts that violate the rights to confidential information owned by a person that has economic value. While Article 14 of the UURD reads: "A person shall be deemed to have committed an infringement on a Trade Secret of another party if he obtains or possesses the Trade Secret in a manner that is contrary to the prevailing laws and regulations". The provisions of Article 14 do not explicitly mention "intentionally" as Article 13 of the UURD reads that means the provisions of Article 14 have a broader scope than Article 13 as could be seen in the form of "negligence and intentional". However, with regard to acts against the law, Article 14 is interpreted as an act against in a narrow scope as it states "...that is contrary to the prevailing laws and regulations."

Settlement of civil disputes regarding Trade Secrets is carried out through the District Court instead of the Commercial Court for the disputes relating to Trade Secrets remain undisclosed as the trial could be conducted privately in District Court and attended only by the parties of the disputes, while in the Commercial Court the trial is publicly open which has the potential to reveal Trade Secrets and lead to vanishment. Criminal charges according to Article 17 stated that (1) "Any person who deliberately and without rights uses the Trade Secret of another party, or conducts any acts as referred in Article 13 or Article 14 shall be sentenced to imprisonment of at most 2 (two) years and/or fine of at most Rp.300.000.000,- (three hundred million rupiahs), (2) "The criminal action as referred to in paragraph (1) shall constitute offense that warrants complaint".

Settlement of the violations of confidentiality agreement on Trade Secret information could be carried out not only through litigation or courts (civil lawsuits and criminal prosecutions), as UURD allows the settlement of these disputes through non-litigation as regulated in Law no. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. However, the Law is more likely to regulate in detail Arbitration

⁴⁰ Nyoman Samuel Kurniawan, *Op. Cit.*, hlm. 4.

while Alternative Dispute Resolution is regulated in a brief, so the author argues that the title of the Law is not appropriate as the Law shall equally regulate the norms of Arbitration and Alternative Dispute Resolution.

Law No. 30 of 1999 states that Alternative Dispute Resolution is an institution for the settlement of disputes or differences of opinion through a procedure agreed by the parties, i.e. resolution outside the courts by consultation, negotiation, mediation, conciliation, or expert assessment.⁴¹ The general provision did not regulate the mechanism of the resolution, therefore the methods of the settlement are further explained in the doctrine or teachings of the experts.

Consultation is an encounter between two or more parties to discuss or request for consideration of a dispute or difference of opinion to reach a joint solution.⁴² Mediation is a way to resolve disputes or differences of opinion with the assistance of a neutral third party or dispute resolution by mediating.⁴³ Furthermore, conciliation is a dispute resolution process by submitting to a commission to elaborate or elucidate facts and enacted a non-binding proposal.⁴⁴ Expert Assessment, in Article 6 paragraph (3) of the Law referred to as "expert advisors", is the principle determined that disputes of different opinions be resolved with the assistance of one or more "expert advisors" or a mediator.

III. CLOSING

1. Conclusion

The category of the confidentiality agreement according to the regulation, including innominate agreement (not regulated under the Civil Code), according to the method of the establishment appertain to a standard agreement (determined unilaterally by the owner of the Trade Secret) based on the principle of freedom of contract, characteristically is a formal agreement, that the confidentiality agreement established

⁴¹ Manuasa Saragi, "Litigasi dan Non Litigasi Untuk Penyelesaian Sengketa Bisnis Dalam Rangka Pengembangan Investasi Di Indonesia", *E-Journal Graduate Unpar Part B: Legal Science*, Volume 1 No. 2, 2014, hlm. 55.

⁴² Nyoman Rai Asmara Putra Dewa dan I Putu Rasmadi Arsha Putra, "Akibat Hukum Pendaftaran Penyelesaian Sengketa Alternatif", *JHAPER*, Volume 6 No. 1, 2020, hlm. 81.

⁴³ Joni Emirzon, *Alternatif Penyelesaian Sengketa di Luar Pengadilan*, Jakarta: Gramedia Pustaka Utama, 2011, hlm. 67.

⁴⁴ *Ibid*, hlm. 91.

on the ground of mutual consent as well as stated in a deed (underhand), in the written document, namely the "Confidentiality Agreement" or Non-Disclosure Agreement.

The criteria for good faith according to the doctrine of subjective good faith (*subjectieve goede trouw*) and objective good faith (*objectief goeder trouw*) are the nondisclosure of Trade Secrets, however, the UURD does not regulate explicitly that the criteria for good faith appertain with the obligation to maintain confidentiality according to the Article 1338 paragraph (3) of the Civil Code, doctrine, or expert opinion. The legal consequences of disclosing a Trade Secret raise the right of the owner of the Trade Secret to draw a legal action, both litigation, and non-litigation.

2. Recommendations

Comprehensive regulation in the UURD regarding the prohibition of the confidentiality agreement of Trade Secret information with exoneration clause, namely divert responsibility of disclosure of the Trade Secret to the worker over the fault of the owner of the Trade Secret for disregarding the obligation imposed by law to maintain the confidentiality.

To ensure legal certainty, the UURD needs to designate the criteria of good faith, however, since the trade secrets do not require registration, the good faith criteria shall emphasize the use by parties that are not aware of the existence of Trade Secrets that protected by law, and maintaining the confidentiality related to "Confidential Agreement".

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