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Freedom of Contract and Judicial Intervention: does the Court have the Right?

Liberdade de Contrato e Intervenção Judicial: o Tribunal tem Direito?

Libertad de Contrato e Intervención Judicial: tiene Derecho el Tribunal?

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ABSTRACT

Objective: The paper aims to elaborate on the implementation of freedom of contract and judicial intervention taken by the Indonesian judiciary institutions in the event that a contract does not reflect the balance of rights and obligations of the parties. It also

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discusses several cases that expose the involvement of the court in upholding justice by intervening in the contract.

Methodology: The study is doctrinal legal research. It employed the statutory, conceptual, and case approach with prescriptive data analysis.

Results: The study reveals that the freedom of contract is not limitless. In certain conditions, the court can intervene the implementation of the contract in case the court found the party's position is inequal and led to the harmful consequences that detriment a certain party.

Contributions: It explores the restrictions of the freedom of contract principle by comprehensively explaining the reasoning behind its enforcement under the court's authority. In addition, it clarifies the court's justification to perform a corrective function towards inequalities in contract performance.

Keywords: corrective function; freedom of contract; Indonesia; judicial intervention.

RESUMO

Objetivo: O artigo visa elaborar sobre a implementação da liberdade de contrato e intervenção judicial tomadas pelas instituições judiciárias indonésias no caso de um contrato não refletir o equilíbrio de direitos e obrigações das partes. Discute também diversos casos que expõem o envolvimento do tribunal na defesa da justiça por meio da intervenção no contrato.

Metodologia: O estudo é uma pesquisa jurídica doutrinária. Ele empregou a abordagem estatutária, conceitual e de caso com análise de dados prescritiva.

Resultados: O estudo revela que a liberdade contratual não é ilimitada. Em determinadas condições, o tribunal pode intervir na execução do contrato caso o tribunal considere a posição da parte desigual e tenha levado a consequências nefastas que prejudiquem determinada parte.

Contribuições: Explora as restrições do princípio da liberdade contratual, explicando de forma abrangente o raciocínio por trás de sua aplicação sob a autoridade do tribunal. Além disso, esclarece a justificativa do tribunal para desempenhar uma função corretiva em relação às desigualdades na execução do contrato.

Palavras-chave: função corretiva; liberdade contractual; Indonésia; intervenção judicial.

RESUMEN

Objetivo: El documento tiene como objetivo profundizar en la implementación de la libertad de contrato y la intervención judicial adoptada por las instituciones judiciales de Indonesia en caso de que un contrato no refleje el equilibrio de derechos y obligaciones de las partes. También analiza varios casos que exponen la participación del tribunal en la defensa de la justicia al intervenir en el contrato.

Metodología: El estudio es una investigación jurídico doctrinal. Se empleó el enfoque estatutario, conceptual y de casos con análisis de datos prescriptivos.

Resultados: El estudio revela que la libertad de contratación no es ilimitada. En determinadas condiciones, el tribunal puede intervenir en la ejecución del contrato en caso de que el tribunal determine que la posición de las partes es desigual y condujo a las consecuencias perjudiciales que perjudican a una determinada parte.

Contribuciones: explora las restricciones del principio de libertad de contratación al explicar de manera integral el razonamiento detrás de su aplicación bajo la autoridad del tribunal. Además, aclara la justificación del tribunal para ejercer una función correctiva de las desigualdades en el cumplimiento de los contratos.

Palabras clave: función corrective; libertad de contratación; Indonesia; intervención judicial.

1 INTRODUCTION

For a long time, freedom of contract has evolved alongside the growth of Adam Smith's *laissez faire* principles, which emphasize the principle of non-intervention by the state in economic activity and market operation (STAHL, 2016). Smith desires a political economy in which law is not employed to interfere with contract freedom, because this freedom is critical to the survival of trade and industry (JAHN; BRÜHL, 2018). The teachings of nineteenth-century philosophers and economists, as stated by Adam Smith and Jeremy Bentham, hold that the major purpose of legislation and social thought must be able to provide the greatest pleasure for the greatest number (HOLLANDER, 2016). Therefore, it can be said that the source of freedom of contract is individual freedom whose starting point is the interest of the individual as well, thus it can be understood that individual freedom gives him the freedom to contract.

Along with the increasing influence of the term *laissez faire* in the economic field, freedom of contract has become a general principle in support of the free competition (STAHL, 2019). Freedom of contract is the legal expression of the free market principle. This term assumes that any interference by the state in contracts is against the market. In its development, it turns out that freedom of contract is not freedom without limits (BARKATULLAH, 2020). Freedom of contract accompanied by the principle of *pacta sunt servanda* can in fact lead to injustice.

Freedom of contract must be based on a balanced bargaining position, but in reality, the parties do not always have a balanced bargaining position (YUANITASARI, 2017). As a result, the party with a stronger bargaining position tends to dominate the party with a weaker bargaining position. Finally, the state then imposed a number of restrictions on freedom of contract either through legislation or court decisions

(ALLEN, 2018). The limitation on freedom of contract is influenced by at least two factors. Firstly, the more influential the teaching of good faith, where good faith does not only exist in the implementation of the agreement, but also must exist at the time the agreement is made. Secondly, it is due to the growing abuse of circumstances (*misbruik van omstandigheden* and undue influence) (HERNOKO; ANAND, 2017).

Good faith is an important principle in contract law that can limit the principle of freedom of contract and the principle of *pacta sunt servanda*, however, in its application still raises a number of issues. This is because good faith is an abstract term so that in its application it still requires the judge's interpretation (FEBBRAJO, 2016). The regulation of good faith contained in the Indonesian Civil Code only covers good faith in the implementation of the contract. Whereas, the principle of good faith should has been existed at the stage of negotiation and contract drafting (WILLETT, 2016).

The aforementioned phenomena of contracting imbalance can be noticed in numerous contract types, particularly consumer contracts in standard form, which contain terms whose contents (tend to be) one-sided (CORNELIUS, 2018). For example, in the practice of providing credit in banking, there is a clause requiring clients to comply with all bank provisions and regulations, whether existing or to be regulated later, or a clause exempting the bank from customer losses caused by the bank's actions. In the contract of sale, for example, there is a clause that goods that have been purchased cannot be returned.

Freedom of contract, until now, remains an important principle in the contract law system, both in the civil law system, the common law system and in other legal systems. This is because, first, the principle of freedom of contract is a universal principle that applies in all countries in the world (ROMAŃSKI, 2016). Second, the principle of freedom of contract has the meaning as an embodiment of the free will of the parties in an agreement, which also means a reflection of the recognition of human rights (LISASIH *et al.*, 2020).

The principle of freedom of contract implies a balance between the rights and obligations of the parties. However, in its implementation, superior and inferior parties often appear in a contract (SCHÜTTE, 2017). Here then comes the understanding that in the event a contract does not reflect the balance of rights and obligations of the parties, a corrective function is needed to reorganize and balance the positions of the parties. Nevertheless, the question arises on who should perform this corrective function? Can the parties themselves or the Judges because of their position perform corrective functions? In what ways and to what extent can corrective functions be applied in a contract? These are the issues that will be addressed in this paper, and they will be developed and discussed thoroughly in the context of Indonesia, with several relevant cases and facts that have a close relationship with the prevalence of judicial intervention in the country.

2 RESEARCH METHODOLOGY

This paper is doctrinal legal research. This study examines the rules, norms, and principles of law, including legal doctrines that develop and are relevant to the research topic. The approach used in this research is a statutory, conceptual, and case approach. The analysis of the data obtained in this study is prescriptive. Prescriptive contains analysis results that describe the normative side of an arrangement in legislation regarding what should be done and what should not be done. In order to achieve this goal, the data analysis will begin with a study of several rules, norms, legal principles, and cases related to the research topic. All of them will be inventoried and analyzed using an extensive and teleological interpretation of the law.

3 THE FREEDOM OF CONTRACT AND ITS RELATION WITH CONSENSUALISM

In contract law, there are two interrelated principles, namely the principle of consensualism and the principle of freedom of contract (BUDIARTHA, 2018). According to the principle of consensualism, a contract is said to have been born if there has been an agreement or conformity of will between the parties who made the contract (HIDAYAT; NAWI; POERNOMO, 2020). The principle of consensualism is related to respect for human dignity (HANDAYANI; YUSLIM; ULFANORA, 2019). Subekti stated that this was the pinnacle of increasing human dignity, which was drawn from the Dutch proverb, "*een man een woord, een woord een man*", which means that by placing one's words, that person's dignity is enhanced as a human being (ZULKARNAEN, 2018).

The theoretical basis for binding contracts to parties, which is generally adopted in civil law countries, was developed by post glossators in the fourteenth century (POUND; DEROSA, 2017). This concept not only became the basis of Roman jurisprudence in the twelfth and thirteenth centuries as developed by the glossator through Aristotle's concepts, categories, and definitions but also became the basis of jurisprudence and legal systems in the twelfth and thirteenth centuries which were influenced by canonical law (POLDNIKOV, 2016). Canon law adds to some of the principles of the Roman covenant law system (RENNIE, 2018). First, the principle of binding the promise to the parties who make it. Second, the promise is the basic cause of the contract, which means that if it is a proper cause, then it provides validity. Canon law begins with the principle of critical discipline that every promise is binding (CHIODI, 2020). This is where the principle of *pacta sunt servanda* was born (DECOCK, 2017). Therefore, it is not important whether an act in the contract is not

in writing or not by oath. A promise without an oath is equal in God's sight (THOMAS, 2021).

The promise creates a will for the parties to fulfil their rights and obligations as well as the willingness to bind themselves to each other. This contractual obligation is a source for the parties to freely determine the contents of the contract with all its legal consequences. Based on this will, the parties are free to reconcile their respective wills. The will of the parties is the basis of the contract. The occurrence of a legal act is determined based on an agreement (consensualism). With the consensus of the parties, the agreement enhances the binding force of the agreement as befits the law (*pacta sunt servanda*). When someone swears an oath and proclaims it orally, the person to whom the oath was taken is granted rights (*Cum nexum faciet mancipiumque, uti lingua nuncupassit, ita ius esto*) (VAN NIEKERK, 2011). This principle becomes the binding force of the agreement. It is not only a moral obligation, but also a legal obligation whose implementation must be obeyed. As a consequence, neither the judge nor the third party may interfere with the contents of the agreement made by the parties.

Under the principle of freedom of contract, everyone is regarded as having the ability to make a contract with anyone, determine the content and form of the contract, and choose the law that applies to the contract in question (KAR; RADIN, 2018). So, if it is simplified, the principle of consensualism is related to the establishment of a contract, the principle of the binding force of a contract is connected to legal implications, and the principle of freedom of contract is tied to the contents of the contract. These three principles are drawn from the classical contract law doctrines that developed in France (doctrine of the autonomy of the will) and England (doctrine of *consensus ad idem* and *laissez faire*) (KHAIRANDY, 2000).

The contract, according to the classical doctrine of the French contract, is about free will. The contract is a reflection of the parties' free will. A contract is a specific law formed by the parties that connect their will, similar to legislation, which is a manifestation of the state's will. Autonomy of the will means that the parties have the ability to make their own laws, and contractual duties come from the parties' ability to freely create contracts with all of the legal consequences. The parties are free to make any contract they desire as long as it does not violate public order (KASTNER, 2020).

During the nineteenth century, judges and legal scholars in England and the United States challenged the traditional doctrine that based contractual responsibilities on justice. The meeting of the parties' will is the source of contractual obligations. The contract highlights the existence of consent to the parties' will or intents. In other words, consent is essential in drafting a contract (*consensus ad idem*). Adam Smith as one of the pioneers of *laissez faire* economics believes that laws and regulations should not be used to interfere with freedom of contract because it is important for the continuation of the trade (LEIST, 2018). In this regard, Robert Jenkinson who was the

Prime Minister of United Kingdom for fifteen years (1812 - 1827) believed that any interference in the economy almost always brings disaster, and during his reign, he did not want to intervene because it violated the "sacred" principle of freedom of contract (ATIYAH; ATIYAH, 1979).

To achieve the goal of the principle of freedom of contract, the parties to the agreement must have a balanced bargaining position. The real freedom of contract will exist if the parties to the contract have economic and social balance. In the *Coppage v. Kansas* case, Judge Pitney stated that it was impossible to enforce freedom of contract without at the same time recognizing the balance of the bargaining positions of the parties (ZWEIGERT *et al.*, 1998). In reality, not always the parties have a balanced bargaining position so that it can be detrimental to those who have a weak bargaining position. The classical contract law doctrine does have very little attention to the imbalance in the bargaining position of the parties in the contract. For this doctrine, freedom of contract means that people can choose what they want through a mutual agreement. The emergence of this view is due to the assumption that the bargaining position of the parties in the contract is equal.

If the principle of freedom of contract and the principle of *pacta sunt servanda* are adhered to without any limitations, it might lead to impropriety and injustice. Therefore, various restrictions on freedom of contract and the force of binding agreements arose as a result of this, both through legislation and the courts.

4 RESTRICTING THE FREEDOM OF CONTRACT: WHY AND HOW?

The paradigm of freedom of contract eventually shifted to the paradigm of propriety. Although freedom of contract is still an important principle in contract law in both civil law and common law, it no longer appears like the freedom of contract that developed in the nineteenth century. Now freedom of contract is not unlimited freedom. The state has imposed a number of restrictions on freedom of contract through statutory regulations and court decisions, as well as in the practices of economic activity in society (KHAIRANDY, 2003).

Restrictions on freedom of contract by the state are very evident in legislation such as in determining the terms and conditions of insurance policies, minimum wages, working conditions, and terms of employment, as well as insurance programs for workers that are required in connection with employment agreements between employers and its workers. In the United States, for example, state intervention is applied to labor laws, antitrust laws, business regulations, and public welfare. In Indonesia, the limitation of this principle can be seen in the provisions of various articles in the Civil Code such as Article 1320, 1330, 1332, 1335, 1337, 1338, 1339.

Courts in examining and adjudicating cases related to the principle of freedom of contract are also fully granted 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 who has the autonomy of freedom which includes interpreting statutory regulations, seeking and finding the principles and fundamentals of law, creating a new law when facing a vacuum of law. Besides, it is also justified to carry out *contra legem* if the provisions of the legislation are incompatible with the public interest as well as having free autonomy to follow jurisprudence (LE COQ, 2017).

The judge has the authority to examine the contents of a contract, if necessary, because the content and implementation of a contract are contrary to the values in society. The principle of freedom of contract is no longer absolute as in certain circumstances the judge is authorized through legal interpretation to examine and assess and declare that the position of the parties in an agreement is in an unbalanced state, resulting in an abuse of opportunity or circumstances (*misbruik van omstandigheden*) (HERNOKO; ANAND, 2017). Judges have the authority to prevent violations of a sense of justice. In the context of contract law, this authority includes the authority to reduce, or even completely eliminate, a contractual obligation from an agreement that contains injustice. This is in line with the purpose of the law, namely, realizing justice. The contents of the law, including the contents of the agreement, must contain the values of justice, which is propriety that develops in society.

Through a good interpretation, the law will live from time to time and provide a sense of justice. When facing a case or dispute that contains certain conditions or that has not been regulated in legislation, or has been regulated in legislation, but the substance is too general, abstract, and contrary to the public interest or not in accordance with propriety; then in a situation like this, the judge must function as a law's maker. The legal discoveries made are not only interpreting or implementing laws, but also legal discoveries, in the sense of carrying out the process of concretizing and individualizing general legal regulations by remembering concrete events (KOWALCZYK, 2016).

5 JUDICIAL INTERVENTION AND ITS CORRECTIVE FUNCTION: A FUNDAMENTAL PRECEDENT

In contract law, there are three interrelated principles, namely the principle of consensualism, the principle of the binding force of contract, and the principle of freedom of contract (SUDANTO, 2019).

The principle of freedom of contract is a principle that was born in the 17th century AD, where this principle has a very strong working power, which means that freedom should not be limited, either by a sense of justice in the community or by the

rule of law. The source of the freedom of contract is individual freedom, so the main point of this principle is individual interests. Subsequently, it is fair to say that individual freedom entitles the freedom to contract (HUDIATA, 2018).

But in fact, the principle of freedom of contract cannot be applied absolutely due to many interventions, including intervention from the court (CALLEROS, 2016). Asikin Kusuma Atmadja argues that judges have the authority to enter or examine the contents of a contract if necessary due to the content and implementation of a contract being contrary to the values embraced in society (APRITA; INDRAJAYA, 2020). This means that under certain circumstances the judge is authorized through legal interpretation to examine and assess and declare that the position of the parties in an agreement is unbalanced in such a way so that one of the parties is considered not free to express his will.

In a contract, although not explicitly written, the principle of good faith must be the main basis in the process of making and implementing the contract (ARYAN; MIRABBASI, 2016). Good faith can be interpreted as an act that does not only provide honesty or sincerity of action but must also pay attention to the values that develop in society/ Besides, it also shows a standard of justice or propriety and does not contain anything that is detrimental the others (WICAKSANA; WITASARI, 2020).

The principle of good faith is also one of the legal instruments that can limit the freedom of contract and the binding power of the agreement. With the function of good faith that is limiting and nullifying, judges can intervene in contractual obligations that objectively contain or contradict propriety and justice. The principle of good faith is used to interpret contracts. The contract must be interpreted according to propriety and fairness. If it is found that an agreement deviates from the principle of good faith, the judge has the power to decide otherwise from the contents of the contract that has been agreed for the sake of goodness and justice for both parties (MUSKIBAH; HIDAYAH, 2020).

Gilbert Guillaume argues that the main function of judges is to adjudicate the disputes. Judges function to judge and decide who is right and who is wrong (HARISSA, 2018). According to Koesnoe, the task of judges is to determine how the law is for a concrete legal problem brought to him, which is then attached as legal consequences. In carrying out his judicial duties, one must not take sides with anyone except for truth and justice (ZAMRONI, 2017). Richard A. Posner writes, for the judge, the duty to decide the case and to do so, moreover, with reasonable dispatch is primary (HARISSA, 2018).

From the above explication, it can be stated that the right of authority to adjudicate contract disputes is in line with the objectives of contract law, namely to protect the disputing parties, by providing fair protection of the interests of the parties, and providing legal certainty to the disputed contracts.

As the example of the Judicial Intervention in the agreement, it could be found in the Supreme Court Decision No. 3431k/Pdt/1985. The decree is commonly known as the Supreme Court's arrest on the pension book which is one of the jurisprudences in Indonesian legal history (SUMRIYAH, 2019). The decision stipulated that the agreed interest rate of 10% per month was lowered by the judge to 1% per month. Moreover, all the interest that has been paid by the debtor and received by the creditor must be recalculated (SUPREME COURT, 1985).

The case started when the creditor has lent a fund to the debtor with a promise of 10% interest every month and the debtor's pension fund payment book as collateral for the loan. However, the debtor was no longer able to pay debts as his business was at a loss which then led the creditor sue the debtor to the district court to pay the debt and interest according to the agreement (SUPREME COURT, 1985).

In the district court's decision, the judge granted the creditor's claim and punished the debtor to pay the debt plus 4% interest every month starting from the time the case was entered in court (DISTRICT COURT, 1983). Likewise, when an appeal is made to the high court, the judge at the high court in his decision strengthens the previous judge's decision (HIGH COURT, 1983).

When the case was appealed to the supreme court, in its decision the supreme court overturned the *judex facti* decision, considering that the *judex facti* had misapplied the law. The Supreme Court then adjudicated the case with several considerations as follows (SUPREME COURT, 1985):

a) the interest stipulated in this debt activity is too high, which is 10% and the judge also considers that this is contrary to propriety and justice, moreover, the debtor is a retired person who has no other income;
b) whereas the provisions in the agreement to submit several pension fund payments as collateral also contradicts propriety and justice;
c) the debtor has paid interest of IDR 400,000, from the loan amount of IDR 540,000;
d) whereas in this case the Supreme Court has the authority to determine *ex aquo et bono*, which means in the sense that it is appropriate and fair;
e) if the loan interest is set at 1% per month, so what must be paid for 10 months x IDR 5,400 is IDR 54,000;
f) interest that has been paid to the creditor of IDR 400,000 must be considered as payment of the loan principal;
g) so that the remaining debtor's loan to creditors is IDR 140,000 plus interest of IDR 54,000, which is the total IDR 194,000.

The similar things happened to other cases decided by the supreme court, they are Supreme Court Decision No. 1076K/Pdt/1996, dated 09 March 2000 and Supreme Court Decision No. 3641K/Pdt/2001 dated 11 September 2002. In Decision No.

1076K/Pdt/1996, The case began when Paul (Respondent) borrowed money from Singgih (Claimant) in the amount of Rp 350.000.000,- (three hundred and fifty million rupiahs), as stipulated in the statement of debt acknowledgement, with a clause stating that the Respondent is obligated to repay the loan at the latest by the date of 10 May 1990 in such amount plus 2.5% monthly interest rate, which was firstly paid on 10 September 1998. However, in the subsequent months, the Respondent failed to make any payments toward the agreed-upon interest; as a result, the Claimant considered the Respondent to have breached the contract (*wanprestasi*). The Claimant then filed this case with the Court, which was decided in cassation level. The Panel of Judges considered that the agreed interest rate of 2.5% monthly or 30% per year, even though it had been agreed upon by the parties, needed to be adjusted to the prevailing interest at state banks, which was 18% per year (SUPREME COURT, 1996). The Supreme Court in this decision, qualified the Defendant to have defaulted because they only paid one month of agreed interest. However, even though he was qualified as a default, the Supreme Court corrected the amount of interest charged according to the average interest rate on debt at state banks. Here there is a corrective function performed by the Supreme Court. Specifically, the Supreme Court corrected the amount of interest agreed by the Plaintiff and Defendant, which was far above the government bank's average interest rate of around 18% per year (ASNAWI; HUDIATA, 2017).

Meanwhile, in the decision No. 3641K/Pdt/2001, the Supreme Court firmly cancelled the agreements No. 41 and 41 made by the parties on October 29, 1997, as well as Deed No. 31 made by the parties on November 26, 1997. The considerations of the Supreme Court, among others, are that the principle of freedom to contract is not absolute, which means that under certain circumstances the judge is authorized through legal interpretation to examine and assess and declare that the position of the parties in an agreement is in an unbalanced, so that one of the parties is considered not free to express his will as if the agreement occurred unilaterally (SUPREME COURT, 2001).

Indonesia's contract law system is basically open in nature, consequently, at the time of the agreement is made, Civil Code and Customary Law is not the only value applied, but other life values among the people in accordance with propriety, justice, humanity, such as abuse of circumstances/opportunities and or economic abuse which apply side by side and complement each other become the consideration. Therefore, the values in question have an influence that can be used as an effort to change the provisions agreed in the agreement (ROSADI, 2016). Because the agreement was made in a condition where the parties were not balanced, the Supreme Court argue that there had been an abuse of circumstances or opportunities in which the Cassation Applicant as one of the parties to the agreements was not free to express his will, so that the Supreme Court argue that the agreements should be annulled (SUPREME COURT, 2001).

Decision Number 3641K/Pdt/2001 becomes the jurisprudence of the Supreme Court. The decision gave birth to an important legal rule regarding the meaning of the principle of freedom of contract and the judge's authority. In the principle of freedom of contract, the judge is authorized to examine and declare that the position of the parties is in an unbalanced, so that one party is considered not free to express his will (SULISTYARINI *et al.*, 2018). The essence of the rule of law in the decision is at least categorized into two things. First, freedom of contract is a principle that is limited by the values of justice and fairness in the distribution of rights and obligations of the parties in a contract. Second, the limitation on the freedom of the parties in the statement of will is intended as an effort to protect the parties from the arbitrariness of the other party in the contract.

Based on the case above, it can be seen that the court has interfered in part of the agreement that has been agreed upon, whereas if it refers to Article 1338 of the Civil Code, what has been agreed applies as law for the parties (ERWIN; SUJATMIKO, 2020). and cannot be intervened by a judge. This has indirectly undermined the principle of freedom of contract, which is based on that principle, the parties are free to enter into a contract with anyone as long as the agreed contract fulfills the conditions of the validity of the agreement as regulated in Article 1320 of the Civil Code, among others (IRIANTO, 2021):

a) there must be consent of the individuals who are bound thereby;
b) there must be capacity to conclude an agreement;
c) there must be a specific subject;
d) there must be an admissible cause.

6 CONCLUSION

Based on the discussion, it is clear now that the principle of freedom of contract is limitative. Even though the parties have the freedom to express their will and include certain clauses, the statement of will embodied in these clauses must not conflict with the principles of decency, justice, and proportionality. The purpose of limiting the freedom of contract is twofold, namely, first, freedom of contract is a principle that is limited by the values of justice and fairness to the distribution of rights and obligations of the parties in a contract. Second, the limitation on the freedom of the parties in the statement of will is intended as an effort to protect the parties from the arbitrariness of the other party.

Furthermore, the Judge has the authority to correct a clause in a contract if the contract places the parties in an unbalanced or proportional position. The judge's corrective function can be in the form of cancelling a clause or correcting certain clauses in accordance with the aim of realizing the balance and proportionality of the parties in

the contract. The issues described above are undoubtedly a challenge for jurists to provide the optimum answer for the implementation of a mutually advantageous contract for the parties (win-win solution), while also guaranteeing legal clarity and fairness. Even if it is recognized that integrating legal certainty and justice is a challenging task, however, through a contract instrument that is able to accommodate proportional differences in interests, the dilemma of "pseudo" conflict between legal certainty and justice can be eliminated. It will even become a necessity for a mutually beneficial contract to be realized.

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NOTE

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