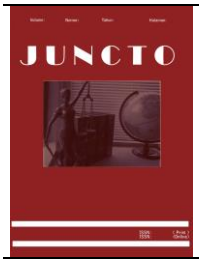

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The Principle of Freedom of Contract in Commercial Agreements: Are Limitations Needed?

Shenti Agustini*, Febri Jaya & Agustianto
Program Studi Hukum, Fakultas Hukum, Universitas Internasional Batam, Indonesia

Abstract

The principle of freedom of contract is one of the principles in an agreement where the parties can determine for themselves the form of the agreement that will be made. However, by implication, this principle reaps many injustices. One form of implementation of this principle is standard agreements made in the business world. Standard agreements are only made unilaterally so they have the potential to cause injustice. This research aims to analyze whether or not restrictions are necessary in the principle of freedom of contract. The research method used is normative juridical. The theoretical basis used is Economic Democracy Theory. The research results show that the principle of freedom of contract has resulted in a lot of injustice, for example, standard agreements are made in the business world for time efficiency but do not involve the parties in making them, so there are parties whose position is very weak in the agreement. This is not by the theory of economic democracy which should provide prosperity for all, not just certain parties. Therefore, it is necessary to limit the principle of freedom of contract.

Keywords: Freedom of Contract, Agreements, Limitations

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**E-mail: shenti.agustini@uib.ac.id* *ISSN 2550-1305 (Online)*

INTRODUCTION

The law of engagement provides freedom to parties who wish to agree, as long as it does not conflict with public order and morality. Engagement law is a complementary law, where the parties can remove the articles that the parties wish. The parties also have their own will to regulate their interests in the agreement, but if the parties do not submit to their own will, then they are subject to the provisions of the law. Article 1233 of the Civil Code regulates that every agreement is created either by agreement or agreement by law (Ndaomanu, 2021)

An agreement is a legal relationship between one person and another person or several people to carry out certain things that have been agreed upon (Buana et al., 2020). In a different sentence, trade relations must be based on an agreement. So that the rights and obligations of the parties can be regulated in writing to avoid risks in the future (Perdana et al., 2014). An agreement is a private legal relationship that exists between parties who have agreed, regarding the object that has been promised as a form of fulfillment of rights and obligations, after the creation of an agreement between the parties who have bound themselves to an agreement (Anggraeni & Rizal, 2019)

In agreeing, there is a principle that can be adhered to or become a reference in agreeing, namely the principle of freedom of contract. The principle of freedom of contract is regulated in Article 1338. Article 1338 Paragraph (1) of the Civil Code determines: "all agreements made legally are valid as law for those who make them" The words all can be interpreted to mean that every legal subject can agree with Whatever the content, there is freedom for legal subjects to determine the form of the agreement. In other words, through the principle of freedom of contract, legal subjects have the freedom to make agreements, including opening up opportunities for legal subjects to make new agreements that have not been regulated in the Civil Code to be able to follow the needs of society due to developments over time (Innominat agreements) (Budhayati, 2009).

As time goes by, the forms of agreements circulating in the business world are increasingly developing. Forms of business behavior often used by business actors are using a "standard agreement/standard contract/standard agreement" (Dewi, 2007). A legal expert named Stein expressed his opinion regarding the use of the principle of freedom of contract as the basis for standard agreements/standard contracts in regulating consumer relationships with business actors by explaining that:

"A standard agreement can be accepted as an agreement based on the fiction of will and belief (fictie van wil en vertrouwen) which arouses the confidence of the parties to bind themselves to the agreement. "If the consumer accepts the agreement document, it means the consumer voluntarily agrees to the contents of the agreement." (Harianto, 2017)

Although based on the principle of freedom of contract the use of standard contracts is not prohibited, the imbalance in the position of business actors and consumers means that standard contracts are often used by business actors to include exoneration clauses to limit their obligations and responsibilities and potentially cause losses to consumers. Standard agreements (standard standards) are only made without negotiating with related parties or consumers and indirectly consumers have 2 (two) choices, namely accepting or rejecting. As a result, it can cause losses to consumers as parties who buy goods and services can sue the seller based on causing losses to consumers, by filing a legal process to obtain everything related to the losses suffered (Eleanora & Dewi, 2022).

Standard agreements made by business actors contain standard clauses that have permanent and final force and cannot be negotiated by consumers. This results in an imbalance in the position between consumers and business actors. The imbalance in position between consumers and business actors can be seen in the agreement between consumers and one of the cable TV service provider companies, namely MNC Play. The agreement entered into by the consumer with MNC Play is an agreement to purchase services to subscribe to Cable TV, the agreement is made in the form of a Subscription Form (Application Form) which must be filled out

by the consumer as a condition for subscribing to Cable TV with the company. The form consists of 1 (one) original form and 2 (two) copies of the form. The first page is a subscription form and the second page behind it contains the subscription terms and conditions which contain various standard clauses made by MNC Play.

The standard agreement contains a clause that states that business actors have the right to make changes to the regulations in the agreement without notifying consumers. Meanwhile, in the provisions of Article 18 of the UUPK, it is stated that business actors are prohibited from including standard clauses stating that consumers are subject to new rules which are new, additional, continued, or subsequent changes made unilaterally by business actors. This research was conducted to analyze the conflict of norms that occurs in standard agreements between consumers and cable TV service providers with provisions for the inclusion of standard clauses contained in Article 18 UUPK (Oktaviani & Sulistyowati, 2018).

Apart from that, the implementation of the principle of freedom of contract is also found in the form of standard credit agreements in banking which is a common thing. This makes it easier when signing a credit agreement. Customers as borrowers generally just sign without reading the agreement in more detail. Problems will arise when the credit experiences problems and ultimately a dispute must occur in court (Susanto, 2017).

Several studies test the validity of a sale and purchase agreement, such as that carried out by Diah and Andika. Diah's research examines sales and purchase agreements made through vending machines. This research specifically examines the validity of an agreement made automatically through an agreement-making machine. Based on Diah's research, agreements made via machines remain valid as long as they meet the legal requirements of the agreement. Meanwhile, the research presented by Andika specifically examines sales and purchase agreements regarding illegal cell phones. Based on research written by Andika, he tried to test the validity of illegal cell phone sale and purchase agreements.

The research written by Diah and Andika is similar. These two studies have something in common, namely testing the validity of a sale and purchase agreement. These two studies examined sales and purchase agreements that were made by both parties, only the object of the agreement was not halal, namely in the form of illegal goods, and the form of the agreement was printed by machine. The difference with this research is that this research specifically discusses standard agreements which are a form of the principle of freedom of contract which has the potential to cause losses because these standard agreements tend to be made by only one party so that the other party in the agreement seems to be in a weak position. Based on this background, the formulation of the problem that will be discussed in this research is first, do there need to be restrictions in implementing the principle of freedom of contract in an agreement?

RESEARCH METHODS

The research method used in this research is normative juridical. This normative juridical research method is a study that comes from a literature study (Tan, 2021). The normative juridical research method is research that is suitable for use in this research because this research specifically discusses the implementation of a legal principle, namely the principle of freedom of contract, which in its implementation has various negative impacts, so this research will specifically examine the urgency of limiting the principle of freedom of contract. This research will be carried out using a literature, and legislation approach and through other literature such as previous research articles and books that discuss agreements and the principles of agreements. The data source used is secondary data. Secondary data consists of first, primary legal material, namely the Civil Code, Law No. 8 of 1999 concerning Consumer Protection. Second, secondary legal materials consist of articles, journals, and books that discuss standard agreements, engagements, and agreements in the Civil Code.

RESULT AND DISCUSSION

Limitations on the Principle of Freedom of Contract

Everyone in everyday life always carries out engagements. Such as buying goods, renting, buying and selling goods, all of which are included in engagement activities. Engagements in Indonesia are regulated in Book III of the Civil Code. An agreement is a legal relationship in the field of property between two or more people, each of whom has rights and obligations. This legal relationship gives rise to legal consequences from the emergence of the agreement. In the law of engagement, every person can enter into an agreement that originates from an agreement, any agreement and, whether regulated by law or not, this is what is called freedom of contract, provided that freedom of contract must be halal and not violate the law, as has been said. regulated in law. In an agreement, there is an obligation to do something, and not to do something. What is meant by an engagement to do something is to carry out an action that is positive, halal, does not violate the law, and is by agreement. Meanwhile, an agreement not to do something is not to carry out certain actions that have been agreed upon in the agreement (Satrio et al., 2020).

Agreements or contracts are developing rapidly nowadays as a logical consequence of the development of business cooperation between business people. Many business collaborations are carried out by business people in the form of written contracts or agreements. Even in business practice, an understanding has developed that business cooperation must be held in written form. Written contracts or agreements are the basis for business actors or parties to carry out prosecution if one of the parties does not carry out what has been agreed in a contract or agreement (Syaifuddin, 2012). An agreement or contract is a legal relationship between two or more people who bind themselves based on an agreement to give rise to legal consequences. The legal consequences are in the form of reciprocal rights and obligations between the parties. When designing or making a contract, an important thing that the parties must pay attention to is the conditions for the validity of the agreement or contract as regulated in Article 1320 of the Civil Code, which essentially regulates:

1. Agree between the parties
2. Skills of the parties
3. Specific objects
4. Halal reasons.

The principle of freedom of contract is the autonomy of the parties (partij autonomy or freedom of making contracts), as an elaboration of Book III of the Civil Code which adheres to an open system (optional law). This principle can be concluded from Article 1338 Paragraph (1) of the Civil Code. Freedom of contract means freedom to determine the contents of the agreement and with whom to agree. The principle of freedom of contract is universal which refers to the free will of every person to make a contract or not to make a contract, the restrictions are only for the public interest, and in the contract there must be a reasonable balance. In practice, the principle of freedom of contract is not applied in making a standard agreement but remembers that standard contracts have become a necessity for society and business actors. The principle of freedom of contract means that the parties have freedom in agreeing/contract (Badrulzaman, 2015).

All agreements made legally apply as law to the parties who make them. This provides a society statement that we are allowed to make agreements in the form and content of anything or about anything and that agreement will bind those who make it as law. In other words, we are allowed to make our laws. Articles of Agreement Law only apply if we do not implement the rules ourselves in the agreement we make. It can be concluded that: every person is free to enter into or not to enter into an agreement with anyone; free to determine the contents and terms of the agreement ourselves and free to submit ourselves to the legal provisions of the agreement we make. This principle of freedom of contract is the embodiment of free will and the emanation of human rights. Everyone is free to make any type of agreement as long as it does not conflict with the law, public order, and morality ex Ps 1337 of the Civil Code (Noor, 2015).

The principle of freedom of contract is one of the legal principles in an agreement. The position of a "principle" in law is very important. Paul Scholten defines legal principles as "the tendencies required by law by our understanding of morality". It is understood that legal principles are the basic thoughts contained within and behind the legal system, each of which is formulated in statutory regulations and judges' decisions, concerning which individual provisions and decisions can be made. seen as an explanation (Atmadja, 2018).

The principle of freedom of contract in this agreement means that everyone can freely make and determine the form of contract that will be made and agreed upon. Contract agreements are one form of implementation of the principle of freedom of contract. Many foreign companies come to Indonesia and bring various forms of agreements, one of which is a standard contract (Standard Agreement) which is used in agreements providing goods and/or services (Warmadewa & Udiana, 2016). In essence, standard agreements aim to provide convenience or practicality for the parties in carrying out transactions. Therefore, the rapid development of standard agreements cannot be stopped in an era that demands practicality in carrying out transactions (Pradnyani et al., 2018).

The existence of restrictions on the principle of freedom of contract that came from the state began to develop around the 20th century. Restrictions on the principle of freedom of contract have been known and recognized by contract law. New restrictions have emerged that were previously unknown to contract law, namely restrictions that come from the courts in the context of carrying out their functions as lawmakers, from those making laws and regulations, especially from the government, and from the introduction and enactment of adhesion agreements or standard agreements arising from business needs. There are restrictions on the application of "exemption clauses" in standard agreements (standard contracts), namely partly by court decisions and partly by statutory provisions (Roesli et al., 2019).

Apart from restrictions that come from the state in the form of statutory regulations and from the courts, in the last few decades, the principle of freedom of contract has also been restricted by the introduction and enforcement of standard agreements in the business world. So strong are the restrictions on the principle of freedom of contract as a result of the use of standard agreements in the business world by one party, so that for the other party freedom is only a choice between accepting or rejecting the terms of the standard agreement offered to him. The principle of freedom of contract is also limited by the Civil Code. In terms of freedom to make agreements.

In the business world, some agreements are sometimes used by business actors and are known as standard agreements. Standard agreements limit freedom of contract, but in practice, these agreements move freely in society, especially in certain business fields, for example, in the banking and real estate sectors. The rights and obligations of the parties are contained in a standard or standardized agreement. This means that the contents of the agreement are determined unilaterally, and the other party can only accept or reject the contents of the agreement, without being able to change its contents. This contract is made collectively or en masse, so because of this nature, Vera Bolger calls the agreement a "take it or let it contract" (Putra, 2015).

The emergence of standard agreements was motivated by socio-economic conditions. For their interests, large companies or companies unilaterally determine the terms of cooperation. The opposing party in the cooperation is generally in a weaker position, either because of or because of their position of ignorance, so they can only accept the terms of the agreement. This standard agreement results in effectiveness and efficiency regarding costs, energy, and time expenditure. This is certainly more profitable for entrepreneurs (Novenanty, 2017).

In implementing standard agreements between business actors as creditors and consumers as debtors, business actors often have a more dominant position. This is because the formulation of the agreement clauses in the standard agreement has been previously determined by the business actor without involving the role of consumers in the creation process. Mariam Darus

Badrulzaman believes that a standard agreement is a form of agreement that shows the dominance of one party (Badrulzaman, 2005).

Article 1 number 10 of Law Number 8 of 1999 concerning Consumer Protection (UU PK) defines standard clauses as "every rule or provision and conditions that have been prepared and determined in advance unilaterally by the business actor as outlined in a document and/or agreement which is binding and must be complied with by consumers." Furthermore, a standard agreement is an agreement that has been printed in large quantities and has previously been made standard by one of the parties. The printing is made on blanks for several parts which are the object of the transaction, including the type of object being agreed upon, the amount of the transaction value, the number of goods being transacted, and other things. Thus, the other party does not have the opportunity to negotiate the object of the agreement that will be included in the agreement (Rahman, 2003).

The creditor in a standard agreement has the authority to design the standard form of the agreement to be implemented, while the debtor does not have the freedom to negotiate or reject the clauses or conditions proposed by the creditor. In practice, standard agreements are often used in credit agreements between customers and banks, insurance agreements, and motor vehicle parking ticket agreements. So standard agreements open up opportunities to create an unequal position between business actors as agreement makers or creditors and consumers or debtors as parties who cannot change the clauses of the agreement.

If we refer to the expression stated by Siti Malikhatun Badriyah, an agreement has the aim of achieving a balance of interests between the parties in it (Badriyah, 2016). Based on this, it can be concluded that balance is a crucial thing in an agreement so that its existence cannot be ruled out. The balance of the agreement must be realized in its entirety from the beginning of the formation of the agreement, starting from the pre-contractual stage or when the offer begins, the contractual stage, or when an agreement has emerged in the form of an agreement between the parties, up to the implementation stage of the agreement (Prasnowo & Badriyah, 2019).

Freedom of contract developed long ago along with the development of Adam Smith's laissez-faire teachings which emphasized the principle of non-intervention by the state in economic activities and the workings of markets. Smith wanted a political economy so that legislation would not be used to interfere with the freedom of contract because this freedom was very important for the continuation of trade and industry. The teachings of economist philosophers in the nineteenth century, as stated by Adam Smith and Jeremy Bentham, were of the view that the main goal of legislation and social thought must be to be able to create the greatest happiness for the greatest number. Therefore, it can be said that the source of freedom of contract is individual freedom, the starting point of which is individual interests, so it can be understood that individual freedom gives him the freedom to contract. In its development, it turns out that the principle of freedom of contract can bring injustice, because this principle can only achieve its goal, namely bringing optimal welfare as possible, if the parties have balanced bargaining power. If one party is weak, then the party with a stronger bargaining position can impose its will to suppress the other party, for its benefit. The terms or conditions in such a contract will ultimately violate the rules of fairness and justice. The development of this principle creates inequality in people's lives, so the state needs to intervene to limit the implementation of the principle of freedom of contract to protect the weak (Hernoko, 2008).

The phenomenon of imbalance in contracts as mentioned above can be observed in several contract models, especially consumer contracts in standard form which contain clauses whose contents (tend to be) one-sided. In the practice of providing credit in the banking environment, for example, there is a clause requiring customers to comply with all bank instructions and regulations, whether existing or those that will be regulated later, or a clause that frees the bank from customer losses as a result of the bank's actions. In a hire purchase contract, for example, there is a clause that contains the obligation to pay in full and immediately if the rental buyer is in

arrears in payment twice in a row. In a sales and purchase contract, for example, there is a clause that goods that have been purchased cannot be returned.

Freedom of contract does require restrictions, because the positions of the parties in a commercial agreement are often unequal, so a party who has a weak position or bargaining position in an agreement may suffer many losses. Moreover, if a party who has a strong position or position imposes his will on a weak party for the benefit of the party who has a strong position or position. As a result, the contract becomes unreasonable and contrary to fair legal regulations.

Several factors influence restrictions on freedom of contract, including:

1. The increasing influence of the teaching of good faith where good faith is not only present in the implementation of the agreement but must also be present at the time the agreement is made;
2. The growing development of the teaching of abuse of circumstances;
3. The development of the economic field which forms trade associations, legal entities, companies, and other groups of society, such as workers and farmers;
4. The development of trends in society that desire social welfare;
5. The government's desire to protect the public interest or weak parties

Restrictions on freedom of contract from the state, for example, are very visible in legislation to determine the terms and conditions of insurance policies, minimum wages, working conditions, and terms of employment, as well as insurance programs for workers required in connection with employment agreements. between employers and their workers. In the United States, for example, state intervention is applied to labor laws, anti-trust laws, business regulations, and public welfare. In Indonesia, restrictions on this principle appear in the provisions of various articles in the Civil Code, as explained above, namely: 1320, 1330, 1332, 1335, 1337, 1338, and 1339.

In examining and adjudicating cases relating to the principle of freedom of contract, the courts are also fully empowered to limit this principle, if it is truly felt to be contrary to the sense of justice in society. This is in line with the function and authority of the Judge himself who has autonomy and freedom which includes:

1. Interpreting laws and regulations;
2. Search for and discover the principles and basics of law;
3. Creating new laws when facing a vacuum in statutory regulations;
4. It is also justified to carry out contra legem if the provisions of laws and regulations conflict with the public interest and;
5. Have free autonomy to follow jurisprudence.

The principle of freedom of contract was born from the principle of welfare pioneered by Jeremy Bentham which focuses welfare on the greatest happiness for the individual. This shows that the principle of freedom of contract is not in line with the values that exist in Indonesia. Indonesia is indeed a country that aims to provide welfare to its citizens, but the concept of prosperity according to Indonesia is very different from the welfare put forward by Jeremy Bentham. Jeremy Bentham used the concept of maximum welfare for the interests of individuals, while Indonesia adheres to the principles of economic democracy. This shows that good economic management must be based on economic democracy. This shows that carrying out business activities must also be by the principles and values of Indonesia, namely economic democracy to realize prosperity for its citizens.

Based on the theory of economic democracy, economic democracy was born along with the existence of the Welfare State. The concepts and practices of the political state and legal state that existed previously caused a lot of misery for the people, especially people from economically weak groups. The economic system of liberalism and individualism that existed at that time had created an unequal distribution of income, instability in economic life, a concentration of economic power that allowed monopolies to occur, and exploitation of people and their wealth, where the bourgeoisie succeeded in placing its representatives in parliament, and This parliament makes the

rules to become state law which will be implemented by the government. So automatically, the rules made are in favor of the interests of the bourgeoisie (Winarno, 2005).

Indonesia's economic system adheres to economic democracy based on the principle of kinship. This is mandated in Article 33 of the 1945 Constitution, thus prosperity is not only for individuals or groups but for everyone. Economic democracy as emphasized in Article 33 paragraph 4 of the 1945 Constitution is implemented with the principles of togetherness, fair efficiency, sustainability, environmental awareness, and independence, and by maintaining a balance of progress and national economic unity.

Therefore, based on the Economic Democracy Theory, it is natural that the application of the principle of freedom of contract requires restrictions to avoid injustice to consumers. The business world may experience development but must not forget the principles and values that exist in Indonesia. This means that the economic development that is currently developing in Indonesia is not an economy that provides welfare only to individuals or certain groups, but prosperity that can be felt by everyone as mandated in Article 33 Paragraph 4 of the 1945 Constitution.

CONCLUSION

The principle of freedom of contract is one of the principles in agreements and it is regulated in the Civil Code. However, if analyzed philosophically, this freedom of contract emerged based on welfare thinking pioneered by Jeremy Bentham which emphasized the welfare of each individual. This implementation of freedom of contract often results in injustice, for example, standard agreements that are made only unilaterally without involving a second party. the second party is always in a weak position and cannot contribute to determining the clauses in the agreement. The concept adopted in standard agreements is "take it or leave it". This is of course contrary to the concept of welfare in Indonesia. If it is related to the Theory of Economic Democracy, the concept of the principle of freedom of contract which is manifested in standard agreements is not in line with the theory of economic democracy which focuses more on shared prosperity. Therefore, there needs to be restrictions on freedom of contract. This means that each person can make the form of the contract as a whole does not cause loss or injustice to either party.

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