International Journal of Law and Society
Vol. 1, No. 2, April 2024
e-ISSN : 3046-9562, p-ISSN : 3046-9619, Page 91-101

# Application Of The Principle Of Freedom Of Contract In Business Contracts In Indonesia

**Irmanto Brampu [1], Henry Aspan [2], H. Dahlan [3]**
[1,2,3] Universitas Pembangunan Panca Budi

Jl. Gatot Subroto Km.4.5 Sei Sikambing 20122 Medan City, North Sumatra
*Korespondensi penulis: hermanskm86@gmail.com*

***Abstract*** *The Indonesian business community is currently developing very rapidly, and the number of business transactions in Indonesia has also increased. This situation shows that the Indonesian economy is very favorable for people who want to do business in Indonesia, not only Indonesian entrepreneurs but also foreign entrepreneurs. A legal principle applies to the agreement, namely the principle of freedom of contract, which declares a person's freedom to enter into a contract in a conditional form. As long as the parties agree and does not violate etiquette and law, the agreement will be valid. . The research method used is the normative legal approach, which is the analysis and understanding of law within the framework of this study as a set of positive rules or norms in a legal system that governs human life. This was done by studying books, laws, regulations and other documents relevant to this study. In addition, the collection of legal materials also includes legal material analysis methods and legal analysis methods that adjust should be, as long as this is the method of measuring and analyzing the issues in this study. The application of the principle of freedom of commercial contract requires the parties to maintain a balanced position when formulating agreements regulating commercial legal relationships. If a balance is not achieved, economic actors will limit and avoid liability by including release clauses. It is therefore necessary for the government to intervene to limit the application of the principle of freedom of contract through standard contracts by establishing rules prohibiting the inclusion of exemption clauses and monitoring the use of standard clauses in the economy by economic operators.*

***Keywords:*** *Principles of Freedom of Contract, Contract, Business*

## INTRODUCTION

The Indonesian business community is currently developing very rapidly, and the number of business transactions in Indonesia has also increased. This situation shows that the Indonesian economy is very favorable for people who want to do business in Indonesia, not only Indonesian entrepreneurs but also foreign entrepreneurs. To ensure legal certainty for all parties, a bond is required for each party to conduct business. Therefore, a legal agreement is required.

Indonesia is a country governed by the rule of law, and laws and regulations are enacted to improve social well-being (welfare state). Among the various legal components identified, compliance with the implementing regulations is important. As people who are often in contact with others, we cannot escape cooperation, which ultimately leads to agreement between us, so disputes often arise, and disputes often evolve into disputes between two parties. The agreement ultimately creates legal steps, which are rights and obligations that must be fulfilled. Therefore, the agreement between the parties has principles such as the principle of freedom of contract, the principle of concession, the principle of compliance with the agreement, the principle of good faith, the principle of personality and the principle of Islamic contract. Some of the above principles have been formally applied by the community to ensure the continuity of cooperation. (Yulenti, 2008)

*Received March 31,2024; Revised April 05,2024; Published April 30, 2024*
* Irmanto Brampu, hermanskm86@gmail.com

The Civil Code stipulates that the most important source of an agreement is an agreement, because the parties can enter into various agreements through agreement and in accordance with the principle of freedom of contract in Volume 3 of the Civil Code. However, freedom of contract does not mean that they are free to enter into agreements, but rather that they must meet certain conditions for the validity of the agreement listed in Volume III of the Civil Code. In today's society, there are many agreements in the form of standard agreements. The debtor only needs to agree or reject the agreement proposed by the creditor. However, one of the principles of contract law is freedom of contract or the fundamental idea that two parties are given the freedom to discuss or negotiate the terms of an agreement.

Legally, the agreement gives people maximum freedom to create an agreement that meets all their needs, as long as it does not violate public policy. As mentioned in the section on contractual principles, one of them is the Islamic principle of freedom of contract and the principle of establishment of contract. Islamic contract principles include the principle of justice, which encourages contractors to act fairly and in accordance with legal and religious standards. (Marsono, 2019)

A legal principle applies to the agreement, namely the principle of freedom of contract, which declares a person's freedom to enter into a contract in a conditional form. As long as the parties agree and does not violate etiquette and law, the agreement will be valid. Neither the Civil Code nor other laws clearly stipulate the principle of freedom of contract. Article 1338(1) of the Civil Code itself stipulates that an agreement is binding upon the consent of the parties and becomes law, which means that as long as the parties agree, the agreement must be executed. (Harianto, 2016: 149)

According to Article 1233 of the Civil Code, any obligation arises by law or by agreement, i.e., a contractual obligation arising from the parties' "willful agreement" to bind each other in order to obtain rights. In order to fulfill the rights and obligations that should be performed, these rights and obligations must exist in the form of services. A good agreement is proportionate and mutually beneficial. However, in situations where both parties benefit mutually from the existence of an agreement, it is not uncommon in modern times to find ourselves faced with situations where one party has drawn up an agreement in such a way that the other party is unable to change the content of the drawn up agreement. What you agree with and what you disagree with or cannot negotiate.

## LITERATURE REVIEW

Contract law is part of civil law (private law). It focuses on self-imposed obligations. It is called a part of civil law because the breach of the obligations set out in the contract is entirely the responsibility of the contracting party. In its most classic form, a contract is viewed as the expression of free human agreement and choice. Contract is the embodiment of freedom of contract and freedom of choice.

Freedom of contract reflects the development of the free market concept developed by Adam Smith, who implemented classical economic theory based on his reflections on the teachings of natural law. The principle of freedom of contract can be analyzed using the first paragraph of Article 1338 of the Civil Code: "An agreement concluded in accordance with the law shall have legal effect for the parties." The principle of freedom of contract for the parties:

1. To reach an agreement or not to reach an agreement
2. Make an agreement with anyone
3. Determine the content, implementation methods and conditions of the agreement.
4. Determine the form of written or oral agreement

The background to the emergence of the principle of freedom of contract is the idea of individualism, which began in the Greek era, was continued by the Epicureans, and developed rapidly during the Renaissance through the teachings of Hugo de Grecht and others. Thomas Hobbes, John Locke, and J.J. Russo. According to individualism, everyone is free to obtain whatever he wants. In contract law, this principle is realized through "freedom of contract". The Leisbet-Fairy theory assumes that an invisible hand ensures the continuity of free competition. Because the state should not interfere in the socio-economic life of society. A business contract is a written agreement in which the content agreed upon by the parties is of a commercial nature.

## RESEARCH METHODS

This study is a descriptive analysis because it provides the most accurate data about a person, environment, or other symptoms, and aims to obtain data about the relationship between one symptom and another. The type of research used is normative legal research (legal norms). This is a legal theoretical approach that conceptualizes law as law within legal regulations (book law) and conducts legal systematics research in the context of specific legal regulations or statutory law.

Data collection method: library research or literature research, including primary, secondary, and tertiary legal materials. Research is conducted by reading some reference materials such as literary books related to papers, law and materials on the internet such as

magazines, articles and literary works. In terms of research data sources, a general distinction is made between data coming directly from the community (primary data) and data coming from library materials (secondary data). Normative legal research methods consider only secondary data. Secondary data include primary legal materials, secondary legal materials and tertiary legal materials.

a) Main legal materials, that is, binding legal materials, including:

1) Constitution of the Republic of Indonesia 1945

b) Secondary legal materials, that is, legal materials that explain primary legal materials, including:

1) Literature-related books;

2) Theses, theses, theses, scientific journals and scientific articles;

3) The information comes from the Internet

c) Tertiary legal materials, i.e. materials that provide guidance for primary and secondary legal materials, such as Indonesian Big Dictionary (KBBI), legal dictionaries and materials searched through the Internet.

The research method used is the normative legal approach, which in the context of this study analyzes and understands law as a set of positive rules or norms in a legal system that governs human life. This method, also known as the biographical method, is done by studying books, laws, regulations, and other documents relevant to the study. In addition, it also includes the collection of legal materials, the analysis methods of legal materials, and the legal analysis of adjusting what should be, which is a method for this study to measure and analyze the problem.

## RESULTS AND DISCUSSION

Throughout its history, contract law initially followed a closed system. This means that both parties are bound by the agreement contained in the law. This is due to the influence of the legislative doctrine which postulates that there is no law outside the law. The same can be found and read in the various decisions of Hoge Raad (HR) 1919 from 1910 to 1919. It should be noted that the decision of the Hoge Raad (HR) 1919 of January 31, 1919 was the most important decision. This decision concerns the interpretation of infringements provided for in Article 1365 of the Civil Code.

The definition of infringement in the judgment not only violates the law, but also infringes on the subjective rights of others, public order and good customs, and public order. Under H.R. 1919, an unlawful act is an act or omission that:

1. Violate the rights of others; this means that some personal rights, such as physical integrity, freedom, honor, etc., are violated. These include absolute rights such as property rights and intellectual property rights.
2. Violates the legal obligations of the perpetrator; that is, only the obligations stipulated by law.
3. Violating public order and good customs; this means that a person's behavior violates the unwritten customs that develop and develop in society.
4. Contrary to the preventive measures that society must abide by.

And according to Jack P. Friedman in The New York Dictionary of Business Terms, Barron's, 1987, page 66, the term "business" refers to an organization established for the purpose of profit Business enterprise, profession or trade. Businesses are created by entrepreneurs who invest money into certain "risks" to promote certain businesses for profit. Therefore, business is an activity with commercial value. A commercial contract is therefore a "written agreement with commercial value".

The subject of the contract is services. Creditors have the right to fulfill their promises, and debtors have the obligation to fulfill their promises. The core of a contract is "performance". According to Article 1234 of the Civil Code, the performance of a promise includes the act of "giving something" or "not doing something".

The subject matter of the contract or the performance of the contract must be determinable or at least of a certain type in accordance with Article 1320 of the Civil Code. Since the object or object type is a prerequisite for the validity of the contract, the contract will automatically be invalid if the entire object is not specified.

It has been established that a contract is created by the existence of a legal relationship between two or more persons. The proponents of contract law must be at least two specific persons. Each one occupies a different position. One person becomes a creditor and another person becomes a debtor. The creditor and the debtor are the subjects of the contract.

A business contract is a written agreement in which the content agreed upon by the parties is of a commercial nature. According to Article 1313 of the Civil Code, an agreement is an act by one or more persons that binds another person. An agreement is therefore a legal relationship regulated and legitimized by the law itself. The agreement on the legal relationship between individuals is something that exists in the legal environment. Therefore, the legal relationship in the agreement does not arise on its own, but is created by a legal measure that results in one party being granted the right to perform by the other party and the other party

acquiring the right to perform its obligations. The party has an obligation to perform its obligations.

An agreement or contract is a series of mutually binding agreements signed by two parties. In this modern and digital era, many foreign companies have invested in Indonesia. Different types of needs such as trade in services, transportation, motor vehicles, wood processing plants, coal, etc. all need to be agreed upon. Foreign enterprises also use standard protocols or standard protocols in the implementation process. in the company's development process. This is generally considered appropriate because of the high volume of trade and the varying consumer perceptions of achieving desired goals.

Indonesian contract law follows the principle of freedom of contract and provides that an agreement is legally binding on the person who enters into it. Each activity represents a legal act that must be performed between two contracting parties. The principle of freedom of contract in Article 1338(1) is a principle related to the form and content of the agreement (Rahman 2011). The principle of freedom of contract stipulates that everyone has the freedom to act, to participate or not to participate in legal relations between others, and to bind others. In other words, there must be a balance of bargaining power when entering into a contract. Both economically and socially. (Mufidi 2018)

The principle of freedom of contract emerged in the 17th and 18th centuries. At that time, the principle of freedom of contract had a very strong impact, since freedom operated unconstrained by a sense of social justice or state interference. This creates injustice to the unequal parties. In later developments, the principle of freedom of contract was restricted by law, court decisions and extra-legal norms, which meant that the content and performance of the contract must be guided by the principle of reasonableness. (Hudiata, 2014)

The principle of freedom of contract is actually a continuation of the principle of equality of parties as the basis of civil law relations, and is further distinguished from superior-subordinate public relations. Although the principle of freedom of contract is also important, there are equally important principles in civil law, namely the principle of reasonableness, the principle of balance, the principle of proportionality, which of course can be evaluated and understood by everyone, as well as the color of the agreement. Understanding this principle means that each person has the freedom to attach himself to another person. In addition, it should be noted here that Indonesia pursues an open agreement system, which means that anyone has the right to enter into an agreement as long as the person has the right and is authorized by the rules and regulations to enter into an agreement with a legal person. result. This can be derived from the provisions of Article 1338, paragraph 1, of the Civil Code. In

English, "principle" is a synonym of "principle", etymologically speaking, it has three meanings:

1) Foundation (the basis of ideas or opinions)

2) Basic ideals; and

3) Basic Law.

Freedom of contract is one of the most important principles of contract law. In the 19th century, freedom of contract was celebrated and dominated. The existence of the principle of freedom of contract is inseparable from the influence of liberal economic philosophy. In the economic field, Adam Smith developed the laissez-faire school of thought, which emphasized the principle of government non-interference in economic activities and market operations. In the field of contract law, the influence of the laissez-faire school manifests itself in the restriction of state intervention in private contracts regulating the relationship between natural and legal subjects. As long as private contracts do not violate the law, public order, decency and morality, the government will not interfere.

If the positions of the parties to an agreement are unbalanced, the weaker party is often not truly free to decide what it wants in the agreement. In this case, the party with a stronger position will usually take the opportunity to clarify certain terms in the model contract so that the content of the agreement only serves the interests of the party with a stronger position. It can be seen that the agreement contains clauses that are beneficial to him, or clauses that reduce or eliminate certain burdens or obligations that he should bear, commonly known as "rescission clauses."

Obligations arising from standard contracts are often affected by disagreements between the contracting parties or existing laws, which in particular often leave users of goods and services in a vulnerable position. An insurance contract is a standard contract confirming the performance of binding rights and obligations between the insurer and the insured and therefore requires compliance with all points of the contract that are part of it. The Contract Law stipulates that a contract is deemed valid when it is established and must meet the subjective and objective requirements listed in Article 1320 of the Civil Code, which clearly stipulates the existence of an "agreement", which is a condition that must be met. condition. Compliance with the validity of the agreement.

If there is an imbalance between the parties, it must be rejected as it will affect the content of the contract and its meaning and purpose. The term balance explains the content of the rules as:

1. Pay more attention to the balance of the parties' status, which means that the parties' status in the contractual relationship is balanced;
2. Equal distribution of rights and obligations in the contractual relationship, regardless of the process of determining the distribution results;
3. Balance is just the end result of a process
4. State intervention is a mandatory and binding tool to achieve a balance between the positions of all parties.
5. In principle, a balance between the positions of the parties can only be achieved under equal conditions (all else being equal).

In the Civil Code and other laws and regulations, there is no explicit provision for the introduction of the principle of freedom of contract. As for the existence of the principle of freedom of contract, it can be inferred from several articles of the Civil Code, especially Article 1329 of the Civil Code, which stipulates: "Everyone has the ability to enter into a contract unless he is incapable of entering into a contract." According to Article 1332 of the Civil Code states, "Everyone has the freedom to enter into agreements regarding goods of economic value." Article 1320, paragraph 4) Qiao. Article 1337 of the Civil Code can lead to the following conclusion: "As long as it is not prohibited by law or goes against morals or public order, everyone has the freedom to enter into an agreement." According to Article 1338 of the Civil Code, first item, the Code states: "All agreements lawfully entered into are deemed law to those who made them." This can be interpreted to mean that anyone can enter into an agreement with anything, but every legal entity has the freedom to enter into agreements with others . They can find whoever they want.

With the existence of the principle of freedom of contract, people can create a new type of contract that has not been seen before in the contract (nominal) and whose content is different from the contract (nominal) stipulated by law, that is, Volume 3 of the "General Principles of Civil Law" code. This contract is called an Innominat. The possibility of entering into new contracts is also inextricably linked to the open system, which is contained in Book III of the Civil Code as supplementary law and can be overridden by the contracting parties. Further development of the principle of freedom of contract in Indonesian contract law includes the following areas:

1. Freedom to reach an agreement or not
2. Free choice of agreement parties
3. Freedom to decide for oneself or choose the reasons for the agreement
4. Freely determine the subject matter of the contract

5. Freedom to determine the terms of the agreement, including the freedom to do so Accept optional legal provisions or deviate from them (aanvullend, optional).

In practice, the principle of freedom of contract is generally used as the basis for standard contracts that regulate transactions between consumers and economic operators. Due to its practicality and ability to save costs and time, this standard contract is used in almost all commercial activities, including insurance contracts (policies), banking contracts, lease contracts, house/apartment sales contracts companies (real estate), office building lease contracts , credit card contract, cargo transportation contract (land transportation, sea transportation, air transportation, etc.).

Efforts to limit the principle of freedom of contract will be more effective if the prohibition on the inclusion of standard clauses is accompanied by oversight by authorized state bodies/authorities. As for the power to supervise the incorporation of standard clauses, Section 52(c) empowers the Consumer Disputes Settlement Authority (BPSK) to supervise the incorporation of standard clauses. "

Freedom of contract in an agreement can be said to be ideal when the parties to the agreement are balanced against each other. However, if the parties' positions in an agreement are unbalanced, the party perceived to be weaker is often not in a position to truly be exempt from the requirements of the agreement. This usually occurs when the party in a strong position usually has the opportunity to formulate so-called standard terms.

Standard clauses refer to an agreement in which the terms are determined or drafted by one party, so the agreed agreement should be formulated and drafted by the parties involved in the agreement, while the contract is drafted by the party with a stronger position. Since the person who created the content and structure of the contract is the stronger party, it can be determined that the contract contains provisions that are favorable or mitigating to him.

Freedom of contract is often described as the freedom to decide in accordance with one's own interests and experiences when and with whom to contract and to determine the content of the contract as one wishes. As far as contracts are concerned, the scope of the principle of freedom of contract is recognized as such, including the freedom to make or not to make an agreement. On the first point, the parties have the right to reach an agreement or not. If both parties decide to enter into an agreement, an agreement is entered into between the parties. The word "agreement" in an agreement basically means a meeting of the will or a consensus of will between the parties. When a person really wants to agree on something, he or she is said to be agreeing or assent (toestemming).

## CONCLUSION AND RECOMMENDATION

The application of the principle of freedom of contract requires the parties to maintain a balanced position when formulating agreements regulating commercial legal relationships. If a balance is not achieved, economic actors will limit and avoid liability by including release clauses. It is therefore necessary for the government to intervene to limit the application of the principle of freedom of contract through standard contracts by establishing rules prohibiting the inclusion of exemption clauses and monitoring the use of standard clauses in the economy by economic operators.

It is also expected that the originally powerful principle of freedom of contract should not be restricted by a sense of social justice or by legal regulations. However, in subsequent developments, agreements based on this principle failed. This can be seen in evidence of Parliament's freedom to intervene through contract law. Therefore, when making laws or regulations, legislators should pay attention to the basic rules and not be lenient to the parties, because if the parties to the contract are unequal or do not have equal rights, such lenient treatment will lead to inequality and injustice. The same people have the same negotiating position.

## REFERENCES

### Journal

Harianto, D. (2016). Asas Kebebasan Berkontrak: Problematika Penerapannya Dalam Kontrak Baku Antara Konsumen Dengan Pelaku Usaha. Jurnal Hukum Samudra Keadilan, 11 (2). Diambil dari https://ejurnalunsam.id/index.php/jhsk/article/view

Uama, A. P. C., Dinda, C. M., & Pamungkas, D. (2021). Telaah Regulasi Ojek Online di Indonesia dalam Persfektif Filsafat Fenomenologi Hukum. *Reformasi Hukum,XXV(1).* https://doi.org/10.46257/jrh.v25i1.182

Republik Indonesia. Kitab Undang-Undang Hukum Perdata (KUH Perdata)

Niru Anita Sinaga, "Peranan Asas-Asas Hukum Perjanjian Dalam Mewujudkan Tujuan Perjanjian," Binamulia Hukum 7, no. 2 (2018): hlm. 109

Mohammad Zamroni, "Urgensi Pembatasan Prinsip Kebebasan Berkontrak Dalam Perspektif Historis," Perspektif Hukum19, no. 2 (2019): hlm. 291

R. Subekti dan R. Tjitrosudibio, ed., Kitab Undang-Undang Hukum Perdata: Burgerlijk Wetboek Dengan Tambahan Undang-Undang Pokok Agraria dan Undang-Undang Perkawinan, Cetakan 43 (Jakarta: Balai Pustaka, 2017), hlm. 120.

Muskibah dan Lili Naili Hidayah, "Penerapan Prinsip Kebebasan Berkontrak Dalam Kontrak Standar Pengadaan Barang Dan Jasa Pemerintah di Indonesia," Refleksi Hukum: Jurnal Ilmu Hukum 4, no. 2 (2020): hlm. 17

### Textbooks

Dewi, Gemala, 2013, *Aspek-aspek Hukum Dalam Perbankan dan Perasuransian Syariah*, Kencana, Jakarta.

Khairandy, Ridwan, 2013, *Hukum Kontrak Indonesia Dalam Perspektif Perbandingan,* FH UII Press, Yogyakarta.

Nugroho, Susanti Adi, 2008, *Proses Penyelesaian Sengketa Konsumen Ditinjau dari Hukum Acara Serta Kendala Implementasinya,* Kencana. Jakarta.

Patrik, Purwahid, 2012 *Dasar-dasar Hukum Perikatan,* Mandar Maju, Bandung.

Sidabalok, Janus, 2010, *Hukum Perlindungan Konsumen di Indonesia*, Citra Aditya Bakti, Bandung