



Freedom of Contract in Consumer Transactions and Its Effect on Consumer Protection

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ABSTRACT

This research aims to reveal the Freedom of Contract in Consumer Transactions and its Influence on Consumer Protection. The application of the principle of freedom of contract in consumer transactions can influence efforts to provide adequate legal protection to consumers, who are often considered to be in a weak position in every transaction carried out with business actors or producers. Freedom of contract in consumer transactions has been adequately regulated and guaranteed in applicable laws and regulations, both in the Consumer Protection Law, the Civil Code and other provisions. Meanwhile, factors that can influence the application of freedom of contract include agreement standards or contract standards used in consumer transactions, actions that support conditions in the process of making agreements/contracts in consumer transactions, the principle of balance in the contents of agreements/contracts in consumer transactions and incompatibility of fair doctrine and inappropriate influence in the preparation of agreements/contracts in consumer transactions. The research method used was a qualitative method with systematic steps and a normative analysis method. The results of this research show 4 main things, namely the Principle of Freedom of Contract in Agreements or Contracts, Consumer Protection, Protection of Consumers in Agreements, and The Implementation of the Principle of Balance in Consumer Transactions.

Keywords: *Freedom of contract, Consumer transactions, Consumer protection.*

1. INTRODUCTION

In society, various kinds of transactions occur at any time, which are expressed in oral or written form, which are often called agreements. Many of the agreements that are created in various transactions are carried out in written form or are often referred to as contracts. The written agreement that is created is often in the form of a Standard Agreement or is

termed a Standard Contract. Transactions carried out by consumers with business actors or producers are also called Consumer Transactions. According to Shidarta, a consumer transaction takes the form of a transfer of goods and/services, including a transfer of enjoyment in using them (Shidarta, 2006).

In consumer transactions outlined in the form of an agreement or contract, the principle of freedom of contract, known in Contract Law or Agreement Law, can be applied, which means that if an agreement is concluded between the parties, there is the free will of the parties. In this freedom of will, equality is implied. In reality, equality of economic power between the parties often does not exist. On the other hand, if equality between the parties is not possible, then it cannot be said that there is freedom of contract.

Restrictions on the principle of freedom of contract arise in such a way that the content of the contract is no longer determined by the will or interests of one party alone. The parties are no longer free to reciprocally regulate their rights and obligations to each other. Many of the agreements made apparently contain standard terms or are agreements whose provisions are determined by the party whose position is economically stronger. Little remains of the principle that an agreement is based on a meeting of wills. In fact, few agreements can be found that contain the achievements of the parties which are fully formed through negotiations. There is less and less bargaining being done (Kessler, 2013).

In practice, the principle of freedom of contract is not fully implemented in various legal relations that occur in society. Freedom to both have the right to express their own wishes and express them in various forms of agreements that are entered into seems to be just a theory, but is very rarely found in reality.

The application of the principle of freedom of contract in consumer transactions can influence the extent to which we are able to provide adequate protection to consumers, who are often considered to be in a weak position in every

transaction they carry out with business actors or producers.

Consumer protection is an inseparable part of healthy business activities. In healthy business activities there is a balance of legal protection between consumers and producers. The absence of balanced protection leaves consumers in a weak position. Moreover, if the product produced by the producer is a limited type of product, the producer can abuse its monopolistic position. This of course will be detrimental to consumers (Muru, 2013).

One of the factors that hinders the realization of freedom of contract in society is the standard form of agreement which has become a phenomenon in various transactions carried out, so that there is no other way for one party to just accept what the other party wants. The phenomenon of standard agreements is caused by the unequal position between the two parties, where one needs the other more, which can lead to injustice.

A standard or standard agreement allows one party to determine the contents of the agreement unilaterally, without the need to give the opposing party the opportunity to read, study, ask for an explanation in as much detail as possible, let alone bargaining or rejecting all or part of what the opposing party wants by offering the contents of the standardized agreement. Based on the principle of freedom of contract as stated in Article 1338 paragraph 1 of the Civil Code, an agreement that is made legally is binding as law on the parties who make it. However, Article 1338 paragraph 3 of the Civil Code states that every agreement must be implemented in good faith (Suharnoko, 2005).

2. THEORY OF THE RESEARCH



2.1. Agreement or Contract

The term Agreement is a translation of the term "overeenkomst" in Dutch. Apart from that, the term Perikatan is also known, which is a translation of the term Verbintenis in Dutch. Meanwhile, the term Contract is a translation of the term Contract in English.

The term contract in everyday terminology seems to be very popular, terms such as rental contracts, sales and purchase contracts, employment contracts, almost do not need clarification for lay people and often they start from the view that what is meant by a contract is a written document. Today's Dutch jurists generally use as a synonym for "contract" "agreement" or "overeenkomst". Contract is a Dutch word that comes from the Latin word "Contractus", from Latin it has been translated into French "Contrat", English "Contract" and German "Kontrakt". However, this term is not as popular there as the word "vertrag". In fact, the precision of the Latin term cannot but be thought to be due to the great influence that Roman law had in Western Europe. However, in Roman law the term "contractus" had a more limited meaning than today's contracts (Dirdjosiswono, 2003).

According to Munir Fuadi, the term Contract Law is widely used today, the reasons are as follows, Contract Law is intended as a law that regulates written agreements solely. So people often ask which contract is meant to mean that what is being asked is the written contract (Fuady, 2001).

2.2. Principle of Freedom of Contract in Agreements or Contracts

The principle of freedom of contract is one of the principles in contract law. Freedom of contract is defined as "if an agreement is concluded between the

parties, there will be free will from the parties. In the context of freedom of will, it is also implied that there is minimal equality." (Herlien, 2006)

The existence of the public interest of society requires and at the same time determines the limits of freedom to make and conclude contracts. Having the freedom to agree about anything and with anyone is very important. For this reason, the principle of freedom of contract is included as part of human freedom rights. Freedom of contract is so important, both for individuals, in the context of the possibility of self-development in personal life, as well as in the traffic of social life, as well as to control or own property, as well as for society as a totality, so much so that by some authors it is seen as a human right man. (Khairandy, 2003)

3. RESEARCH METHOD

This research uses qualitative methods with a normative systematic approach. The legal research method is a systematic approach to collecting, analyzing and understanding data or information related to legal or statutory issues. This method relates to the analysis of legal texts, including laws, regulations, court decisions, and other legal documents. Researchers use a deductive approach to draw conclusions about how the law should be applied in a particular context. Normative research in law involves the analysis of legal norms and applicable legal principles. Normative research steps include identifying legal sources, interpreting norms, and developing legal arguments based on an understanding of existing law. In addition, normative research often involves analysis of doctrine, court decisions, and legal theory to form a comprehensive view of the legal issue under study.



In normative research regarding freedom of contract in consumer transactions and its influence on consumer protection, data analysis steps involve identifying legal norms related to freedom of contract and consumer protection. Next, researchers will analyze the interpretation of these norms and evaluate their impact on the balance between freedom of contract and consumer protection. The final step involves developing a legal argument to provide a comprehensive view of the issue under study, taking into account the ethical and justice implications in the legal context.

4. RESULT AND DISCUSSION

4.1. Principle of Freedom of Contract in Agreements or Contracts

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scholars, this freedom of contract is usually based on Article 1338 paragraph 1 BW that all agreements made legally apply as law to those who make them. Likewise, there are those who base it on Article 1320 BW which explains the conditions for the validity of an agreement.¹⁸ The most rapid development of freedom of contract emerged after the French revolution which put forward the motto: *liberte, egalite, fraternite*. The revolution with the spirit of freedom, equality and brotherhood emerged as a reaction to the state's excessive intervention into social life. We can base the influence of individualistic and liberal doctrines on the principle of freedom of contract on the following two arguments: closing any contractual agreement is permissible and every contractual agreement carried out based on free will is valid and therefore worthy of legal support. In this context, the teachings of individualism and liberalism have a big influence, both on the Civil Code and the BW (old), especially on the principle that agreements can be made freely (Susanto, 2023)

Freedom of contract has two distinct dimensions. First, freedom from contract, which determines that a person does not have contractual obligations if these obligations are not based on an agreement between them. Second, freedom to contract, which determines that a person will have authority based on an agreement in their legal relationship (Khairandy, 2003).

4.2. Consumer Protection

Consumer protection is a critical aspect of legal frameworks worldwide, aimed at safeguarding the rights and interests of consumers in their interactions with businesses and markets. It involves the establishment of laws and regulations

that ensure fair and transparent transactions, prevent fraudulent practices, and provide avenues for consumers to seek redress in case of disputes. Effective consumer protection contributes to building trust in the marketplace, fostering economic stability, and promoting sustainable business practices.

In many countries, consumer protection laws cover various aspects such as product safety standards, accurate labeling, fair pricing, and protection against deceptive advertising. These regulations often empower consumers with the right to information, the right to choose, and the right to fair treatment. Furthermore, regulatory bodies and consumer advocacy groups play a crucial role in monitoring and enforcing these laws. For instance, in the United States, the Federal Trade Commission (FTC) is a key agency responsible for enforcing consumer protection laws, promoting competition, and preventing anticompetitive business practices. As consumer markets evolve with advancements in technology and globalization, ongoing efforts are essential to adapt and enhance consumer protection measures to address emerging challenges and ensure a balanced and equitable marketplace.

According to article 1 number 1 of Law Number 8 of 1999 concerning Consumer Protection, what is meant by Consumer Protection is all efforts that ensure legal certainty to provide protection to consumers. (Law No. 8 of 1999)

According to article 1 number 2, Law Number 8 of 1999 concerning Consumer Protection, what is meant by Consumer is every person who uses goods and/or services available in society, whether for the benefit of themselves, their families, other people or other living creatures. and not for trading. (Law No. 8 of 1999)

According to article 1 number 3 of Law Number 8 of 1999 concerning Consumer Protection, what is meant by Business Actor is every individual or business entity, whether in the form of a legal entity or non-legal entity which is established and domiciled or carries out activities within the jurisdiction of the Republic of Indonesia. Indonesia, both individually and jointly through agreements for the implementation of business activities in various economic fields. (UU No. 8 of 1999).

Nasution is of the opinion that consumer protection law is part of consumer law which contains regulatory principles or rules and also contains characteristics that protect consumer interests. Consumer law is defined as the overall principles and legal rules that regulate relationships and problems between various parties with each other relating to consumer goods and/or services, in social life. (Budiono, 2015; Nasution, 2002)

4.3. Protection of Consumers in Agreements

Consumer protection in agreements is a crucial aspect of legal frameworks designed to ensure fairness and equity in contractual relationships between consumers and businesses. Such protection involves the establishment of laws and regulations that govern the terms and conditions of agreements, aiming to prevent unfair practices, misinformation, and abusive contractual clauses. These regulations often provide consumers with rights such as the right to clear and accurate information, the right to fair and non-discriminatory terms, and the right to seek redress in case of contractual disputes. Effective legal measures in this regard contribute to building consumer



confidence, fostering responsible business conduct, and maintaining a healthy and trustworthy marketplace (Dawson, 2017). Protection for consumers relating to standard clauses is contained in article 18 of Law Number 9 of 1999 concerning Consumer Protection, which states that:

1. Business actors in offering goods and/or services intended for trading are prohibited from creating and/or including standard clauses in every document and/or agreement if:
 - a. Declare the transfer of responsibility of business actors.
 - b. States that business actors have the right to refuse goods purchased by consumers.
 - c. States that business actors have the right to refuse to hand over money paid for goods and/or services purchased by consumers.
 - d. States the granting of authority from consumers to business actors, either directly or indirectly, to carry out all unilateral actions related to goods purchased by consumers in installments.
 - e. Regulates the matter of proving the loss of use of goods or use of services purchased by consumers.
 - f. Gives business actors the right to reduce the benefits of services or reduce the assets of consumers who are the object of buying and selling services.
 - g. States that consumers are subject to regulations in the form of new, additional, continued rules and/or further changes made unilaterally by business actors while consumers are utilizing the services they purchase.
 - h. States that consumers authorize business actors to impose mortgage rights, liens, or security

rights on goods purchased by consumers in installments.

2. Business actors are prohibited from including standard clauses whose position or form is difficult to see or cannot be read clearly, or whose expression is difficult to understand.
3. Every standard clause that has been stipulated by a business actor in a document or agreement that meets the provisions as intended in paragraphs 1 and 2 is declared null and void by law.
4. Business actors are obliged to adjust standard clauses that conflict with this law.

Then in another part it is also interpreted as a rule that provides protection for consumers, namely in article 7 of Law Number 9 of 1999 concerning Consumer Protection which regulates the obligations that must be carried out by business actors, namely:

1. Have good intentions in carrying out business activities.
2. Provide correct, clear and honest information regarding the condition and guarantee of goods and/or services as well as providing explanations of use, repair and maintenance.
3. Treat or serve consumers correctly and honestly and not be discriminatory.
4. Guarantee the quality of goods and/or services produced and/or traded based on the provisions of applicable quality standards for goods and/or services.
5. Provide consumers with the opportunity to test, and/or try certain goods and/or services and provide guarantees and/or warranties for goods made and/or traded.



6. Provide compensation, compensation and/or replacement if the goods and/or services received or utilized are not in accordance with the agreement.

Protection for consumers can also be obtained through the rules contained in article 19 of Law Number 9 of 1999 concerning Consumer Protection, which contains the Responsibilities of Business Actors, namely:

1. Business actors are responsible for providing compensation for damage, pollution and/or consumer losses resulting from consuming goods and/or services produced or traded.
2. Compensation as intended in paragraph 1 can be in the form of a refund or replacement of goods and/or services of the same or equivalent value, or health care and/or provision of compensation in accordance with the provisions of the applicable laws and regulations.
3. Compensation is provided within a period of 7 (seven) days after the transaction date.
4. Providing compensation as intended in paragraphs 1 and 2 does not eliminate the possibility of criminal prosecution based on further evidence regarding the existence of an element of error.
5. The provisions as intended in paragraphs 1 and 2 do not apply if the business actor can prove that the error is the consumer's fault.

So it can be concluded that the provisions in the Consumer Protection law are deemed sufficient in order to ensure the fulfillment of consumer rights in every transaction carried out with business actors or producers. What is an obstacle in fulfilling these rights is law enforcement and the legal awareness of consumers

themselves in obtaining and fighting for their rights, if they are harmed by business actors or producers.

4.4. The Implementation of the Principle of Balance in Consumer Transactions

An Agreement (legal act) can be canceled if there is an abuse of circumstances. Nieuwenhuis put forward 4 conditions for abuse of circumstances as follows:

1. Special circumstances (bijzondere omstandigheden), such as: emergencies, dependency, carelessness, mental insanity, and inexperience.
2. A real thing (kenbaarheid). It is required that one of the parties knows or should be moved (his heart) to close an agreement.
3. Misuse (Misbruik). One of the parties has executed the agreement even though he knew or should have understood that he should not have done so.
4. Causal Relationship (Causal Verband). It is important that without abusing the situation the contract will not be closed.

The use of standard agreements in agreements between consumers and producers sometimes or even frequently results in misuse of conditions or what in Dutch terms is known as "misbruik van omstandigheden". Abuse of circumstances occurs when a person knows or should understand that another party, due to special circumstances such as an emergency, dependency, inability to think, abnormal mental state or inexperience, is moved to carry out a legal action, even though he knows or should understand that in fact he is have to prevent it. 32



This abuse can occur if an agreement is born because of the superiority of one of the parties, whether economic superiority, psychological superiority or other advantages. However, in general only two groups of abuse of circumstances are known. Therefore, in general, abuse of circumstances is grouped into two groups, namely: 33

1. Abuse of circumstances due to economic superiority (economische overwicht) of one party over another party; And
2. Abuse of circumstances due to psychological superiority (geestelijke overwicht) of one party over another.

The formation of the teaching about abuse of circumstances was due to the absence (at that time) of the Burgerlijk Wetboek (Netherlands) provisions governing this matter. In the event that a judge finds that there are circumstances that are contrary to custom, the judge often finds a decision that cancels the agreement in whole or in part.

Van Dunne further expressed his opinion that it was not appropriate to state that agreements made under the influence of abuse were contrary to good habits. Misuse of the situation is related to the occurrence of the contract. That an agreement occurs under certain circumstances has no influence on whether or not the cause of the agreement is permissible. Abuse of circumstances concerns the circumstances that contributed to the contract; enjoying another person's condition does not cause the contents of the contract or its intention to become impermissible, but it causes the misused will to become impermissible.

Classifying abuse of circumstances as a form of defect of will is more in line with the needs of legal construction in the event

that someone who has been harmed demands cancellation of the agreement. A lawsuit based on abuse of circumstances occurs with a specific purpose. The plaintiff must argue that he did not actually want the agreement or that he did not want the agreement in that form. And it can be concluded that abuse of circumstances is categorized as a defective will, because it is more in accordance with the content and essence

abuse of the situation itself. It does not relate to the objective terms of the agreement, but rather influences its subjective terms.

From the description of abuse of circumstances, it can be concluded that in consumer transactions there is always the possibility of abuse of circumstances, namely by creating an agreement or contract by taking advantage of special conditions or conditions of the consumer, which causes the consumer to conclude an agreement or contract without free will. which is due to their weak economic and psychological position in dealing with business actors or producers in the process of making agreements/contracts, so that this can be exploited by business actors or producers to take advantage unilaterally and has the potential to cause harm and cause consumers to not receive adequate protection.

5. CONCLUSION

Freedom of contract in consumer transactions is crucial in the context of a market economy, but needs to be analyzed carefully to measure its impact on consumer protection. A deep understanding of the dynamics of freedom of contract can provide a basis for developing balanced legal policies, ensuring that consumers not only have freedom in transactions, but are also

effectively protected from harmful practices. Thus, it is necessary to carefully investigate how regulations can be structured to maintain a balance between freedom of contract and consumer protection. Freedom of contract in consumer transactions has been adequately regulated and guaranteed in applicable laws and regulations, both in the Consumer Protection Law, the Civil Code and other provisions. Factors that can influence the application of the principle of freedom of contract in an effort to provide legal protection to consumers. Standard agreements or standardized contracts used in consumer transactions have the potential to be detrimental and may result in consumers being less protected. The act of abusing conditions in the process of making agreements/contracts in consumer transactions has the potential to be detrimental and leave consumers unprotected. Applying the principle of balance in the contents of agreements/contracts in consumer transactions can provide adequate protection for each consumer. The application of the doctrine of unfairness and undue influence in the preparation of agreements/contracts can provide adequate protection for consumers in any transactions carried out that have the potential to harm them.

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