

## **Legal Concepts the Freedom of Contract in Bank Credit Agreement**

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### **Abstract**

*The understanding of freedom of contract as basic rights in the society, especially bank credit agreement has a fundamental sense, does not mean freedom at large but must adhere to the restrictions in the relationship and the balance of the law. No more detailed explanation regarding the freedom of contract in the credit agreement. In addition to the restrictions contained in the Civil Code, the application of the principle of freedom of contract in relation to bank credit is limited by several principles: trust, confidentiality, and prudence. The principle of freedom of contract should also not ignore the principle of balance in the standard agreement and these partnerships.*

**Keywords:** Freedom, contracting, credit

In every social life has undergone further development level, transactions in bank credit agreement has a requirement set forth in the form of agreements between the parties concerned. The principle that we are bound by the promises and contractual abilities not only to be met morally, but also legally, assuming we are in a society that is civilized and advanced. In such a society there is freedom to participate in traffic juridical-economical. For that a principle, namely the freedom of contract, which is a part of the rights and freedoms of man.<sup>1</sup> Hugo Grotius, assume that a contract is a voluntary act of a person who he promises something to another person with the intent that other people would accept it. The contract is more than just a promise, because a promise does not entitle the other party for the implementation of that promise.<sup>2</sup> Pioneer of the principle of freedom of contract, Thomas Hobbes, said that freedom of contract is a part of human freedom. According to Hobbes freedom is possible only if people can freely act in accordance with the law.<sup>3</sup> This concept is also supported by John Stuart Mill who use the concept of freedom of contract by two principles.<sup>4</sup>

The first general principle that "the law cannot limit the terms that may be agreed by the parties". It means that the law should not limit what has been agreed by the parties who have entered into an agreement. The first general principle was confirmed that the parties are free to decide for they the content of the agreement will be made. The second general principle suggests that "in general, according to the law a person cannot be forced to enter into an agreement". The second general principle affirms that freedom of contract includes the freedom for the parties to determine by whom he is willing or not willing to make an agreement. In contrast to Adam Smith's concept that it is precisely the applicable law in Indonesia limiting the freedom of contract that is freely. Another concept comes from Bentham, who is a Saxon utilitarianism. According to Bentham, the size of which is to be the benchmark in relation to the freedom of contract is that everyone can act freely, without can be prevented simply because they have a bargaining position or a position of bargaining power to be able to obtain money to meet their needs.<sup>5</sup>

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<sup>1</sup> Hartkamp-Asser-Rutten. *Handeling tot de beoefening van het Nederlans burgerlijk recht, verbintenissenrecht, Deel II, Algemene leer der overeenkomsten*, tiende druk, bewerk door Hartkamp. (Deventer: Tjeen Willink, 1977), hal. 5.

<sup>2</sup> Peter Aronstam. *Consumer Protection, Freedom of Contract and The Law*. (Cape Town: Juta and Company Limited, 1979), hlm.1.

<sup>3</sup> *Ibid.*, hlm.3.

<sup>4</sup> *Ibid.*, hlm.3-4.

<sup>5</sup> Sutan Remy Sjahdeini. *Kebebasan Berkontrak dan Perlindungan Yang Seimbang Bagi Para Pihak Dalam perjanjian Kredit Bank di Indonesia*. (Jakarta: Institut Bankir Indonesia, 1993), hlm.44.

Also none as a party to a treaty can be prevented to be able to act freely to achieve that, so long as the other party may agree to the terms of the agreement as a well-deserved. So happens that the bank credit agreement in Indonesia, the relationship bank and depositors are borrowing money relations between debtors (banks) and creditors (depositors). He said also that in general no one can know what is good for the sake of himself, except himself. Restrictions on freedom of contract are thus a restriction on freedom itself. The government should not intervene in things that are not understood. Similarly Subekti, argued that the principle of freedom of contract means that the parties may make any agreement, as long as not contrary to law, public order and decency.<sup>6</sup> Freedom of contract is reviewed from two angles, namely in terms of material and formal.<sup>7</sup> First of all, freedom of contract in a material sense is that we give to an agreement any desired content or substance, and that we are not tied to certain types of agreements. Restrictions on approval only in the form of general provisions, which requires that the contents should be something that is lawful and implement other forms of special rules, in the form of legal force for the types of specific agreements. Freedom of contract in the sense of material known as open systems-consent agreement. Second, freedom of contract in a formal sense, namely an agreement may be held in a desired manner. In principle here is no requirement whatsoever on the form. Conformity will or agreement between the parties is enough. Freedom of contract in the formal sense is often also called the principle of consensus "Open system" and "consensus" will receive the full meaning when we relate it to the legal consequences of an agreement, namely the power tie. The principle that people are bound to the spoken word itself comes from ethics. The principle of "open systems" and the principle of "binding force" received support in the provisions of Article 1338 paragraph (1) of the Civil Code (hereinafter the Civil Code), which reads: "All the agreements are made legally valid as a law for those who make it."

### ***The Principle of Freedom of Contract and Restrictions of Government and Regulations in Indonesia***

The existence and the enactment of the principle of freedom of contract in Indonesia listed in the Civil Code. The Book of the Law of Civil Law has a similar sequence to the Constitution in the hierarchy of law<sup>8</sup> in Indonesia. To impose restrictions on the principle of freedom of contract through government interference cannot be done by some form of legislation that has a lower degree of the Act. Therefore, only the Act or the Government Regulation in Lieu of Act or legislation that have higher levels who have the legal power to restrict the operation of the principle of freedom of contract, while the legislation in the lower level of the Act, such as government regulation, Decree of the Minister, and regulations that other lower can only regulate the implementation of the restrictions that have been predetermined by an Act or the Government Regulation in Lieu of Act and instead set restrictions on itself.

### ***Restriction of Decency and Public Order***

Restriction of decency and public order can be seen from;  
Article 1335 of the Civil Code reads:

"An agreement without cause, or that have been made due to any reason that counterfeit or illicit, does not have the strength."

Article 1331 of the Civil Code reads:

"One reason is prohibited, if it is prohibited by law, or if contrary to good morals or public order."

Restrictions on the principle of freedom of contract in two clauses concerning that decency and public order.

<sup>6</sup> Subekti, Hukum Perjanjian. (Jakarta: Intermedia, 1984), hlm.15.

<sup>7</sup> Feenstra dan Margreet Ahsmann. Contract, Aspecten van de Begrippen Contract en Contractsvrijheid in Historisch Perspectief. (Deventer: Kluwer, 1988), hlm.5

<sup>8</sup> The hierarchy of legislation in Indonesia for the first time in the set in the Decision of MPRS No. XX / MPRS / 1966, then in 2000 the Assembly to revise through MPR Decree No. III / MPR / 2000 on Law Resources and order legislation. With the release of Act No. 10 of 2004, legislation in Indonesia, is a hierarchical manner as follows:

1. The Constitution of the Republic of Indonesia Year 1945;
2. Act / regulation
3. Government Regulation
4. Presidential Regulation
5. Regional Regulation

Decency (goede zeden) is an abstract term, the contents of which can vary in the region compared with other regions, and in addition, the assessment about morals change according to the times.<sup>9</sup> There is inequality between the causes that should not be contrary to the general or specific. Van Brekel more specifically agrees with the opinion, on the grounds that it is difficult for us according to the judge that he is applying the moral norm, that he was not sure, because he not come from among the moral force and are therefore not in accordance with his moral consciousness.<sup>10</sup> To determine an agreement contrary to morality or not, Wirjono Prodjodikoro gives the example of "sales practices" a doctor or lawyer to the counterpart. Told him that all of them depend on public acceptance.<sup>11</sup> Causes of public order related to the cause of morality, because what is contrary to common decency is concerned also with public order. Only public order here has a broader meaning, covering security of the state. Thus in discussing the causes that are contrary to law and morality is concerned with the causes that are contrary to public order.<sup>12</sup> In general, said "public order" is matters relating to the issue of public interest, such as the security of the country, anxiety in the community, and others, and hence is said about the constitutional issue.<sup>13</sup> The judge must assess the validity of the agreement through both pieces of personal interests and the interests that the public interest in accordance with the circumstances.

### ***Restriction of Disability Will***

The will of the parties intended for the creation of consent must be freely given. The deal is happening due to the lack of freedom for the parties to provide a statement that would also affect the freedom of contract, namely dwelling or oversight, dwang or coercion, bedrog or deception and misbrui van omstandigheden or misuse of circumstances. Civil Code does not explain what is meant by an oversight but limiting the damaging mistake was an oversight agreement about the nature of the goods the subject of the agreement and oversight of the person. According Subekti oversight occurs when one party err on the basic things of what is agreed upon or about the essential qualities of the goods which is the object of the agreement, or the person with whom the agreement was held.<sup>14</sup> Physical coercion does not lead to an agreement on those who are forced; therefore the agreement is void and not be requested cancellation.<sup>15</sup> Article 1324 of the Civil Code formulate that "occurs when there is a force that acts in such a way as to be intimidating a sound mind and if that action could cause fear in that person that he or wealth is threatened by a loss of the bright and real". According Subekti, is a force of spiritual duress or coercion is the soul (psyche), so it was not coercion body (physical).<sup>16</sup> Coercion can be a reason to request cancellation of a treaty, when coercion was carried out on:

1. The person or party who made the agreement (Article 1323 of the Civil Code); 2. Husband or wife of the parties agreement or relatives in the family lineage upwards or downwards (Article 1325KUHPerdata).

Coercion to cancel an agreement not only coercion exercised by the counterparty but also includes coercion exercised a third party (Article 1323 Civil Code). What is meant by the third party is a party outside the agreement. Fraud is one of the reasons that undermine the deal. Fraud can be used as an excuse cancellation of the agreement is the ruse of one of the parties is such that the bright and real that the other party will not make an engagement that if there is a ruse (Article 1328 Civil Code). According Subekti, fraud occurs when one the parties intentionally giving false particulars or not properly accompanied by a ruse to persuade the other party shall give its agreement.<sup>17</sup>

Black's Law Dictionary states that misrepresentation is:

"Any manifestation by words or other conduct by one person to another that under the circumstances amounts to on assertion not in accordance with the facts"<sup>18</sup>

<sup>9</sup> J.Satrio. Hukum Perikatan, Perikatan Yang lahir dari Perjanjian dan buku II. (Bandung: Citra Aditya Bakti, 1995), hlm. 109

<sup>10</sup> Brakel. Leerboek Van Het Nederlandsche Verbintenissenrecht. (Zwolle: Tjeenk, 1945), hlm. 433-434

<sup>11</sup> Wirjono Prodjodikoro. Asas-asas Hukum Perjanjian. (Bandung: 1993), hlm. 37

<sup>12</sup> Satrio., Op.Cit., hlm. 127

<sup>13</sup> Wirjono Prodjodikoro., Op.Cit., hlm. 37

<sup>14</sup> Subekti, Op.Cit., hlm.23

<sup>15</sup> Subekti, Op.Cit., hlm.23

<sup>16</sup> Hardijan Rusli. Hukum Perjanjian Indonesia dan Common Law. (Jakarta: Pustaka Sinar Harapan, 1993), hlm. 71

<sup>17</sup> Subekti. Hukum Perjanjian, Op. Cit. hal. 24

<sup>18</sup> Black's, Black's Law Dictionary, Sixth Edition, St. Paul Minn: West Publishing Co 1990, hlm. 1001

Misrepresentation or fraud can be divided into two kinds, namely scams and material fraud fraudulent fraud. Material fraud occurs when an untrue statement that causes people to think sane (reasonable person) or specific people (the particular person) gives its agreement to a transaction, while a fraudulent fraud occurs when untrue statement accompanied with the intent or desire from the maker of the statement to influence the other party to believe. Fraud must be an untrue statement of a fact that existed at the time the statement was made. In civil law there are new developments that need to be assessed in relation to the application of the principle of freedom of contract, which is emerging doctrine of abuse circumstances (misbruik van omstandigheden; Undue Influence). Abuse categorized as defective will (wilsgebrek), because it is more appropriate to the content and nature of the abuse of circumstances itself. He is not related to the objective conditions of the agreement,<sup>19</sup> but affecting the terms of their subjective. Classify abuse will be one form of disability will, more in line with the needs of legal construction in terms of someone who harmed demanding the cancellation of the agreement. The lawsuit on the basis of abuse of circumstances occurs with a specific purpose. Plaintiffs should have control of that agreement was actually not wished, or the agreement is not in shape so wished.<sup>20</sup> As well as the principle of freedom of contract, misappropriation of circumstances will be very helpful in resolving the cases relating to the issue of the agreement. A doctrine abuse circumstance is basically a manifestation of the principle of freedom of contract. Therefore, regarding the abuse that interferes with the freedom of the will which is free to hold approval so that misuse is one of the reasons for canceling the agreement.<sup>21</sup> According Hartkamp, in the case of abuse of circumstances, approvals, loss of balance and consideration among the achievements, and is directed at both the restriction of freedom of contract and issue binding force approval. In the case of the parties which later suffered substantial losses, he is no longer obliged to fulfill the agreement has been made.<sup>22</sup> Therefore it is categorized as an abuse of circumstances the will is flawed because it does not relate to the objective conditions of the agreement, but the terms of his subjective influence.

Abuse of circumstances that occurred in Nieuw Burgerlijke Wetboek (NBW) determined four (4) terms the abuse of circumstances, namely:

1. Special Circumstances (bijzondere omstandigheden), such as emergencies, dependence, sloppy, less sane soul, and inexperienced; 2. A real thing (kenbaarheid), required that one party knows or should know that the other party because of special circumstances moved to seal an agreement; 3. Abuse (seconds Report abuse), one of the parties has executed the agreement even though he knows or ought to know that he should not do it. 4. The causal relationship (causaal verband), it is important that no misuse of the agreement state that it will not be closed<sup>23</sup>

Doctrine abuse of circumstances contains two (2) elements, namely: 1. The losses of the parties; 2. The abuse of the opportunity by the parties at the time of the agreement.<sup>24</sup>

### ***The Principle of Freedom of Contract and the Relationship with the Credit Bank***

Applicability of the principle of freedom of contract in contract law Indonesia, among others, can be summed up in the formulations of Articles 1329, 1332 and 1338 paragraph (1) of the Civil Code which states that:

Article 1329:

"Every person is competent to make the engagements if he is by law not declared incompetent".

Article 1332:

"Only goods that can be traded just may be the subject of an agreement".

<sup>19</sup> Setiawan. Asas Kebebasan Berkontrak dan Kedudukan Yang Seimbang daro Para Pihak dalam Perjanjian. Media Notariat No. 28-29, tahun VIII, Juli-Oktober 1993, 12

<sup>20</sup> Ibid., hlm. 12-13

<sup>21</sup> Herlien Budiono (2). Kebebasan Berkontrak dan kedudukan yang Seimbang dalam Suatu Perjanjian. Media Notariat No. 28-29, tahun VIII, Juli-Oktober 1993, hlm. 31

<sup>22</sup> Hartkamp., Op.Cit, hlm. 32

<sup>23</sup> Henry Panggabean. Penyalahgunaan Keadaan (Misbruik van Omstandigheden) Sebagai Alasan (Baru) Untuk Pembatalan Perjanjian (Berbagai Perkembangan Hukum di Belanda). (Yogyakarta: Liberty, 1992), hlm. 40

<sup>24</sup> Ibid., hlm. 64

Article 1338 paragraph (1):

"All the agreements are made legally valid as a law for those who made it".

Article 1329 of the Civil Code specifies that everyone is capable to make an appointment, unless it is determined incompetent by law. Article 1332 can only be concluded that the origin of goods concerned economic value, and then everyone is free to betoken it. From the provisions of Article 1320 (4) in conjunction with Article 1337 of the Civil Code can be concluded if only not about the cause of which is prohibited by law or contrary to good morals or public order, then everyone has the freedom to betoken it.. In the Civil Code, in addition to the foregoing, there is no provision requiring or prohibiting a person to be bound or not entered into an agreement. This is consistent with the scope of the principle of freedom of contract. Applicability of the principle of contract law consensus in Indonesia has established the existence of freedom of contract. Without the agreement of one of the parties to make an agreement, then the agreement made invalid. In 1934, Benedity saw that there are phenomena of an evolution of a contract "autonomy" in the direction of a more or less "heteronomous"; of determination "own" a leading contract "fixing" it by the authorities.<sup>25</sup> In the process intervene in private legal authorities to increase in number, it is increasingly many elements of public law found in private law.<sup>26</sup> Restrictions on freedom of contract to make the parties are not free to regulate the rights and obligations on a reciprocal basis in accordance with the will of its own. It seems almost no longer exist approval, where both this achievement is truly fulfilled by the results of the negotiations the two sides. So with such requirements freely expressed by the the parties the less, and more imposed by official regulations or as otherwise disclosed by Pitlo "freedom of contract is a fiction"<sup>27</sup>

In doctrine, tendency towards restriction of freedom of contract can be seen, although the scale is not too visible. Encouragement was particularly to the fore by giving wide scope to the notions of justice and propriety, decency and public order, and in the making of contracts. Evaluated formally freedom of contract is maintained, but the content of the contractual relationship is essentially determined by a set of predetermined rules. Law experiences the process of socialization through the shifting pressures from private interests toward common interests. So, here encountered backward displacement action elements of private law and the withdrawal of forward elements of public law. An obvious result of this action is the erosion of personal freedom.<sup>28</sup> In the development, freedom of contract can only achieve its objectives if the parties have equal bargaining power. If one party is weak, then the party which has a stronger bargaining position can impose his will to suppress the other party for its own benefit. Therefore, the terms or provisions of the treaty as it would violate the sense of justice. In fact it is not always the parties have equal bargaining power, so that the state can intervene to protect the weaker party.<sup>29</sup> Such circumstances may apply in the relationship between banks as creditor and loan clients as debtor. Due to the bank's position as creditor who incarnated in the form of a large company and owner of the funds, it can be assumed to have a strong bargaining position against the debtor. In the course of the contract principle, the enactment of this principle is not absolute. Civil Code provides restrictions on entry into force of the principle of freedom of contract.

Restrictions contained in the Civil Code, can be seen in the following provisions:

Article 1320 paragraph (1) of the Civil Code specifies that the agreement is not valid if made in the absence of the party making it. This provision gives the instructions that contract law dominated by the "principle of consensus". The provisions of Article 1320 paragraph (1) of the Civil Code implies that the freedom of one party to determine the content of the agreement is limited by the other parties agree or it can be said that the principle of freedom of contract is restricted by the principle of consensus. Article 1320 (2) of the Civil Code can be concluded that the freedom to make an agreement limited by skill. Someone who according to the provisions of the law is not competent to make an appointment did not have the freedom to make arrangements. Article 1320 (4) and Article 1337 of the Civil Code specifies that the parties are not free to make arrangements concerning the cause of which is prohibited by law or contrary to morality or contrary to public order. Article 1332 of the Civil Code provides direction regarding the freedom of the parties to make an agreement as far as the object of the agreement.

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<sup>25</sup> Herlien Budiono (1)., Herlien Budiono. *Het Evenwichtbeginsel voor het Indonesisch Vor Contractenrecht*. Dissertatie. (Leiden: 2001), hlm.72

<sup>26</sup> Herlien Budiono (1)., *Ibid*, hlm. 73

<sup>27</sup> Pitlo. *Evolutie in Het Privaatsrecht*. (Haarleem: 1969), hlm. 173

<sup>28</sup> Herlien Budiono (1)., *Op.Cit.*, hlm. 73

<sup>29</sup> *Ibid.*, hlm. 38-39

According to this provision is not free to pledge any goods whatsoever, only goods that have economic value that can be made the object of the agreement.

### ***The Principle of Freedom of Contract and the Principle Underlying the Credit Banking***

In addition to various restrictions in the Civil Code, the application of the principle of freedom of contract in connection with credit banking is limited by several principles, namely trust (fiduciary relation), confidential relations, and prudential relations. The principle trust is a principle which states that the bank's business is based on the relationship trust between the bank and its customers.<sup>30</sup> Bank sought from public funds saved by trust, so that every bank needs to maintain the health of the banks and maintaining public confidence. Symons, Jr., said that the relationship between banks and customers is not just a mere debtor-creditor relationship but more than that. Judging from loan transactions to deposit is a debtor-creditor relationship. However, given the bank's status as a special place of safety and probity, then the relationship is fiduciary.<sup>31</sup> Provisions concerning the relationship trust (fiduciary relation) gets the attention of Ogilvie who argued as follows: "The Banker and customer relationship is no longer simply one of debtor and creditor. In the past three decades the courts, slowly but steadily have found that in special circumstances banks are subject to additional higher duties in tort or as fiduciary over and above their contractual duties, whether derived from an express contract or the common law",<sup>32</sup> The relationship between banks and debtors also be a relationship of trust which imposes a duty trust (fiduciary obligation) by a bank to its customers. Banks are only willing to extend credit to the debtor on the basis of trust that the debtor is able and willing to pay back the loan.<sup>33</sup> The principle of trust listed in Article 29 paragraph (4) of Act No. 10 of 1998 on the Amendment of Act No. 7 of 1998, reads:

"For the benefit of customers, banks are required to provide information on the likelihood of the risk of losses related to customer transactions carried out through the bank." Provision of information about the possibility of a risk of loss of customers meant that access to information regarding the business activities and conditions that banks are becoming more open as well as ensuring transparency in the banking world. The principle of confidentiality is a principle that requires or require banks keep everything connected with the financial world in the ordinary course of banking shall be kept confidential. This secrecy for its own sake because the bank requires public confidence that save their money in banks. Society will only entrust their money or use the services of a bank if the bank guarantee that there will be no abuse of savings. The principle of confidentiality regulated in Act No. 10 of 1998 on the Amendment of Law Number 7 of 1992 concerning

Banking, in the articles:

Article 40 paragraph (1):

"Banks are required to keep information about customers and savings deposit, except in the case as meant in article 41, article 41 A, article 42, article 44, and article 44 A".

Article 40 paragraph (2):

"The provisions referred to in paragraph (1) shall also apply to affiliated parties"

Explanation of Article 40 paragraph (1):

"If the bank customers are depositors who as well as debtors, banks are obliged to keep secret the information about the customer in his capacity as depositors. Information about the customer than as a depositor, not the bank's confidential information. For banks which conduct activities as capital market supporting institutions, such as banks or custodian and trustee, subject to the provisions of the legislation in the field of capital markets. "

Bank secrecy provisions can be excluded in certain cases, namely for tax purposes (Article 41), settlement of bank accounts (Article 41 A), criminal justice (Article 42 and Article 42 A), a civil case between the bank and its clients (Article 43 ), exchange of information between banks (Pasal44) and upon request, approval or authorization from depositors (Article 44A).

<sup>30</sup> Rachmad Usman. Aspek-aspek Hukum Perbankan di Indonesia. (Jakarta: Gramedia, 2001), hlm.16

<sup>31</sup> Edward L.Symons and James J. White. Bankin Law, Teaching Materials. Second Edition. (St.Paul Minnesota: West Publishing Co, 1984), hlm.285

<sup>32</sup> M.H. Ogilvie. Canadian Banking Law. (Toronto: Creswell, 1991), hlm. 431

<sup>33</sup> Sutan Remy Sjahdeini (1)., Op.Cit., hlm. 167-168

Attachment to the bank secrecy provisions for liabilities client financial circumstances indicate that the relationship between banks and depositors based on the principle of confidentiality. Prudential principle is a principle which states that the bank in carrying out their business functions and activities are required to apply prudential principles in order to protect the public's trust in banks. The prudential principle has been regulated in Act No. 10 of 1998 on the Amendment of Act No. 7 of 1992 concerning Banking, in the articles:

Article 2:

"The Banking of Indonesia in conducting its business based on economic democracy with the use of the prudential principle."

Article 29 paragraph (2):

"Banks are required to maintain the soundness of the bank in accordance with the provisions of the capital adequacy, asset quality, management quality, liquidity, profitability, solvency, and other aspects related to the business of the bank, and shall conduct business activities in accordance with the precautionary principle."

General explanation:

"... The prudential principle must be adhered to while provisions on the bank's business activities need to be improved, especially with regard to the distribution of funds,"

Elucidation of Article 29 paragraph (2):

"... On the other hand, banks are required to have and implement a system of internal control in order to ensure the process of decision-making in the management of the bank in accordance with the prudential principle." The purposes of the implementation of the prudential principle so that banks are always in good health, conduct its business properly and correctly to comply with the provisions and norms prevailing in the banking world.

### ***The Principle of Freedom of Contract and the Principle of Balance in the Standard Agreement***

The formulation contained in article contained in Article 1338 paragraph (1) of the Civil Code states that all agreements made legally valid as the law has for those who make it. The term "all" principle contained therein Partij autonomie; freedom of contract; contracy vrijheid .isi and form of agreement they would make, including her casting in the standard agreements, it is fully recommended to the parties. Of the content of the credit agreement, the principle of freedom of contract is closely related to the freedom of determining "what" and the "who" credit agreement was held. While on the shape, the credit agreement must be put in writing<sup>34</sup>, either by deed under the hand or with a notarized deed.

Pouring a credit agreement in the form of a standard agreement or standard must understand the position of freedom of contract in connection with the integrated principles of contract law more thoroughly these principles are the pillars, poles, foundations of contract law.<sup>35</sup> One of these principles is the principle of balance. The principle of balance according to Mariam Darus Badruzaman is a further development of the principle of equality. Creditors have the power to demand repayment of achievement through the wealth of debtors, but also creditors bear the burden to implement the agreement in good faith. Can be seen here that strong creditor position offset by the obligation to observe good faith, so that the position of the creditor and the debtor balance.<sup>36</sup>

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<sup>34</sup> Based Presidium Instruction No. 15 / EN / 10/66 on Guidelines for Policy in the Field of Rural dated October 3, 1966 in conjunction with the Circular Letter of Bank Negara Indonesia Unit I nomor2 / 539 // UPK / Pemb. October 8, Bank Indonesia Circular Letter No. Unit I 2/649/UPK / Pemb. Dated October 20, 1966 and the Presidium of the Cabinet Instruction No. 10 / EK / 2/1967 dated February 6, 1967 stated that banks are prohibited from lending in various forms in the absence of a clear kresit agreement between the bank and the customer or the Central Bank and other banks. Decree of Directors of Bank Indonesia Number 27/162 / KEP / DIR and Bank Indonesia Circular Letter No. 27/7 / UPPB each dated March 31, 1995 on Liability Policy Formulation and Implementation for Commercial Banks Credit Bank, which states that every credit disetujui and agreed, credit applicant stated in the loan agreement (loan agreement) in writing.

<sup>35</sup> Mariam Darus Badrul Zaman. Kerangka Dasar Hukum Perjanjian (dimuat dalam buku "Hukum Kontrak di Indonesia"). (Jakarta: Elips, 1998), hlm.38

<sup>36</sup> Ibid., hlm.43

Herlien Budiono reviews the principle of equilibrium into two principle forms of balance as ethical principles and the principle of balance as a juridical principle.<sup>37</sup>

1. The principle of balance as an ethical principle implies "the cases of weight or weights on both sides are balanced". In the context of this balance is "a state of balance due to some force not to exceed one another, or in the absence of the element that caused it". "Balance" in the psyche and character contains an understanding that there is a situation where an action is not needed anymore because the match between the desire of the will or the instinct or impulse lust and whim. In a state of mental balance, the tendency of people is consciously towards or directed to an action that brings results or circumstances and a better life according to his ability. With the state of "balance" is, one can restrict a desire (which is generated from the assessment) on the one hand and the confidence to be able to implement and achieve the desires; thus "balanced" contains a positive charge; 2. Balance as a juridical principle implies that this principle must have certain traits consistent also drawn to the truth logical and quite concrete. Due to these reasons, we come to the idea that the principle of balance is a principle that can be considered fair and is the foundation that can be accepted as legally binding force to the Indonesian contract law.

For until the discovery of the principle of balance, a balance with regard to the interests of individuals and society as individuals and society together to form the normative provisions in an agreement. In the form of a treaty should be the interests of the individual and public interests so that both these interests are in balance so the will of the parties generated by the forces that led to the motivation to submit ourselves to the intention of the other party with the same objective, namely the achievement balance.

Thus it can be said that the relevant elements of the principle of balance is clear; private interests and public interests should be in balance and applied as the basis for contractually binding force. Standard agreement does not rule out the possibility that the agreement can be contractually binding. Although formulated in the standard agreement and duplicated, agreement has been universally accepted standards and explicitly stated in the Principles of international Commercial Contract (Rome, 1994) or abbreviated Unidroit Principles in Article 2. 19 to 2. 22. Things contractually binds contained in the words "... unless the parties have expressly accepted it". Likewise, the format used, if approved would be binding on the parties unless certain requirements were not agreed and stated explicitly.

### ***The Principle of Freedom of Contract and Partnership Relations***

In the formulation of the credit agreement in the form of clauses as outlined in the standard agreement there is a tendency for the security measures taken unilaterally by the creditor or bank. Clauses that limit in order for the debtor to follow the rules that you want the lender to comply with each clause in the credit agreement. Thus, it can be said that from the beginning there were indications of suspicion towards other parties and put the other parties in a balanced position which should be a treaty partner. Thought patterns treaty partners is an overhaul of the concept of treaty opponents. In the partner agreement of the parties is placed in a balanced position so that the efforts made by the parties to secure agreement and mutual benefit. Talk about the principle of freedom of contract in shades of win-win solution means also talking about the balance of the parties that will touch on a fundamental study of the meaning of justice in the contract. Justice is not merely in the sense of it in the context of "equally, the same sense of" (a commutative justice - *ius komutativa*).<sup>38</sup>

The meaning of justice must be placed within the framework and context of a systematic and comprehensive. The patterns of relationships that exist should be adjusted under the conditions prevailing in the business world, thus there will be a proportionate justice agreed by the parties and reflects the freedom of contract are fair (proportional - *ius distributiva*).<sup>39</sup> In the understanding of the whole round, the application of Article 1338 paragraph (1) of the Civil Code should also be associated with a framework for understanding relevant clauses, namely: Article 1337 states that a cause prohibited where prohibited the law, or if contrary to good morals or public order; Article 1338 paragraph (3) stipulates that the agreement should be implemented in good faith.

<sup>37</sup> Herlien Budiono (2). Asas Keseimbangan bagi Hukum Kontrak Indonesia. Makalah Temu Ilmiah Seminar Nasional I PPAAT di Surabaya, tanggal 8-10 Maret 2002, Hotel Grand Place, hlm. 15-16

<sup>38</sup> Budiono Kusumo Hamidjojo. *Ketertiban yang Adil Problematik Filsafat Hukum*. (Jakarta: Grasindo, 1999), hlm. 38-140

<sup>39</sup> *Ibid.*, Ideas of Aristotle on commutative and distributive justice is also followed by Hobbes and Leviathan.



That is the agreement should be implemented according to decency and fairness. Article 1339 refers to an agreement dependent on the nature of customs, and the law. Habits are referred to in Article 1339 is not the local custom, but provisions in certain circles always be considered. Articles 1347 arrange things according to the habit forever agreed to secretly put performance agreement (*bestanding gebruikelijk beding*).

Thus, it is clear that the understanding of Article 1338 paragraph (1) of the Civil Code to be interpreted within a framework that puts the position of the parties in a balanced condition.

From the foregoing, it can be concluded that the scope of the principle of freedom of contract, according to the law of treaties Indonesia as follows:

1. The freedom to make or not make an agreement; 2. The freedom to choose a party with whom he wants to make a deal; 3. Freedom to selecting causes of the agreement that will be made; 4. Freedom to determine the object of the agreement; 5. Freedom to determine much of an agreement; 6. The freedom to accept or deviate the statutory provision which is optional (*aandvullend, optional*).

Freedom of contract is restricted by morals and public order to observe and adhere to the principles underlying the credit, the balance in the standard agreements and partnerships between the actors bank credit agreement. In this case the required oversight by the government of the standard agreement.

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