

# IMPLEMENTATION OF THE PRINCIPLE OF BALANCE FOR THE PARTIES IN THE STANDARD AGREEMENT

**Dr. Bina Era Dany,SH.,MH**  
**Dosen Fakultas Hukum Universitas Islam Sumatera Utara**

## Abstract

Standard agreements have long been used in various contracts, the use of standard agreements is closely related to progress in economic field that demands efficiency in spending cost, time and effort. Standard agreement does not reflect the principle of balance of the parties in the agreement. Imbalance of position in the standard agreement caused because the parties have a good bargaining position not the same, causing "unreal bargaining". Aim This research is to understand the implementation of the principle of balance in the agreement that uses the agreement law. The method used in this research is normative, which refers to legal norms that contained in the legislation, with using data in the form of qualitative data and using analytical descriptive approach. The results of the study show that an imbalance occurs when the parties are in different economic powers. the balance of a The agreement is not solely determined by position parties, but also determined by the aspect of good faith. There are three aspects so that the balance in the agreement can be achieved, namely the actions of the parties, the contents of the agreement, and implementation of the agreement. So that in the end it will be the engagement that applies to the parties.

## INTRODUCTION

Humans fulfill their various interests in various ways. One of them is by making an agreement. In the Civil Code of the agreement regulated in Book III (Article 1233-1864) concerning Engagement. Article 1313 of the Civil Code states: "Agreement is an act by which one or more persons" bind himself to one or more other people". An agreement has elements, namely competent parties, agreed subjects, considerations laws, mutual agreements, and mutual rights and obligations. Based on the above understanding, the agreement consists of: the parties; There is agreement between the party; There are achievements to be carried out; In oral or written form; There are certain conditions as the contents of the agreement; There is a goal to achieved (Niru Anita Sinaga dan Tiberius Zaluchu. (2017).

In general, an agreement is an agreement between the parties about something that giving birth to a legal engagement/relationship, giving rise to rights and obligations, If it is not carried out as promised, there will be sanctions. A deal in the form of an agreement is essentially binding, even in accordance with Article 1338 paragraph (1) Civil Code, this agreement has binding force as law for those who made it. 2 The making of an agreement should be pay attention to important matters, including the conditions for the validity of the agreement, the principles of agreement, the rights and obligations of the parties, the structure and anatomy of the contract, settlement of disputes and termination of contracts.

According to Siti Malikhatun Badriyah Siti (2016) the purpose of the agreement is to achieve balance of interests between the parties. So that balance becomes a thing which is very important, it has even become a central point from the start, that is, since it starts from pre-contractual stage (bidding stage), then when an agreement appears which gives rise to an engagement between the parties (contractual stage), up to the the stage of implementing the agreement that is binding on the parties. The existence of legal principles certainly needs to be considered, in the contract process for the sake of create balance and maintain the rights of the parties, before the contract is made into a binding engagement. Basic understanding The law according to Sudikno Mertokusumo is (1996) "The basic idea that is general in nature, or is the background of the concrete regulations contained in and behind every legal system that is embodied in the legislation and judge's decisions which are positive laws and can be stated by looking for the general characteristics in the concrete regulations. "

In general, the form of agreement used by the parties in the agreement can be in the form of oral or written. However, in its gradual development, the forms of agreements used in Indonesian society have undergone changes and developments. These changes and developments cannot be separated from the influence of the development of science and technology, the influence of the development of socio-economic and industrial conditions experienced by today's society. Danty Listiawati. (2015).

With these developments, people began to freely determine their position, and were free to determine the content and form of the agreement. In connection with the growing economic growth, an agreement emerged between the parties using a more practical format. This agreement is called a standard agreement, it looks practical in the agreement but is actually more profitable for the maker. Business actors are required to further improve transaction time efficiency in serving consumers, thus requiring more effective contract binding. Initially, the standard agreement was intended to shorten the time so that it could be more effective and efficient. However, it turns out that this cannot be done fairly for one party and tends to provide benefits for the maker.

The standard form of agreement has appeared in every business transaction, ranging from large-scale business transactions to small ones. The emergence of standard agreements is actually an indirect result of the introduction of the principle of freedom of contract (Article 1338 of the Civil Code). This causes the position of the two parties in a negotiation to be unbalanced, which in the end gives birth to an agreement that is not very profitable for either party. The advantage of this position by business actors is often translated by making standard agreements and or standard clauses in every document or agreement made by one party who is "more dominant" than the other party. It is said to be "standard" because neither the agreement nor the clause can and cannot be negotiated or negotiable by the other party.

Balance is known in an agreement as a principle, where the principle of balance is a principle that requires both parties to fulfill and carry out the agreement. The principle of balance in a contract or agreement must be considered so that one party is not harmed just because of the freedom of contract between the two parties in making an agreement. Basically an agreement starts from a difference of interest between the parties. The formulation of the contractual relationship generally begins with a negotiation process between the parties.

Balance is a principle that is intended to harmonize legal institutions and the basic principles of contract law, which is known in civil law which is based on the thoughts and background of individualism on the one hand and the way of thinking of the Indonesian nation on the other Herlien Boediono. (2010). The purpose of the balance of some of the rules that have been put forward is the occurrence of equality of position between the rights and obligations of the parties in an agreement with the same terms and conditions (*ceteris paribus*) Herlien Boediono. (2006).. *paribus*), and no party dominates or exerts pressure on the other party.

## RESEARCH METHOD

The method used in this research is normative juridical, which refers to the legal norms contained in laws and regulations, court decisions, using qualitative data and using a descriptive analytical approach. All data related to this research, processed and compiled systematically and then analyzed qualitatively to produce conclusions in descriptive form.

## RESULTS AND DISCUSSION

In an agreement, the parties express their will in a promise. In fact, an agreement is based on a specific purpose or purpose. The purpose of an agreement is based on the agreed will, namely in the form of promises between the parties. However, in an agreement an imbalance can arise, which is a result of the behavior of the parties themselves or as a consequence of the implementation of the agreement.

The principle of law is the broadest basis for the birth of a legal regulation. This means that legal regulations can ultimately be returned to these principles. Legal principles are not only useful for solving new problems and opening up new fields, but are also needed to interpret the rules in line with the principles that underlie the rules in question. The role of these legal principles is very important to interpret the rules that can never completely solve the problem.

As referred to in everyday language, the word "balanced" (*evenwicht*) refers to the meaning of a "state of load sharing on both sides in a balanced state". In the context of this study "balance" is understood as "a state of silence or a state of harmony because no one dominates, or because no one element dominates the other. as a result of it must give rise to a legal transfer of wealth.

The principle of balance is a principle in Indonesian Covenant Law which is a continuation principle of the principle of equality which requires a balance of rights and obligations between the

parties to the agreement. The principle of balance, in addition to having certain characteristics, must also be consistently focused on concrete truths.

The principle of balance encourages and at the same time becomes a working principle of the principles of treaty law, both from Indonesian treaty law and from Dutch treaty law which represents modern law. In Dutch treaty law, the application of the principle of balance is seen in the obligation to refer to decency, good faith, propriety, and appropriateness in carrying out the rights and obligations in an agreement. Anita Kamilah. (2012).

An agreement is an event where two people promise each other to do something by prioritizing the principle of mutual trust to keep promises. Subekti. (2010) An agreement is not enough just to use oral media, but also needs to be made in written form. A written agreement can be used by the parties to supervise the other party to obey and comply with the contents of the agreement. The disobedience of one party to the contents of the agreement will harm the interests of the other party.

Agreements in the world of economy are an important instrument for realizing economic changes in the distribution of goods and services. The agreement has the aim of creating better conditions for both parties. According to Atiyah, the agreement has three basic objectives, namely: P.S Atiyah. (1995).

- a. Imposing a promise and protecting the reasonable expectations that arise from it;
- b. Prevent efforts to enrich oneself that are carried out unfairly or incorrectly by a party;
- c. To prevent certain kinds of harm.

In addition to the three objectives mentioned above, Herlien Budiono added a fourth objective of the agreement, namely, achieving a balance between one's own interests and the related interests of other parties.

The condition of balance as the fourth goal is achieved through social propriety, immaterial existence which is achieved in the spirit of balance. In an agreement, the interests of individuals and society will simultaneously be guaranteed by objective law. The agreement from the point of view of substance or intent and purpose turns out to be contrary to decency and or public order will be null and void by law and essentially the same thing will apply with respect to agreements that are contrary to the law. With this it is clear that social propriety is intangible through such an agreement. In an unbalanced agreement can arise as a result

The behavior of the parties themselves or as a consequence of the substance (contents) of the agreement or the implementation of the agreement.

With regard to the content or intent and purpose of the agreement, the parties expand by increasing expectations to achieve the entrusted performance. From the rationale of the parties, it can be seen if future expectations can be objective or even contain the sacrifices of the opposing party which results in such a way that future expectations lead to an imbalance. Taufik Kurrohman. (2016). Achieving a state of balance implies in the context of objective future expectations, efforts to prevent harm to one of the parties to the agreement. Understanding the contents of the agreement is a necessity and the balance in the contract is an important thing in an agreement

The agreement has a number of aspects, namely the actions of the parties, the contents of the agreement agreed upon by the parties, and the implementation of the agreement. The three interrelated aspects of the agreement above can be raised as testing factors regarding the working power of the balance principle. The same thing was also stated by Mariam Darus Badruzaman who said that an agreement has a number of aspects, namely the actions of the parties, the contents of the agreement, and the implementation of the agreement. which have been agreed by the parties. Three interrelated aspects of the agreement can be raised as criteria regarding the conditions for balance, but also become criteria for the existence of imbalances if the conditions for balance and these three aspects are not met.

Salim HS stated that the principle of balance is a principle that requires both parties to fulfill and implement the agreement. Salim H.S. (2010). Meanwhile Mariam Darus Badruzaman stated that this principle of balance is a continuation of the principle of equality, where creditors have the power to demand repayment of achievements through the debtor's wealth, but The creditor also bears the burden of carrying out the agreement in good faith, so that the position of the creditor and debtor is balanced. Mariam Darus Badruzaman. (1994).

Understanding the meaning of the principle of balance if traced from several scholars' opinions, generally gives the meaning of the principle of balance as a balance of bargaining positions of the contracting parties. The interpretation of the working power of the balance principle includes:

- a. The distribution of rights and obligations in a contractual relationship is as if without regard to the process that takes place in determining the final result of the distribution;
- b. Balance seems to be the end result of a process;

- c. It is more directed to the balance of the positions of the parties, meaning that in the case of the contractual relationship, the positions of the parties are balanced;
- d. Basically the balance of the positions of the parties can only be achieved on the same terms and conditions.

The use of standard contracts in today's business world creates legal problems that require resolution. Traditionally an agreement occurs based on the principle of freedom of contract between two parties who have a balanced position. The agreement obtained in the agreement is the result of negotiations between the parties. 17 Such a process is not found in standard agreements. There is almost no freedom in determining the contents of the agreement in the negotiation process. The contents or terms of the agreement have been determined unilaterally by the entrepreneur.

The standard agreement does not reflect the principle of balance between the parties in the contract. The imbalance in the position in the standard agreement is caused because the parties have unequal bargaining positions, giving rise to "unreal bargaining". The imbalance of position in the standard agreement is caused by several things:

- a. Standard contract makers generally have higher control over resources (economics, technology, or science) than the recipients of standard contracts. One of the forms is seen in the clauses contained in standard or standard forms whose contents tend to be one-sided or referred to as exclusion or exoneration clauses. This clause provides limitations and/or transfer of responsibility for a business risk to another party so that it can cause an unfair loss or profit to one of the parties. This imbalance in position can be seen by the existence of clauses in the standard contract which are solely concerned with the interests of the business actor or the owner of the capital whose bargaining position is stronger.
- b. Limited access to information that should be obtained by the recipient of the standard contract. Contract recipients in signing standard contracts only focus on important things in the contract, such as choosing a dispute resolution forum, compensation in case of default, changing policies, and so on. hampered because the contract recipient is faced with the choice of "take it or leave it", especially if the contract recipient is faced with the object of the contract that is to fulfill basic needs such as the need for clothing, food and shelter, then this choice will create a dilemma.
- c. The existence of weakness in the economic field or weakness in the field of knowledge on the part of the recipient of the standard contract causes the balance of position aspect to be unfulfilled. The party receiving the standard contract generally signs the offered contract due to the need for the object of the contract.
- d. The existence of power or authority possessed by one of the parties is greater, this can be seen in contracts entered into between the government in its capacity as private legal subjects in civil relations, such as contracts for the procurement of goods and services.

In practice, the unequal position can be seen in the clauses written in an agreement, where the clause provides limitations for the parties such as in bank credit contracts, contracts in the housing sector, parking services, electricity, and others. These types of contracts contain standard clauses.

In the opinion of Sutan Remy Sjahdeini, Sutan Remy Sjahdeini. (1993). what is meant by a standard agreement is an agreement in which almost all of the clauses have been standardized by the wearer and the other party basically does not have the opportunity to negotiate or request changes.

According to Hondius, a standard agreement usually contains standard conditions in the form of written concept requirements contained in several agreements that are still to be made and the amount is not certain, without first negotiating the contents. Purwahid Patrik. (1998). Thus a standard agreement can contain an exoneration clause which is considered as a one-sided and unfair clause. Economically, the use of standard clauses in standard agreements has practical advantages, reducing lengthy negotiations and saving costs, but legally it gives an unequal position to the parties, because one party is usually forced to accept the terms that have been standardized by the other party.

A standard agreement that is determined unilaterally does not rule out the possibility of being misused by one of the parties who has a higher bargaining position to suppress the party whose position is weak. Meanwhile, the weak position can only accept what is offered, so they often bear the loss. But why is this still happening? This is based on economic considerations, namely to reduce costs, energy, and time that arise in making an agreement and is practical because it can be used and signed at any time.

Making agreements that are carried out unilaterally without involving customers is common in the banking environment. The agreement is in the form of a form that has been prepared in advance by the bank, then submitted to the customer on the principle of take it or leave it contract.

Customers cannot submit proposals, inputs, or objections to the format of the agreement and the clauses therein. Maria Anggita Dian Pramestie dan Jamal Wiwoho. (2017). Generally, an agreement containing an exoneration clause is an unbalanced agreement. The relationship between the parties who are not balanced in an agreement would be unfair to the parties. Injustice that occurs in an unbalanced relationship between parties is called undue influence, while injustice occurs in an unbalanced situation (not a relationship) called unconscionability. Hardijan Rusli. (1996). The essence of justice is the fulfillment of everything that is its rights and obligations.

Justice demands a proportional, appropriate, balanced, in harmony with every right of every person. The working power of the optimal balance principle will balance the interests of the parties, provide an ideal law for the parties and provide justice in an agreement. Therefore, an agreement must be tested for its balance by using three aspects, namely:

- a. His own actions or individual actors;
- b. Contents of the contract;
- c. Implementation of what has been agreed.

The thing that is always put forward in relation to balance in an agreement is the freedom of contract for the parties, in determining the clauses of the agreement. Ridwan Khairandy argues that freedom of contract is interpreted in two terms, namely the positive meaning of freedom of contract where the parties have the freedom to make binding contracts that reflect the free will of the parties. As well as freedom of contract in a negative sense, namely the parties are free from an obligation as long as the binding contract does not regulate. Ridwan Khairandy. (2003)

Freedom of contract has a scope in the form of freedom to enter into agreements with anyone and regarding any matter, as long as it does not conflict with law, propriety, morality, and the scope of obligations to comply with what was agreed. The scope is related to the principle of freedom of contract and the principle of binding force of an agreement. The scope is in accordance with Article 1.1 UNIDROIT which reads "the parties are free to enter into a contract and to determine its content"

In a standard agreement where the contents have been determined by one of the parties, then the legal principles of the agreement contained in it seem to be neglected. This can be seen from the absence of negotiations between the parties to determine the contents of the agreement, as well as the weak bargaining position of one of the parties, so that the element of balance in an agreement is not fulfilled.

This imbalance can arise as a result of the behavior of the parties or as a result of consequences of the contents of the agreement, and perhaps also in the implementation of the agreement itself.

An imbalance in an agreement can be exploited by a party in a dominant position to abuse the situation. Ety Mulyati. (2016) In general, an imbalance occurs when the parties are in different economic powers. The weak economy seems to be forced to accept the will of the strong economy. The imbalance in economic conditions can affect the psychological condition of the weak economy, so they feel depressed. In a state of stress, the weak economy is forced to make a take it or leave it decision.

The condition of not being free of one of the parties in entering into an agreement is a condition that is contrary to the principle of freedom of contract. Through this principle, individuals are given the freedom to make agreements as broadly as possible as long as they do not conflict with public order

Thus, freedom of contract must be interpreted as freedom of responsibility in the sense of being free to make agreements as long as it does not harm the other party. This is important, considering that the agreement needs a balance of regulation and protection of the interests of each party. This means that freedom of contract is limited by the obligation to respect the interests of other parties in an agreement.

The position or bargaining position that is not balanced in an agreement is contrary to the purpose of the law, namely justice, because the agreement is formed as a forum that brings together the interests of the parties as a fair exchange of interests. Teguh Wicaksono Saputro. (2011).

In this regard, Agus Yudha Hernoko stated that there is often a misperception regarding the existence of a contract which in the end traps and misleads objective judgments, especially regarding the question "whether an agreement is balanced or unbalanced". Furthermore, Agus Yudha Hernoko said that the error occurred because they only struggled with the different statuses of each contracting party. This view is not entirely wrong, but it will be more fair and objective when assessing the existence of an agreement, especially by observing its substance, as well as the category of the contract concerned. Agus Yudha Hernoko. (2010).

A fair and objective view of an agreement must be interpreted broadly as follows:

- a. It is more directed to the balance of the position of the parties, where the parties are given a balance charge
- b. The equality of the distribution of rights and obligations in a contractual relationship seems to be without regard to the process that takes place in determining the final result of the distribution.
- c. Balance as if merely the end result of a process.
- d. State intervention is a coercive and binding instrument in order to realize the balance of the positions of the parties.
- e. The balance of the positions of the parties can only be achieved on the same terms and conditions (*ceteris paribus*).

The interpretation of the agreement in relation to the balance of the agreement, shows that the balance of an agreement is not solely determined by the position of the parties, but is also determined by the aspect of good faith.

Good faith is a principle that must be obeyed by the parties so as to create a pure (fair) agreement in an agreement. The obligation of good faith has been stated in the Restatement (second) of Contract Chapter 9 Topic 2 Section 205 which states that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement" Robert. E. Scott dan Douglas. L. Leslie. (1988).. Likewise, it is contained in U.C.C section 1-203 which states that "every contract or duty within this Act imposes obligation of good faith in its performance or enforcement" Gordon. D. Schaber, Claude. D. Rohwer. (1990)..

The principle of good faith when drafting an agreement is interpreted as honesty, namely someone who puts full trust in the other party on the basis of honesty and does not hide anything bad, which in the future can cause difficulties. The good faith that exists at the time of drafting the agreement will avoid the emergence of unlawful acts and defaults.

Regarding the role of the principle of balance, Herlien Boediono argues that the concepts of consensualism, binding power, freedom of contract, and balance are full of normative expectations regarding the ideal development of a social role, in harmony with social rules applied by tradition, norms and history. the community concerned.<sup>31</sup> Thus, to assess whether an agreement has been balanced, it is not only judged from the positive law but must also be seen whether the agreement is fair to the community or not.

There are at least three aspects in an agreement that need to be considered in order to achieve balance, namely: first, the actions of the parties, in this case related to the subject of the agreement. It cannot be denied that an agreement can be realized when the parties bind themselves together. The legal actions carried out by the parties can be seen from the statement of the will of oneself to do or not to take legal actions.

Second, the contents of the agreement. The balance in the content of the agreement cannot be separated from the awareness and agreement of the parties to make the agreement. The making of the contents of the agreement by one of the parties, the use of a foreign language, as well as the existence of clauses that are relatively rigid and the bargaining power of one party is weak so that they do not have the opportunity to participate in determining or changing the contents of the agreement. Third, the implementation of the agreement, which is carried out by the parties as a form of obedience to the contents of the agreement. It is hoped that the parties can carry out the agreement in good faith, so that it does not harm any party.

In relation to the working power of the principle of balance, Agus Yudha Hernoko stated that, the principle of balance has work force both in the process of forming and implementing the contract. In the event of an imbalance during the formation or preparation of the agreement, the content of the agreement or the implementation of the agreement, the principle of balance is present by offering an agreement. general responsibility for implementing the diversity of norms as well as for assessing and determining whether there is a fair agreement.

Due to the imbalance of position between the parties, it is necessary for the state to intervene to participate in restoring the balance of the position of the parties. So that it can represent the interests of the parties fairly. The need for state intervention is based on the theory of H.L. Hart in "the minimum context of natural law (minimum protection theory)" that human nature is vulnerable (vulnerable) is one of the reasons for the need for law. H.L.A.Hart. (1981). In relation to making standard agreements, state intervention is required in the form of making legal rules and handling standard agreement cases through the courts (court decisions) to protect weak parties, those who have lower bargaining power due to limitations on access and information, education and capital.

The non-fulfillment of the balance element affects the legal force in an agreement. Balance will be achieved when the parties agree to bind themselves together without any pressure from any party. The parties are in an equal position and have the same rights and obligations. If it is equal, then the parties can carry out their business activities better, so that the welfare of the people can be achieved. So it is hoped that with the intervention of the state or government, a balance can be established in the agreement.

## CONCLUSION

Based on the discussion above, it can be concluded that standard agreements usually contain standard conditions in the form of written concept requirements contained in several agreements that are still to be made and the amount is uncertain, without first negotiating the contents. Standard agreements have controlled almost all contracts in business activities, this is based on an emphasis that standard agreements are more effective and efficient in their implementation

The existence of a standard agreement cannot be dammed and hindered because it grows and develops in line with the growth and development of the business world which is based on the existence of a community need for the standard agreement.

In general, imbalance occurs when the parties are in different economic powers. To create a balance of rights and obligations of the parties in this case, an agreement needs to contain the principles of balance, justice, and fairness which are guidelines and become signs in regulating and forming an agreement to be made so that in the end it will become an agreement that applies to the parties. which can be enforced or complied with. The optimal working power of the principle of balance will balance the interests of the parties, provide an ideal law for the parties and provide justice in an agreement. The balance of an agreement is not solely determined by the position of the parties, but is also determined by the aspect of good faith. There are three aspects so that balance in the agreement can be achieved, namely the actions of the parties, the contents of the agreement, and the implementation of the agreement.

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