PROCEEDINGS

The Second ASEAN International Business Conference 2015

14th – 16th September 2015
Nagaworld Hotel, Phnom Penh, Cambodia

“ASEAN ECONOMIC COMMUNITY 2015: MOVING FORWARD”

Jointly Organized By:
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Welcome to Asean International Business Conference (AIBC)  
September 2015, Phnom Penh, Cambodia

First and foremost, I would like to congratulate the secretariat of AIBC for successfully organizing the second conference in Phnom Penh, Cambdodia. Warm welcome to all presenters and participants of the conference and we do hope this event shall provide a good platform for future academic collaboration, articulation and more importantly strategic networking. Special thanks to Universitas Pembangunan Nasional ‘Veteran’ Jakarta for being a great partner and for making this second conference a success.

Let’s synergize and reap the benefits of Asean Economic Community 2015!

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CONTRACT FREEDOM PRINCIPLES DEVELOPMENT

IN BUSINESS CONTRACT

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Abstract

Contract is the bridge for business activity that connects the rights and obligations of each of the businessmen as an attempt to create legal certainty in achieving its business objectives. To realize the goal, those parties developed legal norms in the form of a set of principles and the rule of law that is generally understood as contract law (law of contract). One of the legal principles in contract law is the principle of freedom of contract. The principle of freedom of contract is necessary for the parties to have an equal footing or balance. But the problem is how the development of the principle of freedom of contract at the moment against the parties who have unequal position in making a business contract. However, at this point it is a fact that there are many contracts where one party has a weaker position than the other party, it is this which create injustice of the agreements made. Hence was born the principle of balance as a rejection of the principle
of freedom of contract, especially with the unconscionability doctrine and the doctrine of equity.

A. Background

In line with the increasing interaction between people in the community in terms of both frequency and variety of business activities, as well as in terms of quantity and quality, as well as the development of human needs in an increasingly complex modern life. The frequency and variety of business activities is always evolving and increasing in line with the development of economic globalization and the globalization of the law\(^1\), which has penetrated the economic system and the legal system in Indonesia.

So it is necessary for the fulfillment of human needs through multidimensional human interaction among the various parties. In an effort to meet the needs of the human being then the exchange of goods and services are performed. These activities are realized through the implementation of obligations issued voluntarily by the promises that bind the parties.

The parties have made promises to implement or not implement these things, it is not enough simply bound by a moral commitment and good will of the parties alone. But they will be entering into a contract. So, the contract is a bridge

\(^1\) Globalization is generally interpreted as a symptom of the union of the world and thanks to advances in transportation and advanced electronics. This situation is considered to simplify the expansionary economic management processes across the borders. However, globalization can also exacerbate inequality and relationship and domination-dependencies relationships between the developed countries to developing countries.
that connects the business activity from the rights and obligations of each of the businessmen as an attempt to create legal certainty in achieving their business objectives.²

To realize the goal of those parties, legal norms then developed in the form of a set of principles and the rules of law that is generally understood as contract law (law of contract). One of the legal principles in contract law is the principle of freedom of contract. The principle of freedom of contract is universal, meaning that it is embraced and recognized by all countries in general. This principle has a very important position in making a contract, although this principle is not poured into a rule of law but has a very strong influence in the contractual relations of the parties.

The principle of freedom of contract is necessary for the parties to have an equal footing or balance. But the problem is how the development of the principle of freedom of contract at the moment against the parties who have unequal position in making a business contract.

B. Discussions.

The contract is essentially an engagement between people or subjects of law in the shape of rights and legal obligations and are published reciprocal as a consequence of an agreement or agreements formed between and over the will of

² Muhammad Syaifuddin, Rukum Kontrak, Memahami Kontrak dalam Perspektif Filsafat, Teori, Dogmatik, dan Praktik Hukum (Seri Pengayaan Hukum Perikatan), CV. Mandar Maju, Bandung, page. 4
the parties that make it. Perfection agreement between the parties must be measured both in terms of human morality as well as in terms of jurisdiction.

Aspects of morality give a feel of good faith (good faith and fair dealings), naturalness (reasonableness), and justice (fairness) in every engagement that was born of the agreement. While the juridical aspect issuing legal certainty guarantees on the various components that cover the entire life cycle of an agreement, including but not limited to the components of the formation, validity, execution, and the efforts for the parties to enforce the rights and obligations that rise from agreement between the parties.³

While until now the contract law that is applicable in Indonesia is still using the Civil Code Book (Burgerlijk Wetboek / BW) S. 1847 No. 23 Book III which governs the engagement of law (Law of Obligations). Book III Burgerlijk Wetboek (BW) regarding the engagement (van Verbintenis) does not provide a definition of what is meant by that engagement. But it begins with Article 1233 BW about the source of the engagement, namely contracts or agreements and legislation. Thus, the contract or agreement is one of the two basic laws which exist apart from legislation that could lead to the engagement.

Definition of engagement according to the doctrine is "legal relationships in the field of wealth between the two

³Ibid, page 16
(or more), in which one party (the debtor) must perform an achievement, while the other parties (creditors) are entitled to that achievement. The main characteristic of the engagement is a legal relationship between the parties, where in the relationship there is rights (achievement) and liabilities (contra achievement) that exchanged by the parties.

While the meaning of contract is an agreement between two or more persons that includes a promise or promises reciprocal that can be enforced by law, or that implementation of law to some degree is recognized as a liability.

The principle of freedom of contract is in Book III BW governed by Article 1338 (1) which adheres to an open system, meaning that the law gives flexibility to the parties to set their own legal relations. Whereas those mentioned in the book III simply regulate and complete. According to Remi Sjahdeini, the principle of freedom of contract under the laws of Indonesia covering the scope of the agreement as follows:

1. The freedom to make or not make a contract
2. The freedom to choose a party with whom they want to make a contract
3. The freedom to determine or choose the clauses of the contract that will be made

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4 Agus Yudha Hermoko, Rukum Perjanjian, Asas Proporsionalitas dalam Kontrak Komersial, Kencana Prenada Media Group, Jakarta, 2011, page 19
5 C. Aser, Pengkajian Rukum Perdata Belanda, Dian Rakyat, Jakarta, 1991, page 5
7 Sutan Remy Syahdeini, Asas Kebebasan Berkontrak dan Perlindungan yang Seimbang bagi Para Pihak dalam Perjanjian Kredit Bank di Indonesia, Institut Bankir Indonesia, Jakarta, 1993, page 47
4. The freedom to determine the object of the contract
5. The freedom to determine the form of a contract
6. The freedom to accept or deviate the statutory provision that is optional.

Another important principle in contract law is the principle of pacta sunt servanda and the principle of good faith. The principle of pacta sunt servanda is also contained in paragraph 1 of Article 1338 of the Civil Code which is binding on the parties to make it valid as a law. The principle of binding force requiring the parties to fulfill their bond with one another in the contract that they make and ultimately the arrangement is enforceable. While the principle of good faith in contract contained in paragraph 3 of Article 1338 of the Civil Code. In Indonesian Dictionary the meaning of good faith is "trust, firm faith, the purpose, the will (that good)." 

Subekti explained that in good faith pursuant to Article 1338 paragraph (3) of the Civil Code is one of the most important joints of contract law that empowers the judge to oversee the execution of a contract, so as not to violate propriety and justice. This means that the judge is authorized to deviate from the contract if the execution of the contract violates the sense of justice (recht gevoel) of one of the two parties. If Article 1338 paragraph (1) of the Civil Code

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8 Tim Penyusus Kamus Pembinaan dan Pengembangan Bahasa Depdikbud RI, Kamus Besar bahasa Indonesia, Balai Pustaka, Jakarta, 1997, page 369
requires legal certainty, in the sense of the legal concrete terms and norms and individual (chapters) in the contract have to be performed, while Article 1338 paragraph (3) of the Civil Code according to their propriety and justice, in the sense of the demands of legal certainty in the form of execution of the contract must not violate the norms of decency and values of justice.\footnote{Subekti, Pokok-Pokok Hukum Perdata, Intermasa, Jakarta, 1996, page 68}

Another general principle of law is the principle of balance. The principle of balance is closely related to the principle of freedom of contract and the principle of good faith. At first the principle of freedom of contract is assuming that the parties who implement the agreement have the same position and balanced. However, at this point the fact that many contracts where one party has a weaker position than the other party, it is this which create injustice of the agreements made. Hence the principle of balance is born as a rejection of the principle of freedom of contract. Because of the principle of freedom of contract often give rise to injustice, which is the main purpose of the law.

Related to justice, John Rawls states that an adequate justice must be established by the contract approach, because justice is the result of mutual agreement of all the people which are free, rational and in equal position. According to
Christopher Greenwood the unbalanced state is called "unconscionability", while the unbalanced relationship is called "Undue Influence". Unconscionability doctrine is the terms and conditions of an agreement that may become inappropriate and unfair, when the agreement was formed from a state which is not balanced. This doctrine develops in the common law system.

Black's Law Dictionary gives unconscionability definition as:

"The principle that a court may refuse to enforce a contract that is unfair or oppressive because of procedural abuses during contract formation or because of overreaching contractual terms, especially terms that are unreasonably favourable to one party while precluding meaningful choice for the other party".11

The point is basically the Court can ignore the implementation of the provisions of the contract that is unfair or pressing, because due to an abuse of the process in the forming of the contract or because the terms of the contract which exceeds the limit, particularly the provisions which unreasonably favor one of the parties and override the choices that are important to the other party. Therefore this unconscionability

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is very inappropriate and unfair because one of the parties has a weak position and the provisions of the contract does not make sense because it is only benefit one party only.

Whereas in the system of civil law, the principles of equity is set forth under the principles of good faith (goeder trouw), appropriateness and feasibility or propriety (relijkheid en billijkheid) In the Civil Code the principle of equity is regulated in Article 1338, paragraph 3 that the agreement should be implemented in good faith and governed by Article 1339. The doctrine of equity (bilijkheid / propriety) as the doctrine of misuse condition is also known in common law countries.

Equity doctrine is a doctrine that allows the judge to make a decision based on the principles of propriety, equality, moral rights and natural law.¹²

Base on this unconscionability doctrine and the doctrine of equity, an unjust and very burdensome contract for one of the parties is void or can be canceled, although the parties have signed the contract in question.¹³ It is possible because this unconscionability doctrine gives the possibility for a judge to disregard a clause in a contract or all of the

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¹³ Munir Fuady, Hukum Kontrak (Dari Sudut Pandang Hukum Bisnis), Bandung, Pt. Citra Aditya Bakti, 2001, page 52
contents of the contract if the contract have an effect that are contrary to the conscience of a judge.  

C. Conclusions.

At this time the development of the principle of freedom of contract has undergone significant changes, because at first the principle of freedom of contract is assuming that the parties are implementing the agreements have the same position and balanced. However, at this point it is a fact that there are many contracts where one party has a weaker position than the other party. It is this which creates injustice of the agreements made. Hence was born the principle of balance as a rejection of the principle of freedom of contract. Especially with this unconscionability doctrine and the doctrine of equity, an unjust and very burdensome contract for one of the parties is void or can be canceled, although the parties have signed the contract in question.

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10. Muhammad Syaifuddin, *Hukum Kontrak, Memahami Kontrak dalam Perspektif Filsafat, Teori, Dogmatik, dan Praktik Hukum (Seri Pengayaan Hukum Perikatan)*, CV. Mandar Maju, Bandun

