

FORMULATION OF THE PRINCIPLE OF BALANCE IN A FAIR CONSTRUCTION CONTRACT

Isnafiah Astari¹
Universitas Mahendratta

Ni Ketut Wiratny²
Universitas Mahendratta

Erikson Sitohang³
Universitas Mahendratta

Correspondence : Isnafiah Astari (astariisnafila@gmail.com)

Abstract

The principle of balance is one of the fundamental principles in contract law that requires proportionality of rights and obligations between the parties, especially in construction work contracts. This principle is crucial considering that there are still many contract drafting practices that place one of the parties, generally the service provider, in a dominant position without rights that are balanced with his obligations, as seen in the case of villa purchase which limits the buyer's right to use the object he has purchased. The problems studied include how to regulate the principle of balance in the Indonesian contract legal system and how to describe it in construction contracts. This study uses a normative juridical method with a legislative, conceptual, and comparative legal approach, through a literature study of primary, secondary, and tertiary legal materials that are analyzed qualitatively. The results of the study show that the principle of balance comes from the principles of freedom of contract, consensualism, good faith, and *pacta sunt servanda* as stipulated in Article 1320 and Article 1338 of the Civil Code, and is further described in the Construction Services Law which requires equality of rights and obligations between users and service providers in every stage of the contract starting from negotiation, implementation, to dispute resolution. This study also identifies various unbalanced contract models and their causative factors, including lack of understanding of business processes and lack of legal protection, while offering an ideal construction contract norm model based on the proportionality of the exchange of rights and obligations of the parties as a basis for the creation of contractual justice in the construction sector.

Keywords: principle of balance; construction contracts; proportionality; law of contracts

INTRODUCTION

Contracts as a legal institution that are deliberately made by the business actors, become a guideline for themselves in establishing business relationships which are an inseparable part of every community transaction, business actors in all parts of the world cannot be separated from Indonesia. In response to this, lawmakers have prepared a set of legal rules as a benchmark for the parties to test the standard of validity of the contracts they make. The set of legal rules is regulated in the systematics of Book III of the Civil Code, namely regarding the conditions for the validity of the agreement stipulated in Article 1320 of the Civil Code (Civil Code). An agreement that does not meet the legal requirements as stipulated in Article 1320 of the Civil Code, both subjective terms and objective conditions, will have consequences, including

agreements or contracts that are considered non-existent, agreements or contracts can be canceled, and agreements or contracts are null and void.

In relation to an agreement, Article 1313 of the Civil Code defines that an agreement is an act by which one or more persons bind themselves to one or more other people (Civil Code). In treaty law, the principle of freedom of contract is known, which means that everyone is free to enter into an agreement in any form, both its form, content, and to whom the agreement is addressed. This principle can be deduced from Article 1338 paragraph (1) of the Civil Code which states that all consents made legally are valid as laws for those who make them (Civil Code). The purpose of the above article is that in general an agreement can be made freely to make or not to make an agreement, free to enter into an agreement with anyone, free to determine its form and its terms, and free to determine its form, namely written and unwritten.

Usually in an alliance or agreement, the party with a stronger economic position will determine the content of the alliance or agreement. The legal relationship occurs because of the engagement of business actors whose capital is larger and will determine proportionality. As stated by Subekti, an agreement is a legal relationship between two people or parties based on which one party has the right to demand something from the other party, and the other party is obliged to fulfill the demand (Subekti, 2005).

The agreement between the parties is the basis for the agreement. Article 1320 paragraph (1) of the Civil Code determines that an agreement or contract is invalid if it is made without the consensus or agreement of the parties who made it (Civil Code). This provision provides an indication that the law of the treaty is governed by the principle of consensualism. The provisions of Article 1320 paragraph (1) contain the understanding that the freedom of one party to determine the content of the agreement is limited by the agreement of the other party.

The agreement as one of the conditions for the validity of the contract to be reached must not be influenced by coercion, fraud, error, or abuse of circumstances, which may result in the agreement being defective. Therefore, by realizing proportionality and balance in the relationship of the parties, it will make the contract valuable so that one does not feel the same loss to each other. Even if there is, then the party who feels aggrieved should have the right to claim compensation for the losses that have been caused by the other party.

According to Niewenhuis, legal principles function as system builders, and furthermore, these principles also form a *system of checks and balances* (Niewenhuis, 1985). Basically, in accordance with the function of *check and balance*, the principles of contract law such as the principle of freedom of contract, the principle of consensualism, the principle of contractual binding power, the principle of *pacta sunt servanda*, good faith, and the principle of

proportionality/balance have a working force that reaches the contract concerned. As a system, in principle, the parties are free to make contracts, determine their content and form, and carry out the process of exchanging rights and obligations according to their respective agreements proportionately, and of course based on the spirit of good faith in all processes and stages.

One of the important principles in contracts in the field of construction is the principle of balance. Sinamora in his dissertation revealed that the main concern in the principle of proportionality is the balance in the division of obligations (Sinamora, 2011). This principle basically focuses on the balance between the division of rights and obligations of the parties, not the equality of results obtained from investment in the construction sector.

The principle of balance is often understood as similarity, even though the main goal in investing is business continuity. In this regard, Hernoko argues that the debate on whether or not there is a balance of positions between the parties is basically irrelevant to be associated with commercial contracts. The dimension of commercial contracts that emphasizes more on the aspect of appreciation for partnership and business continuity (*efficiency and profit oriented*) no longer dwells on mathematical balance, but rather emphasizes on the proportionality of the exchange of rights and obligations among the actors (Hernoko, 2010).

An imbalance in a contract is shown in the dominance of the obligations of one of the parties without rights that are balanced with his obligations. In the agreement, the buyer, even though he has bought a villa, cannot freely use it (especially if he wants to rent it out). This is also experienced by several other investors, so this problem is ultimately processed through legal channels.

METHODS

This research uses a normative juridical law research method that examines law as a norm or rule in laws and regulations (law in books) through a statutory approach, a conceptual approach, and a comparative legal approach. The legal materials used include primary legal materials in the form of relevant laws and regulations and court decisions, secondary legal materials in the form of books, journals, research results, and expert opinions, and tertiary legal materials in the form of legal dictionaries and encyclopedias. The collection of legal materials is carried out through library research, then legal materials are analyzed qualitatively by inventorying, classifying, interpreting, and connecting all legal materials obtained to produce systematic legal arguments in answering research problems.

RESULTS AND DISCUSSION

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The implementation of business in the construction sector requires a guarantee of legal protection for consumers as service recipients. The legal system that applies in Indonesia can be classified as modern law, with a number of the following characteristics. First, there is a demand for written formalities, as reflected in the Preamble to the 1945 Constitution which mandates that the independence of the Indonesian nation must be outlined in the form of a constitution. Second, the enactment of the law in all areas of the country, as implied in the constitutional declaration regarding the protection of the entire nation and territory of Indonesia. This is in line with one of the characteristics of modern law according to Galanter (1966), who stated that modern law is characterized by uniformity of rules without exception, territorial rather than personal, meaning that it applies equally to all citizens regardless of religious background, ethnicity, social class, region, or gender. Differences in treatment, if any, are not caused by a person's innate attributes, but by their roles, situations, and achievements in social life. Third, the law functions as an instrument that is deliberately used to realize the political agenda of a society, as seen in the formulation of the Five-Year Development Plan (Repelita) in the past.

The parties to an agreement are obliged to respect and treat the agreement as per the provisions of the law, this principle is one of the main pillars in contract law. The value of *good faith* must be inherent throughout the process, starting from the negotiation stage, implementation, to dispute resolution. In addition, the principle of reciprocity requires that the parties carry out their rights and obligations in a balanced and mutually beneficial manner (Hernoko, 2010).

These values are normatively contained in Article 1338 of the Civil Code, which essentially regulates three things: first, the agreement is binding like a law for the parties who make it;

second, the expiration of an agreement is only possible through mutual agreement or due to the provisions of the law that terminate it; and third, the application of the principle of *pacta sunt servanda*, which is the obligation for the parties to obey what has been agreed (Civil Code, Ps. 1338).

The performance of each contract must be based on good faith, which can be distinguished into subjective and objective good faith. Good faith acts as a complementary element when conditions arise that are different from the parties' initial estimates, and on the contrary function as an element that deviates from the content of the contract if the judge decides to set aside or change certain provisions in the contract (Hernoko, 2010).

The principle of consensuality emphasizes that the birth of a contract occurs immediately when an understanding of the will is reached between the parties, without the need to wait for the actual implementation of the contract. In other words, once an agreement is reached, a contract has been born and at the same time gives rise to rights and obligations for the parties—this condition is known as the obligatory nature of a contract, which is the emergence of obligations for the parties to fulfill the content of the agreement (Badrulzaman, 2001). The provisions of Article 1338 of the Civil Code are in line with the provisions in the 1969 Vienna Convention Part III related to the implementation of agreements, which also adheres to the principle of *pacta sunt servanda*. This principle emphasizes that treaties must be complied with because of their binding nature for their makers as well as being an imperative norm in the practice of international treaty law (*Vienna Convention on the Law of Treaties*, 1969).

Syahrani (2006) is of the view that a person cannot be burdened with legal responsibility if the person concerned has made all possible efforts to implement the contract and avoid the risk of loss, but the expected result is still not achieved, even though the contract has been legally made and binding. Referring to Article 1338 paragraphs (1) and (2) of the Civil Code, every contract that has been agreed upon is in principle binding as a law for the parties and cannot be changed unilaterally, except by mutual agreement. The binding power of the contract is valid from the fulfillment of the legal conditions of the agreement, which means that from then on, the obligations of the parties to carry out the contents of the contract come into effect. Consequently, violations of contract provisions have legal consequences equivalent to violations of the law (Badrulzaman, 2001).

Form of Elaboration of the Principle of Balance in Construction Contracts

The application of the principle of balance in construction agreements should reflect the proportionality of rights and obligations between service users and service providers, so that justice is created and no party suffers significant losses. This is also a manifestation of the principles of freedom of contract and good faith, which should ideally be applied consistently starting from the stage of contract design, implementation, to dispute resolution, based on the Civil Code and the Construction Services Law. Ideally, a contract is designed to put the parties on an equal footing, this is the essence of the principle of balance that is the main foundation of good contract drafting. However, practice in the field still often shows deviations from this principle, characterized by the dominance of one party over the other in the contract structure.

The provisions of Article 1 number 8 of Law Number 2 of 2017 concerning Construction Services, as amended through Law Number 6 of 2023 concerning the Stipulation of Government Regulations in Lieu of Law Number 2 of 2022 concerning Job Creation into Law, interpret the Construction Employment Contract as a whole document that regulates the legal relationship between service users and service providers in the implementation of construction services (Law No. 2 of 2017, Ps. 1 number 8). Furthermore, Article 46 emphasizes that the employment relationship must be stated in the form of a Construction Work Contract, the format of which can be adjusted to needs as long as it is subject to the provisions of the applicable laws and regulations.

Article 47 stipulates that the Construction Work Contract contains at least the following elements: clear identity of the parties; the construction of the work which includes the scope of work, the value of the contract, the unit price or lumpsum, and the period of implementation; the coverage period which includes the period of implementation and maintenance; balanced rights and obligations between the user and the service provider; the provisions for the use of certified labor; the payment mechanism and its guarantee; the consequences of default; dispute resolution procedures; terms of termination of contract; force *majeure* circumstances; liability for building failure; protection of workers from the aspects of safety and social security; third-party protection; environmental aspects; legal risk and liability guarantees; and construction dispute resolution options (Law No. 6 of 2023, Ps. 47).

In addition, the contract can also contain provisions regarding incentives for the parties. Article 48 adds that for planning services, contracts are obliged to regulate the protection of intellectual property rights; For the implementation stage, the contract may contain provisions regarding sub-service providers and suppliers that must meet technical standards; Meanwhile, contracts involving foreign parties are required to include technology transfer obligations.

Article 49 confirms the applicability of the same provisions to the contractual relationship between the main service provider and the sub-service provider. Meanwhile, Article 50 requires the use of Indonesian language in the drafting of contracts; if it involves a foreign party, the contract must be drafted in bilingual (Indonesian and English), with the Indonesian version being the main reference in case of disputes (Law No. 6 of 2023, Ps. 48–50).

Some Unbalanced Contract Models

A contract that has been legally made by the parties has binding consequences, which only applies to the parties themselves and their heirs (on the basis of public rights) and third parties who obtain benefits on the basis of special rights (Civil Code, Ps. 1338, 1340). Based on Article 1338 paragraphs (2) and (3), the agreement cannot be withdrawn unilaterally except by mutual agreement or for reasons regulated by law, and its implementation must be based on good faith. The judge has the authority to deviate from the content of the agreement if it is contrary to the sense of justice, so the performance of the contract must be subject to the principles of good faith, propriety, and custom (Civil Code, Ps. 1338).

The legal relationship of wealth between the parties gives rise to the right to achievement for one party and the obligation to fulfill achievements for the other. Harahap (in this context) defines a contract as a legal relationship of wealth that entitles one party to obtain achievements while obliging the other party to fulfill it, with the fulfillment of which is influenced by both autonomous factors (the will of the parties) and heteronomous factors (beyond the will of the parties) (Harahap, 2011). Achievement itself, according to Article 1234 of the Civil Code, consists of three forms: giving something, doing something, and not doing something (Civil Code, Ps. 1234). Non-fulfillment of achievements without force majeure reasons is categorized as default, which theoretically occurs in three forms: not fulfilling achievements at all, being late in fulfilling achievements, or fulfilling achievements poorly (Badrulzaman, 2001). The obligation to recover damages only arises after the debtor is declared negligent through *the institution of ingebrekestelling* (determination of default), as stipulated in Article 1243 of the Civil Code (Civil Code, Ps. 1243). The party accused of default can file a rebuttal in the form of a coercive situation (*overmacht*), a postulate that the other party is in default (*exceptio non adimpleti contractus*), or a postulate of relinquishment by the other party (Subekti, 1987).

Adolf (1997) proposed three techniques to overcome legal uncertainty in international contracts, namely agreements between countries to apply international law, the application of *the principle of choice of law*, and the unification and harmonization of international trade law. In practice, business disputes are generally rooted in business actors' lack of understanding of

business processes, failure to recognize the credibility of business partners, and lack of awareness of the importance of *legal cover* in their business activities (Margono, 2000). Syaukani and Thohari (2004) emphasized that law cannot be understood in a *taken for granted* manner without considering non-legal factors that affect the form and content of a legal product.

Contracts function as legal documents that regulate the rights and obligations of the parties, and become the main reference for dispute resolution if direct negotiations do not yield results, so the settlement depends on the litigation process (Zimmerman, 1999). Indonesia's legal culture tends to prioritize compromise, peace, and a *soft approach* in dispute resolution, in line with the values of community communal solidarity. Pruitt and Rubin (1986) identified five conflict resolution strategies, namely *contending*, *yielding*, *problem solving*, *withdrawing*, and *inaction*. According to Fatahillah (2010), dispute resolution can be pursued through two main routes: adjudication (litigation) and non-adjudication (Alternative Dispute Resolution/APS). Mertokusumo (2006) explained that the civil procedure law regulates the procedures for filing rights claims, examination, and implementation of judgments, which are coercive (*dwingenrecht*).

Dispute resolution through *alternative dispute resolution* (ADR) is now the main choice because it is considered more efficient in terms of cost, confidentiality, and time (Altschul, as quoted in Margono, 2000). Based on Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, the scope of ADR in Indonesia includes arbitration and out-of-court settlement through consultation, negotiation, mediation, conciliation, or expert judgment (Law No. 30 of 1999, Ps. 1 number 10). Article 5 paragraph (1) limits disputes that can be resolved through arbitration only to the field of trade that is fully controlled by the disputing party, while Article 6 paragraph (1) regulates the settlement of civil disputes through APS based on good faith outside litigation (Law No. 30 of 1999, Ps. 5–6).

Forms of out-of-court dispute resolution include conciliation, i.e. the submission of disputes to a neutral commission to formulate a non-binding settlement proposal (Oppenheim, as cited in Margono, 2000); mediation, which is negotiation facilitated by a neutral third party to reach a solution that satisfies both parties (Kovach, as cited in Margono, 2000); negotiation, which is a two-way communication to reach an agreement on common interests as well as different; and arbitration, which is the settlement of civil disputes outside the general court based on a written arbitration agreement (Law No. 30 of 1999, Ps. 1 number 1 and number 3). Arbitration clauses can be in the form of *pactum de compromittendo* (made before the dispute arises) or *acta compromise* (made after the dispute has occurred).

Regarding compensation, Fuady (2002) classifies the form of compensation in the Civil Code including unlawful acts (Ps. 1365), acts of other people who are dependents (Ps. 1367), losses due to animals (Ps. 1368), collapsed buildings (Ps. 1369), death (Ps. 1370), bodily injury (Ps. 1371), and insults (Ps. 1372). Muhammad (2010) differentiates the theory of liability for unlawful acts into liability for *intentional tort liability*, negligence (*negligence tort liability*), and strict *liability*. Kelsen (2007) emphasized that legal responsibility means that a person can be sanctioned for actions that are contrary to the law, where *negligence* is seen as a form of guilt that is lighter than intentionality. The principle of civil liability is generally divided into liability based on fault (Ps. 1365–1366 of the Civil Code), liability based on *presumption of liability* that imposes the burden of proof on the defendant, and strict *liability* without considering the element of fault. In the context of a limited liability company, the doctrine of *piercing the corporate veil* allows the waiver of limited liability of shareholders/managers if it is proven that they act without good faith that is detrimental to the company for personal interests (*Black's Law Dictionary*, as quoted in Muhammad, 2010).

Ideal Construction Contract Norm Model

Residential construction service agreements are binding on contractors and consumers like the law, with legal consequences in the form of reciprocal rights and obligations between parties (Zulham, 2013). The ideal contract must accommodate the exchange of interests proportionately, especially in the negotiation phase as a crucial point in contract formation (Hernoko, 2010). The practice in the Netherlands (*Plas v. Valburg*, Hoge Raad, 1982) divides negotiations into three stages with different compensation consequences, in line with UPICC Article 2.12 which requires good faith in negotiating (UNIDROIT, 2016).

The conditions for the validity of contracts in *the common law* system include *intention, agreement, consideration, capacity, reality of consent*, and *legality of object*, while Indonesian *civil law* refers to Article 1320 of the Civil Code: agreement, skill, certain objects, and halal causes (Civil Code, Ps. 1320). The principle of freedom of contract is derived from Article 1338 paragraph (1) and Article 1320 of the Civil Code (Civil Code, Ps. 1320, 1338).

Article 8 paragraph (1) letter a jo. Article 62 of the Consumer Protection Law prohibits business actors from trading goods/services that do not meet the standards, with a penalty of five years in prison or a fine of Rp2 billion (Law No. 8 of 1999, Ps. 8, 62). Construction service providers are also required to meet safety standards and submit results on time and in accordance with the Construction Services Law and the Building Law (Law No. 2 of 2017, Ps. 52, 54; Law No. 28 of 2002, Ps. 36B).

CONCLUSION

Based on the results of the study that has been described, it can be concluded that the principle of balance in Indonesian contract law originates from a number of interrelated fundamental principles, namely the principles of freedom of contract, consensualism, good faith, and *pacta sunt servanda*, as stipulated in Article 1320 and Article 1338 of the Civil Code, which are then elaborated more concretely in the Construction Services Law through the requirements of equality of rights and obligations between service users and service providers at every stage of the contract, starting from negotiation, implementation, to dispute resolution. However, the application of the principle of balance in practice is still often deviant, as reflected in various contract models that place one party in a dominant position without equal rights to his or her obligations, which is generally triggered by business actors' lack of understanding of business processes, failure to recognize the credibility of partners, and lack of awareness of the importance of legal protection in the contracts they make. Therefore, a construction contract norm model is needed that consistently prioritizes the proportionality of the exchange of rights and obligations of the parties as the main foundation, in order to realize a fair contract, prevent unilateral losses, and provide adequate certainty and legal protection for all parties involved in contractual relationships in the field of construction services. Further research is recommended to examine the effectiveness of the application of the ideal contract norm in the practice of providing construction services in Indonesia, including its supervision and enforcement mechanisms.

REFERENCES

- Adolf, H. (1997). *Hukum perdagangan internasional*. RajaGrafindo Persada.
- Badruzaman, M. D. (2001). *Kompilasi hukum perikatan*. Citra Aditya Bakti.
- Fatahillah, A. (2010). *Penyelesaian sengketa bisnis: Ajudikasi dan non-ajudikasi*. Grasindo.
- Fuady, M. (2002). *Perbuatan melawan hukum: Pendekatan kontemporer*. Citra Aditya Bakti.
- Galanter, M. (1966). The modernization of law. Dalam M. Weiner (Ed.), *Modernization: The dynamics of growth* (hlm. 153–165). Basic Books.
- Harahap, M. Y. (2011). *Segi-segi hukum perjanjian*. Alumni.
- Hernoko, A. Y. (2010). *Hukum perjanjian: Asas proporsionalitas dalam kontrak komersial*. Kencana Prenada Media Group.
- Hoge Raad. (1982). *Plas v. Valburg* (HR 18 Juni 1982, NJ 1983, 723).
- Kelsen, H. (2007). *General theory of law and state* (A. Wedberg, Penerj.). The Lawbook Exchange. (Karya asli diterbitkan 1945)

- Kitab Undang-Undang Hukum Perdata [KUH Perdata].
- Margono, S. (2000). *ADR (Alternative Dispute Resolution) dan arbitrase: Proses pelembagaan dan aspek hukum*. Ghalia Indonesia.
- Mertokusumo, S. (2006). *Hukum acara perdata Indonesia*. Liberty.
- Muhammad, A. (2010). *Hukum perusahaan Indonesia*. Citra Aditya Bakti.
- Niewenhuis, J. H. (1985). *Pokok-pokok hukum perikatan* (Djasadin Saragih, Penerj.). Airlangga University Press.
- Pruitt, D. G., & Rubin, J. Z. (1986). *Social conflict: Escalation, stalemate, and settlement*. Random House.
- Rahardjo, S. (2009). *Ilmu hukum*. Citra Aditya Bakti.
- Sinamora, Y. S. (2011). *Prinsip hukum kontrak dalam pengadaan barang dan jasa oleh pemerintah* [Disertasi tidak diterbitkan]. Universitas Airlangga.
- Subekti, R. (1987). *Hukum perjanjian*. Intermasa.
- Subekti, R. (2005). *Hukum perjanjian*. Intermasa.
- Syahrani, R. (2006). *Seluk-beluk dan asas-asas hukum perdata*. Alumni.
- Syaukani, I., & Thohari, A. A. (2004). *Dasar-dasar politik hukum*. RajaGrafindo Persada.
- Undang-Undang Nomor 14 Tahun 1970 tentang Ketentuan-Ketentuan Pokok Kekuasaan Kehakiman.
- Undang-Undang Nomor 2 Tahun 2017 tentang Jasa Konstruksi, Lembaran Negara Republik Indonesia Tahun 2017 Nomor 11.
- Undang-Undang Nomor 28 Tahun 2002 tentang Bangunan Gedung, Lembaran Negara Republik Indonesia Tahun 2002 Nomor 134.
- Undang-Undang Nomor 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa, Lembaran Negara Republik Indonesia Tahun 1999 Nomor 138.
- Undang-Undang Nomor 6 Tahun 2023 tentang Penetapan Peraturan Pemerintah Pengganti Undang-Undang Nomor 2 Tahun 2022 tentang Cipta Kerja menjadi Undang-Undang, Lembaran Negara Republik Indonesia Tahun 2023 Nomor 41.
- Undang-Undang Nomor 8 Tahun 1999 tentang Perlindungan Konsumen, Lembaran Negara Republik Indonesia Tahun 1999 Nomor 42.
- UNIDROIT. (2016). *UNIDROIT principles of international commercial contracts*. International Institute for the Unification of Private Law.
- Vienna Convention on the Law of Treaties*, 23 Mei 1969, 1155 U.N.T.S. 331.
- Zimmerman, M. (1999). *Business contracts and the law*. Prentice Hall.
- Zulham. (2013). *Hukum perlindungan konsumen*. Kencana Prenada Media Group.
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