



STANDARD AGREEMENTS IN THE CONCEPT OF FREEDOM OF CONTRACT

DHANISWARA K HARJONO¹

Universitas Kristen Indonesia¹

dhaniswara@uki.ac.id¹

Abstract - *The agreement is made on a consensual basis. According to the provisions of Article 1338 paragraph (1) of KUPerdata, the Agreement adheres to the principle of freedom of contract. In business development, an agreement or contract is made in the form of a standard agreement. Problems in research, how the concept of freedom of contract in a standard agreement and whether the principle of consensual is met in the formation of a standard agreement that contains standard clauses. This study uses a type of normative research on the legal norms of freedom of contract in the standard agreement, descriptive-analytical research using document study data collection tools sourced from primary legal materials in the form of the Civil Code, secondary law materials, and tertiary law materials. The conclusion obtained is that the standard agreement, although the clause has been made by the party who has a position and can oppress the party in a weak position, in fact, the weak party has an element of choice, namely agreeing or rejecting it, so the standard agreement does not violate the principle of freedom of contract. The establishment of a standard agreement containing standard clauses violates the principle of consensual is explicitly stated in Article 1320 paragraph (1) of the Civil Code, which states that the legal terms of an agreement are that there must be an agreement between the two parties, where the standard agreement is not based on at the free will of the parties.*

Keywords: *Freedom of contract, standard agreement, principles of consequentialism*

INTRODUCTION

Freedom of contract is a general principle in support of the free competition. Freedom of contract becomes the embodiment of the law (legal expression) of free market principles. Freedom of contract has become a new paradigm that is glorified by legal experts and the courts. The Court prioritizes the freedom of contract and the principle of *pacta sun servanda* rather than the values of justice in its decisions. The freedom of contract tends to develop towards unlimited freedom of contract (*unrestricted*) [1]

According to civil law tradition, the principle of freedom of contract consists of: a) The freedom to make or not to make an agreement; b) The freedom to choose which party to enter into an agreement with; c) The freedom to determine the content of the agreement; and d) Freedom to determine the form of the agreement; e) The freedom to determine the way of formulating the agreement [2].

Freedom of contract should be implemented assuming the parties have a balanced bargaining position. So in obtaining an agreement based on a balanced bargaining position and at the free will of the parties. However, in reality, the parties are often not in a balanced bargaining position, which results in those with a stronger bargaining position tending to dominate those with a weaker bargaining position. Parties who have a stronger bargaining position often impose their will on those who have a weak bargaining position, namely by dictating to other parties to follow their wishes in the formulation of agreements.

With the freedom of contract to determine the form and content of the agreement, along with the development of community activities, especially in business activities, there is a tendency to use agreements in the form of standard or standard, in which the agreement usually contains standard clauses which are written conditions, which have been made by businessmen, which are generally only to protect their interests without considering the interests of other parties. Even at this time, standard agreements have been used widely in various fields of trade in goods and/or services, starting from goods purchase receipts which include a standard agreement that the goods purchased cannot be exchanged or returned, to general insurance or health insurance policies, which is a standard agreement that contains various provisions that have never been negotiated with the insured [2]. The application of standard agreements is intended to facilitate transactions between businessmen and consumers [2]. The standard agreement contains standard clauses which according to the provisions of

Article 1 point 10 of Law No. 8 of 1999, are any rules or provisions and conditions that have been prepared and determined in advance unilaterally by businessmen as outlined in a document and/or a binding agreement and must be fulfilled by the consumer.

In standard agreements made by businessmen, generally, the business actor is the party who has a stronger bargaining position, and other parties who have a weak bargaining position will follow or agree to the standard agreement. In such conditions, often people who agree to the standard clauses will act according to their will so that in giving an agreement there is a general submission of will. In fact, following the provisions of Article 1320 of the Civil Code, one of the conditions for a valid agreement is to agree. Agree is a meeting of minds, that is, what one party wants is also desired by the other, resulting in a consensus between the parties. So, even though the agreement adheres to the principle of freedom of contract, however, the agreement must still comply with the principle of consensual, namely the agreement must be based on an agreement.

Based on the description of the background of the problem, further research is needed on:

1. How is the concept of freedom of contract in a standard form of agreement?
2. Is the principle of consensualism fulfilled in the formation of a standard agreement that contains standard clauses?

1. METHODS

The type of research used in this research is normative legal research, which examines legal norms and principles of contract law related to the concept of the principle of freedom of contract in standard agreements. Meanwhile, the nature of this research is analytical descriptive, in which the research data is processed and analyzed, and presented by providing a complete description of the concept of the principle of freedom of contract in standard agreements.

This study uses a document study data collection tool to obtain secondary data from:

- a. Primary legal materials are in the form of provisions of applicable laws and regulations which include: the 1945 Constitution, the Civil Code (*Burgelijk Wetboek*), Law no. 8 of 1999 concerning Consumer Protection, and Permanent Jurisprudence of the Supreme Court of the Republic of Indonesia.
- b. Secondary legal materials in the form of books, research results, and opinions of experts related to fiduciary legal aspects as listed in the Bibliography.
- c. Tertiary legal materials are legal materials that explain primary and secondary legal materials, such as a dictionary [3].

Furthermore, the research data were analyzed qualitatively by presenting the results of the analysis in the form of a series of sentences.

2. RESULTS AND DISCUSSION

2.1 STANDARD AGREEMENT

An agreement is an event when people promise each other to do something. Agreements in Indonesian civil law which are regulated in Chapter III of the Indonesian Civil Code, use the terms *overeenkomst* and contract for the same meaning, as can be seen from the title of Book III of the Second Title concerning Agreements born of Contracts or Agreements[4].

According to Mariam Darus Badruzaman, “an agreement or contract is a legal action that gives rise to an engagement, namely a legal relationship that occurs between two or more people, which is located in the field of wealth where one party is entitled to achievement and the other party is required to fulfill the achievement.” [5] While the agreement according to Subekti [6] is “an event where someone promises to another person or two people promise each other to do something, from this event a relationship arises between the two people which is called an engagement.” The provisions of Article 1313 of the Civil Code provide the limits of the agreement with the words: “an agreement is an act by which one person or more binds himself to one or more other people.”

The agreement made by the parties must meet the conditions for the validity of the agreement as regulated in Article 1320 of the Civil Code which reads, “For the validity of an agreement, four conditions are needed: 1. Agree those who bind themselves; 2. The ability to make an agreement; 3. A certain thing; 4. A *halal* or lawful cause.” [4]. These four conditions are essential conditions for the validity of an agreement, meaning that without these conditions an agreement is considered invalid.



The first two conditions are called subjective conditions because they relate to the people or subjects who enter into the agreement, while the last two conditions are called objective conditions because they relate to the agreement itself, the object of the legal action taken.

Legal acts are carried out in principle free of form and in principle the agreement is consensual. The principle is the agreement of will. However, in its implementation due to economic needs, the practice of contracting in a standardized form grows and develops, some in the form of forms or agreements that have been prepared standards in accordance with the interests of the parties making the agreement and have been printed which are also called standard contracts.

The development of standard clauses and standard agreements is closely related and spurred by phenomena of mass economic development and acceleration in the distribution and production processes, including the increasing demand for professional service delivery. The term standard agreement comes from the translation of the English language which is a standard contract. Standard agreements are translated from terms known as translations from Bahasa, namely standard contracts or *standardvoorwaarden* [7]. In English law, this is called a standard contract. A standard contract is an agreement that has been determined and set forth in the form. This agreement has been determined unilaterally by one party, especially the strong economy against the weak economy [7]. In Indonesia itself, the standard agreement is also known as the “standard agreement”. In the Indonesian Dictionary (KBBI), the word standard means a certain measure that is used as a benchmark, while the word standard means a benchmark that applies to the specified quantity or quality [8]

Sutan Remi Sjadeini formulated a standard agreement as follows: a standard agreement is an agreement in which almost all of the clauses are standardized by the wearer and the other party basically does not have the opportunity to negotiate or ask for changes. What has not been standardized, for example, is the price, quantity, color, place, time, and several other things that are specific to the object of the agreement. So, what is standardized is not the contract form, but the clauses [9]

The use of standard agreements and standard clauses has several practical advantages, such as reducing lengthy, forgotten negotiations, arranging certain matters, and saving costs. However, on the other hand, the use of standard clauses and standard agreements also raises objections, which are burdensome to one party, and the application of standard clauses and standard agreements as a whole without the possibility of making changes [10] would be detrimental to one of the parties. With no opportunity or open space for negotiations or to change the clauses that have been made, then the agreement is usually one-sided or unbalanced.

The forms of unbalanced clauses in standard agreements are usually: a) printed in small letters; b) language with no clear meaning; c) complex sentences; d) in fact, there are intangible contracts such as contracts (disguised contracts), such as parking tickets, cinema tickets, receipts for taking photos, and others; f) if the sentence is placed in places that are unlikely to be read by one of the parties, for example, if an exception clause is written in the contract for goods that have been purchased [11]

2.2 THE CONCEPT OF FREEDOM OF CONTRACT IN A STANDARD AGREEMENT

What is meant by the principle of freedom of contract is that all parties are free to enter into an engagement relationship with any party they wish, including the freedom in question is being free to determine the terms, implementation, and form of the contract. The principle of freedom of contract concluded from the provisions of Article 1338 paragraph (1) of the Civil Code, it is stated that all legally made contract agreements apply as law for those who make them [12].

The principle of freedom of contract is universal and refers to the free will of everyone to make a contract or not to make a contract, the limitation is only for the public interest and in the contract, and there must be a fair balance. However, it should be noted that the freedom of contract, which is enshrined in the provisions of Article 1338 paragraph (1) of the Civil Code, does not stand alone in solitude. This principle is in one complete system and is integrated with other related provisions. Freedom of contract is based on the assumption that the parties to the contract have an equal bargaining position, but in reality, the parties do not always have a balanced bargaining position [13]. Thus, the parties are in a biased position. According to Sutan Remy Sjahdeni, what is meant by “biasedness” is that the agreement only or primarily includes the rights of one party (that is, the party



who prepared the standard agreement) without specifying what his party's obligations are, and vice versa, only or especially mention the obligations of the other party, while what the rights of the other party are not stated.

According to Konrad Zwieght and Hein Kotz, freedom of contract will exist if the parties to the contract have an economic and social balance. This understanding provides broad opportunities for economically strong groups to overcome weak economic groups, the domination of the strong over the weak, and exploitation de *l'homme par l'homme*. The legislators at that time erred that what was dealing with the contract involved two parties who differed economically. Because gradually it is felt that the freedom to contract leads to injustice [13].

However, freedom of contract is no longer absolute freedom, because of the limitations that are given. The limitation on the principle of freedom of contract is strong, 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 that is offered to him [14]. According to Setiawan, limitation [15] freedom of contract is influenced by: a) The development of the doctrine of good faith; b) The development of the doctrine of abuse; c) the Increasing number of standard contracts; d) The development of the law of economics.

Mariam Darus Badruzaman concluded that standard contracts are contrary to the principle of responsible freedom of contract, especially in terms of national legal principles that put the interests of the community first. In standard contracts, the position of business actors and consumers is not balanced. The position dominated by businessmen opens up wide opportunities for him to abuse his position. Businessmen only regulate their rights and not their obligations. Standard contracts should not be allowed to grow wild and therefore need to be disciplined [11]

Hodius, in his dissertation, maintains that a standard agreement has binding power based on the "bias" (*gebruik*) that applies in society and trade traffic. There is debate among Dutch legal scholars regarding the validity of the standard agreement or standard conditions, of course, this will come to an end, with the publication of a special article regarding the standard terms of an agreement, in the *Nieuw Nederlands Burgerlijk Wetboek* coming into effect on 1 January 1992. The specific article referred to is Article 214 (6.5.1.2) Boek 6 (*algemene Gedeelte Van Het Verbintenissenrecht*), title 5 (*Overeenkomsten in algemeen*) [14].

According to Sutan Remy Sjahdeni [9]. the validity of a standard contract does not need to be questioned because its existence has become a widespread reality in the business world and was born from the needs of the community itself. The business world cannot operate without a standard contract because the standard contract is needed by and therefore accepted by the community. Sutan Remy Sjahdeni further said, although the validity of the standard contract does not need to be questioned, the rules of the game need to be regulated, so that the clauses or provisions in the standard contract, either in part or in whole, are binding on the other party.

Unlike Mariam Darus Badruzaman, Sidarta said that a standard contract does not conflict with the principle of freedom of contract because there is an element of choice in the form of agreeing or rejecting a contract that does not violate the principle of freedom of contract (vide Article 1320 to 1338 of the Civil Code). This means that the consumer is still given the right to agree to the contract (take it) or refuse the contract (leave it). So the standard contract came to be known as "take it or leave it" (Muhammad Sjaifuddin, n.d).

2.3 THE PRINCIPLE OF CONSENSUALISM IS IN THE FORMATION OF A STANDARD AGREEMENT THAT CONTAINS STANDARD CLAUSES

In accordance with the principle of consensualism or consensuality, an agreement arises when there has been a consensus or conformity of will between the parties, in other words, before reaching an agreement, the agreement is not binding [16]. Based on this principle, the agreement is formed because there is an encounter of the will (consensus) of the parties. So that in essence the agreement can be made freely, not bound by form, and reached not formally, but simply through mere consensus [10]. Agree is a conformity of understanding and will of the parties who make the agreement. Conformity of the will of the parties can be described as a corresponding statement of will, which is put together by the contracting parties, so as to form an agreement [17]. The basis for the existence



of the principle of consensuality can be found in the provisions of number 1 (one) of Article 1320 of the Civil Code. Agreement in a contract, according to J.H. Niewenhuis, is formed by two elements. First, the offer (*aanbod, offerte, and offer*) is defined as a statement of a will containing a proposal to enter into a contract containing essential (an element that absolutely must exist) in the contract to be closed. Second, acceptance (*aanvarding, acceptatie, acceptance*), which means a statement of agreement from the other party being offered (Muhammad Syafuddin, n.d).

When the parties have made a decision for themselves that is in accordance with the other party, then at that time it is said that there is an agreement of will. So, the agreement exists since there is an agreement regarding the main subject, except for certain agreements that must be carried out formally, for example, a grant agreement as stipulated in Article 1682 of the Civil Code.

In accordance with the will, then in principle, the agreement is made based on a free agreement between two parties who are capable of carrying out legal actions, which aim to carry out the achievements promised in the contract (agreement), which do not conflict with the law, public order, and morality. That is, the agreement is taken based on the freedom of the parties in obtaining an agreement, without any defects of will or abuse of circumstances. However, often both parties are in unequal negotiations, resulting in a contract or agreement that is more beneficial to one party. The position of the more dominant party will get more profit. Agreements made with this unequal position may be agreements made not based on free agreements.

This unequal position occurs in standard agreements and standard clauses, where the position of one dominant party obtains more benefits than the other in a contract or agreement. The position of the parties in the standard agreement is not balanced because the businessmen are a party whose economy is strong while the consumer is on the side whose economy is weak. Businessmen as parties with strong economies make the rules contained in standard agreements, where these rules are sometimes one-sided. With an unequal position, the standard agreement or standard contract is “take it or leave it”, in the sense that there are two choices, which are agreeing to make a contract or not agreeing to make a contract [14].

Agreements containing standard clauses violating the principle of consensualism are stated explicitly in Article 1320 paragraph (1) of the Civil Code, which states that a valid condition for an agreement is that there must be an agreement between two parties. In this case, the agreement formed is not based on the free will of the parties.

There are several opinions regarding the position of the standard agreement. Sluijter argues: “a standard agreement is no longer an agreement. Businessmen have acted as private legislators (*legio particuliere wetgever*)”. Then Stein gave a middle way: “there is still an agreement because of the fiction of will and trust (*fictie van wil en vertrouwen*) because by accepting, consumers have agreed.” Pitlo is of the opinion: “the standard agreement does violate the law, but it is needed by the community in practice”. In this case, Hondius gave tolerance with the reason being: “custom (*gebruik*) in trade”.

CONCLUSION

The conclusions that can be obtained from the above analysis that The concept of freedom of contract in a standardized agreement is that freedom of contract which is concluded in the provisions of Article 1338 paragraph (1) of the Civil Code is based on the assumption that the parties to the contract have an equal bargaining position. However, even though the clauses in the standard agreement have been made by parties who have a position and can put pressure on the party in a weak position, actually the weak party has an element of choice, which is agreeing or rejecting it, so that the standard agreement does not violate the principle of freedom of contract.

The principle of consensual in the formation of a standard agreement that contains standard clauses violates the principle of consensual stated explicitly in Article 1320 paragraph (1) of the Civil Code, which states that the legal requirement for an agreement is that there must be an agreement between two parties, where an agreement is formed on an agreement not based on the free will of the parties, but there is submission to the will.



ACKNOWLEDGEMENT

We would like to thank the Universitas Kristen Indonesia who always encourages and guides the author in completing this research.

REFERENCES

- [1] K. Ridwan, "Itikad Baik Dalam Kebebasan Berkontrak," *Jakarta Indones. Univ. Grad. Sch. Law*, 2004.
- [2] J. Gunawan and B. M. Waluyo, "Perjanjian Baku Masalah dan Solusi." Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, 2021.
- [3] S. Soerjono and S. Mamudji, "Penelitian Hukum Normatif," *Jakarta Raja Graf. Persada*, 2006.
- [4] K. D. Harjono, "Aspek hukum dalam bisnis," 2019.
- [5] M. D. Badruzaman, "KUH Perdata Buku III Hukum Perikatan Dengan Penjelasannya," *Alumni, Bandung*, 1993.
- [6] M. Syaifuddin, "Hukum Kontrak: Memahami Kontrak dalam Perspektif Filsafat, Teori, Dogmatik, dan Praktik Hukum (Seri Pengayaan Hukum Perikatan)," 2016.
- [7] H. P. Panggabean, *Praktik standar contract (perjajian baku): dalam perjanjian kredit perbankan*. Penerbit PT Alumni, 2012.
- [8] Anonim., *Kamus Besar Bahasa Indonesia (KBBI)*. <http://kbbi.web.id>, diakses pada tanggal 5 November 2021 : 11.34 WIB. 2021.
- [9] S. Remy, "Sutan, Kebebasan Berkontrak dan Perlindungan Yang seimbang bagi para pihak dalam perjanjian Kredit Bank di Indonesia." IBI, Jakarta, 1993.
- [10] H. Budiono, "Kumpulan Tulisan Hukum Perdata di Bidang Kenotariatan Buku Kesatu," *Bandung PT Citra Aditya Bakti*, 2016.
- [11] H. R. D. Naja and B. Seda, *Pengantar Hukum Bisnis Indonesia*. Pustaka Yustisia, 2009.
- [12] D. Hendrawati, "Penerapan Asas Kebebasan Berkontrak dalam Pembuatan Perjanjian Baku (Studi Normatif pada Perjanjian Pembiayaan Konsumen)," *Masal. Huk.*, vol. 40, no. 4, pp. 411-418, 2011.
- [13] A. Y. Hernoko, "Hukum Perjanjian Asas Proporsionalitas dalam Kontrak Komersial. Jakarta: Kencana, 2014."
- [14] M. Roesli, S. Sarbini, and B. Nugroho, "Kedudukan Perjanjian Baku Dalam Kaitannya Dengan Asas Kebebasan Berkontrak," *DiH J. Ilmu Huk.*, vol. 15, no. 1, pp. 1-8, 2019.
- [15] S. H. Setiawan, "Aneka masalah hukum dan hukum acara perdata," 1992.
- [16] A. Ilyas and M. Nursal, "Kumpulan Asas-Asas Hukum," *Jakarta Rajawali Pers*, 2016.
- [17] M. A. S. H. Mr., "Asser's Penuntun Dalam Mempelajari Hukum Perdata Belanda, Hukum Perikatan Ajaran Umum Perjanjian. Diterjemahkan oleh Rachmad Setiawan dari naskah aslinya berjudul Handleiding Tot De Beoefening Van Het Nederlands Burgelijk Recht Verbintenissrecht Deel II," 2020.