Jurnal Office: Jurnal Pemikiran Ilmiah dan Pendidikan Administrasi Perkantoran
Volume 9, Number 1, January-June 2023, 9-16
Homepage: http://ojs.unm.ac.id/jo

Limitation of Freedom of Contract in Business Contract Drafting

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ABSTRACT

The principle of freedom of contract can be interpreted as the freedom of the parties to make or not make an agreement, the freedom to choose or determine with whom the business partner will carry out the agreement, then the freedom to choose the content and form of the things you want to make an agreement with. However, the freedom granted in the principle of freedom of contract is not absolute or without restrictions at all. The existence of this principle must be given restrictions so that contracts made by business people do not harm one of the parties involved in the agreement. This study aims to find out how to limit the principle of freedom of contract in designing business contracts and to find out the structure of designing business contracts. The type of research used in this study uses a normative juridical approach, in obtaining several sources of law in this study derived from primary, secondary and tertiary legal sources. The data collection technique used was a literature review technique (study document). The results of this study found that the principle of freedom of contract contains restrictions that may not be violated in order to create justice and equality of the parties

Keywords: Agreement, business, contract design

INTRODUCTION

A contract is an agreement made in writing, in simple terms it can be said that the contract is part of the agreement itself on a more formal scale because the agreement can be oral or written. Business contracts are made because of the interests between the business actors formulated at the negotiation stage and then formulated into clauses that become the contents of the agreement. So basically in a business contract there is a bond between the parties, which contains things that want to be agreed upon. The business contract in question is formed from a series of sentences agreeing to all matters agreed upon and the ability of the parties to fulfil them (Subekti, 2012).

The term kontrak comes from English namely contract, besides that it is also known in Dutch overeenkomst which is translated into Indonesian, namely an agreement as regulated in Article 1313 of the Civil Code (KUHPerdata) more specifically in book III (Mashdurahatun, 2017). In the Civil Code, there are general rules that apply to all agreements and special rules that apply only to certain agreements whose names have been determined by law (Laisina, 2015). Such as exchange, lease, sale and purchase and so on. While the term contract in Indonesian is no longer a foreign term because it has been used for a long time such as the term work contract and business contract.

In contracts, there are also definitions that regulate contract law. Contract law is translated from English, namely contract of law. Contract law is a legal regulation that exists in society or a series of legal rules that regulate various agreements so that they can give rise to legal

relations between the parties based on an agreement so that legal consequences arise between the contract makers (Diputra, 2019). The source of contract law, apart from being regulated in the Civil Code, is also regulated in Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles or better known as the Basic Agrarian Law (UUPA), Law Number 10 of 1998 concerning Banking and Presidential Decree on Financing Institutions. In addition, also in jurisprudence for example on lease purchase, and other sources of law. This research focuses more on Contracts according to the Civil Code.

Business contracting since the nineteenth century has recognised the principle of 'freedom of contract', which is a general principle supporting free competition. Freedom of contract has become the principle of the free market itself. Freedom of contract has become the principle of the free market itself. Freedom of contract has become a patron of business contracting, and this freedom tends to float towards limitlessness (Khairandy, 2013). The principle of freedom of contract in English literature is known as "freedom of contract" or "liberty of contract" or "party autonomy" The first term is more often used than the second and third. The principle of freedom of contract is a universal principle, which means that almost all countries adhere to this principle (Sjahdeni, 1993).

Freedom of contract is one of the most important principles in the preparation of a business contract. This principle can be interpreted as the freedom of the parties to make or not make an agreement, the freedom to choose or determine with whom business partners will carry out the agreement, then the freedom to choose the content and form of the things they want to agree together (Dirdjosisworo, 2003). In connection with that, the source of freedom of contract is the freedom of legal subjects (parties) to fulfil the interests of the parties. Therefore, it can be concluded that to fulfil the interests of the parties, freedom is given to them in making agreements. This freedom is a form of free will, an illustration of human rights. That the principle of freedom of contract starts from the equal position of the parties, but in practice it is often found that this is not the case. This results in the position of the weaker party not being protected if the position of the parties is one-sided.

The principle of freedom of contract in Article 1338 paragraph (1) of the Civil Code states "All agreements made legally shall apply as laws for those who make them". (Isnaeni, 2013) The existence of the word 'all' indicates that the parties can determine any content in the business contract to be agreed upon (Budhayati, 2009). Thus, the principle of freedom of contract provides an opportunity for parties who will express their agreements in business contracts to make new agreements that have not been regulated in the Civil Code, where the matters agreed upon follow the needs of the community along with the times in the business world.

However, the freedom given in the principle of freedom of contract is not an absolute thing or without restrictions. The existence of this principle must be limited so that the contracts made by business actors do not harm one of the parties involved in the agreement. The limitations are sourced either from the law, doctrine, or through court decisions. In line with this, the focus of the author's study is the limitation of the principle of freedom of contract in the design of business contracts.

METHOD

Research method is a tool to get the results of a problem (Kadaruddin, 2021). The description of the type of research both based on the nature and focus of the study is intended to understand developments and answer the dynamics of society, especially in the formulation of business contract design. The type of research used in this study uses a normative juridical approach, namely an approach that focuses on deepening the law into a whole system including principles and legal rules both codified and not (Ali, 2002). In obtaining several sources of law in this study derived from primary, secondary and tertiary sources of legal material. Primary legal material is the main material, which consists of the 1945 Constitution and the Civil Code. Secondary legal materials are materials related to primary legal materials and can assist in analysing primary legal materials such as books, journals, articles, and literature related to the issues discussed in this study. Meanwhile, tertiary legal materials are materials that provide information, instructions or explanations related to primary and secondary materials such as dictionaries.

After all the materials are obtained, then the writing above uses the literature review technique (study document), namely all the materials to be used then notes are made about things that are considered important for research. Then record the author's name, page, book title, and cite things that are deemed necessary, in order to answer the problems in this study. The research materials that have been collected will be systematically inventoried and clarified in accordance with the problems to be discussed so that there is a scientific analysis-based conclusion.

RESULTS AND DISCUSSION

Rules that Limit the Freedom of Contract Principle

Article 1313 of the Civil Code explains that an agreement is an act between one or more parties that binds themselves to another party. In the event that an agreement that has been formulated according to the interests of the parties can be considered valid, it must contain provisions based on Article 1320 of the Civil Code, namely: the agreement of those who bind themselves; capable of entering into an agreement; a certain thing; a lawful cause (Soeikromo1, 20120).

The fulfilment of the agreement between the parties in drafting a business contract confirms the existence of the principle of freedom of contract. Based on the principle of freedom of contract, the parties have the freedom to choose with whom they will design a business contract. There are several things that limit the principle of freedom of contract for the parties in formulating the contract, which are related to the subject, object and substance of the contract.

Restrictions with subjects in business contracts, these restrictions are contained in the Civil Code Article 1320 part 2, namely subjects or parties may not design business contracts with those who are classified as incapable of performing legal acts. People who are classified as incapable are people who cannot be held responsible when performing legal acts, the people referred to as regulated in Article 1330 of the Civil Code are people who are not yet mature and those who are under guardianship. Article 1320 part 2

confirms that in order for the things that have been agreed in a business contract to be valid, it requires that the parties to the design of a business contract are capable people. Based on this rule, it can be concluded that the parties do not have the freedom to choose with which party they will draft a business contract in order to produce a valid business contract. If you choose a party that is not capable of doing legal acts, the result is that what has been agreed upon can be cancelled based on Article 1331 of the Civil Code.

Restrictions relating to the object of a business contract, this restriction is contained in Article 1320 of the Civil Code section 3, namely a certain thing (object) which explains that in a business contract must mention the object. Furthermore, the requirements for objects in business contracts to be legally valid are that the intended objects are tradable goods and have economic value (Articles 1331-1332 of the Civil Code). Something that becomes the object of the agreement must be clearly determined, can be counted or weighed. The requirement that an object must be certain and determinable is so that the rights and obligations of the parties to the contract are clear. The result of unclear objects can cause business contracts to be null and void or things that have been agreed upon in the contract are never considered to exist (Santoso, 2022).

The limitation of the principle of freedom of contract is also related to determining the substance or content in a business contract, which is limited by the presence or absence of abuse of circumstances, such as differences in economic conditions, differences in social status and differences in position. The existence of unbalanced circumstances between the two parties designing a business contract, can result in a contract that can be cancelled due to a mismatch of wills that can be legally proven, which of course the role of the judge is very important to determine. Judges have the authority and power to provide interpretation in determining the circumstances of the parties as a legal means to break the contents of a contract whose parties' positions are unbalanced (Arifin, 2017).

The limitation in the principle of freedom of contract is also seen in the intervention of judges in assessing whether the matters agreed upon in the contract do not conflict with the norms in society, so in line with this, the principle of freedom of contract is not absolute. The judge has the authority to decide that one of the parties is not free in determining the things he wants (Febriani, 2020).

In addition to the limitations relating to the legal requirements of the agreement Article 1320 of Civil Code described above, the Consumer Protection Law in article 18 also provides limitations to business parties to design business contracts. The article affirms that in a standard contract (a contract formulated unilaterally) it is not allowed for business actors to make contracts that contain substance containing the transfer of responsibility to consumers.

Another rule that limits the principle of freedom of contract is good faith. In line with Article 1338 of the Civil Code, it explains that a contract must be based on good faith. Therefore, the parties may not design the contents of the contract at will, but must formulate matters that can be implemented in good faith. Good faith includes the parties who are willing to bind themselves in a contract by carrying out, namely, the parties stick to their promises; the parties are not allowed to take advantage to the detriment of the other party; the parties must be honest with each other.

Business Contract Design Structure

Drafting a business contract is a discussion about designing and analysing the legal interests of the parties who will make a business agreement. A business contract must be drafted in accordance with the provisions and legal requirements of an agreement in Article 1320 of the Civil Code, because every contract made has different risks based on the interests of the parties who make it.

According to the Big Indonesian Dictionary, drafting means process or method. In English, contract *drafting* is referred to as *contract drafter*, some also call *legal drafter*. In terms of terms, contract drafting can be described as the process of designing by making preparations starting from collecting legal materials, interpreting and pouring the wishes of the parties in the contract. Drafting a contract means planning the structure, anatomy, and substance of the contract involving the parties.

In designing a business contract, there are three stages to go through, namely: *The pre-contractual* stage, is the offer and acceptance stage; *The contractual* stage, is the stage of adjustment of wills between the parties; *The post contractual* stage, is the stage of implementation of the agreement. Contact design is the *pre-contract* stage and *contractual* stage.

1.1 Tecniques in Drafting Business Contracts

For parties who have drafted a business contract, the rule of law will automatically apply to those who make it. The contract is binding and each party is obliged to obey it like a law according to Article 1338 paragraph (1) of the Civil Code. Therefore, the parties must be careful in drafting a business contract before agreeing to be agreed upon so as not to cause problems in the future.

The drafting business contract must at least include: Position of the parties; What is the objective; Contract expiry period; Provisions regarding breaches that do not enforce the contents of the contract; Dispute resolution mechanism; Regarding force majeure; Signature by the party concerned (Diputra, 2019).

In drafting a business contract there are important elements that include: Preambule; Principal Terms of the Contract; Supporting Provisions; Provisions on Formal Aspects of the Contract; Contract Closing Section; and Contract Appendices.

Preambule section contains the identity of the parties and a general explanation of the background to the contract. The preamble contains information on: the title of the contract (contract title); description/identity of the parties (komparisi); background considerations of the contract (recitals); scope of the agreement (scoupe of agreement). (Santoso, 2022)

Principal terms of the contract section contains the main legal relationships and the main rights and obligations of the parties that are born from the agreement formed by the parties to the contract. In this case, the articles of the contract have been formulated when the conversation enters the formulation of provisions on the core terms agreed by the parties. The main provisions consist of general provisions and other provisions. General provisions are formulated definitions or restrictions on the meaning of terms that are considered important and are often used in contracts, with this agreement can minimise debates on differences in interpretation between the parties. While other provisions are the content, form and style of the main provisions of a contract. The content of the main provisions is what describes the characteristics of a contract and distinguishes it from

other contracts.

Supporting provisions section contains the procedures for implementing the rights and obligations of the parties as well as matters deemed necessary to support the implementation of the rights and obligations of the parties. The articles in question contain provisions that are needed to guide the parties in carrying out their rights and obligations that have been stated in the main provisions of the contract. That is, without the provisions of the contract practically cannot be implemented effectively by the parties. The content of this supporting article depends on the type of business transaction agreed by the parties (Pratama & Winanti, 2021). Ingeneral, they contain: procedures for the implementation of the agreement (performance); articles on self-limitation of responsibility; articles on default (branch of contract or nonperformance); articles on guarantees; provisions on force majeure; provisions on the possibility of transferring positions to third parties; provisions on domicile selection; determination of certain conditions that will terminate the contract; articles on changes to the contents of the contract; articles on parties who will take care of licensing, for example business licences, export licences, import licences and so on.

Provisions on formal aspects of the contract, this provision contains matters that must receive attention for the sake of legal validity and the possibility of implementing the agreement made by the parties. In fulfilling the elements of contract formality, it basically contains articles on certain matters that must be considered by the parties so that the business contract that has been designed becomes valid or valid (Arifin, 2017). Such provisions include, for example: articles containing matters relating to the party responsible for the registration process or obtaining special licences (issued by a public body); and articles containing the address and format of correspondence to be used by the parties officially in the execution of the contract. This provision is useful if you want to send a written warning made by one party to the other party.

Contract closing section, this section ends the body of the contract with the identity of the parties to the transaction as well as matters deemed necessary to be contained to give legal validity to the contract. The final part of the contract generally contains various closing information such as: the date and place of signing of the contract by the parties; columns for the signatures of the parties; identifying marks or stamps of the parties; and stamps affixed and dated at the time the contract was signed.

Contract appendices, in drafting a business contract that is rather complex and covers technical or detailed matters, it requires annexes that are an integral part of the contract itself. In order for the annexes to be legally attached to the main contract, the main contract (in the relevant articles) must have a marker article that refers to the annexes. Examples of appendices may include: technical specifications; formulae, recipes, formulas; drawings, motifs, designs; schedules agreed by the parties and so on.

CONCLUSION

Based on the results of research on the Limitation of the Principle of Freedom of Contract in the Design of Business Contracts, it can be concluded that the principle of freedom of contract in the design of business contracts is not absolute. There are certain limitations that have been regulated in the legislation. The rules that limit the principle of freedom of contract are related to Article 1320 of the Civil Code which discusses the valid requirements of the agreement, namely the agreement of those who bind

themselves; Capable of making agreements; A certain thing; A halal cause. The restrictions in this article cover the subject, object and substance of the contract. The subject limits that in order for the things that have been agreed upon in the business contract to be valid, it requires that the parties in the design of the business contract are capable people, if choosing a party who is not capable of doing legal acts results in the things that have been agreed upon being cancelled. Objects provide batwan bring an object must be certain and can be determined is so that the rights and obligations of the parties in the contract become clear. The result of unclear objects can cause a business contract to be null and void. Substance provides limitations in terms of determining the contents of the contract is not allowed the existence of unbalanced circumstances between the two parties, so that it can produce a contract that can be cancelled due to a mismatch of wills that can be legally proven. In addition to the rules limiting the principle of freedom of contract discussed in the valid terms of the agreement, there are also other rules, namely in the Consumer Protection Law and the act of good faith which has the principles: the parties stick to their promises; the parties are prohibited from taking advantage to the detriment of the other party; and the parties must be honest with each other. Likewise, judges with their authority can intervene by interpreting the business contract that is drafted, so as to give a verdict on whether the business contract violates the norms that exist in society or not.

The contract drafting stage is divided into the *pre-contractual stage*, the *contractual* stage, and the *post-contractual* stage. In drafting a business contract, it must contain basic things such as: the position of the parties; what is the object; the period of expiration of the contract; provisions regarding violations that do not implement the contents of the contract; dispute resolution mechanisms; regarding force majeure; and signatures by the parties concerned. Then the elements that make up the structured series of a business contract include: preambule; main provisions of the contract; supporting provisions; provisions on the formal aspects of the contract; closing part of the contract; and attachments to the contract.

REFERENCES

Ali, A. (2002). *Menguak Tabir Hukum (Suatu Kajian Filosofis dan Sosiologis)*. Toko Gunung Agung.

Arifin, M. (2017). Penyalahgunaan Keadaan Sebagai Faktor Pembatas Kebebasan Berkontrak. *Universitas Muhamadiyah Sumatera Utara*, *3*(2), 15. https://core.ac.uk/download/pdf/225830137.pdf

Budhayati, C. T. (2009). Asas Kebebasan Berkontrak Dalam Hukum Perjanjian Indonesia. *Jurnal Widya Sari*, *10*(3), 232–247.

Diputra, I. G. A. R. (2019). Pelaksanaan Perancangan Kontrak dalam Pembuatan Struktur Kontrak Bisnis. *Acta Comitas*, *3*(3), 495. https://doi.org/10.24843/ac.2018.v03.i03.p13

Dirdjosisworo, S. (2003). *Kontrak Bisnis*. Mandar Maju.

Febriani, M. (2020). *Studi hukum kritis: pembatasan asas kebebasan berkontrak dalam perjanjian yang posisi para pihaknya tidak seimbang*.

Isnaeni, M. (2013). *Perkembangan Hukum Perdata di Indonesia*. Perpustakaan Nasional RI.

Kadaruddin. (2021). *Penelitian di Bidang Ilmu Hukum; Sebuah Pemahaman Awal*. Formaci.

Khairandy, R. (2013). *Itikad Baik dalam Kebebasan Berkontrak*. Universitas Indonesia.

Laisina. (2015). Pembuatan Kontrak Bisnis Dan Akibat Hukumnya Menurut Kuhperdata. In *Lex et Societatis* (Vol. 3, Issue 10).

Mashdurahatun, J. W. dan A. (2017). *Hukum Kontrak, Ekonomi Syariah, dan Etika Bisnis*. Undip Press.

Pratama, J., & Winanti, A. (2021). Force Majeure dalam Kontrak Bisnis akibat Pandemi Corona. *NUSANTARA: Jurnal Ilmu Pengetahuan Sosial*, *8*(2), 266–272.

Santoso, A. P. A. (2022). *Contract Drafting Suatu Bentuk Perikatan dalam Implementasi Bisnis*. Pustaka Baru Press.

Sjahdeni, S. R. (1993). *Kebebasan Berkontrak dan Perlindungan yang Seimbang bagi Para Pihak dalam Perjanjian Kredit Bank*.

Soeikromo1, : Deasy. (20120). *Batasan Sahnya Perjanjian Tentang Pembuktian Pada Suatu Kontrak*. *5*, 29–37.

Subekti, R. (2012). *Hukum Perjanjian*. PT. Intermasa.