

CIVIL LAW ANALYSIS OF UNWRITTEN AGREEMENTS IN BUSINESS ACTIVITIES

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Abstract

In traditional societies, unwritten contracts were frequently used for commercial transactions. Unwritten agreements are weaker than written ones, particularly when it comes to proving their existence in the event of a dispute. The aim of this article was to conduct an analysis of unwritten agreements in civil law and to evaluate the advantages and disadvantages of forming and implementing such agreements. This is a normative legal research which focuses on positive law inventory, legal principles and doctrine, legal discovery in concrete cases, legal systematics, level of synchronization, comparative law and legal history. In the deliberation, a verbal agreement was considered valid under civil law so long as it did not contradict Article 1320 of the Civil Code. The existence of a verbal agreement was also supported by the principle of contract freedom, which allowed the parties to determine the form of the agreement. Unwritten agreements were advantageous in terms of the amount of time required to reach an agreement and the use of trust in the formulation and implementation of the agreement, but they lacked the ability to be proven in the event of a dispute.

Keywords: *Business, Civil Law, Unwritten Agreement*

1. INTRODUCTION

Every human being cannot be separated from activities that are interconnected with each other according to his needs, both in individual and group activities in association in his daily life. In essence, humans are social beings who cannot be separated from the social life of their group. According to Aristotle in Is (2017) humans are “*zoon politicon*”, meaning that humans as social beings always try to live in groups and in society.

From the statement expressed by Aristotle, it shows that human nature is basically unable to live alone because human nature is a social being, which definitely needs other people to carry out the dynamics of life. In daily activities, humans are always bound by other humans. It is from this attachment that his needs will be easily fulfilled compared to doing it alone. In line with the old adage “if you want to go fast, go alone, and if you want to go right, go together”. The existence of a relationship between humans in groups or even between individuals is a pattern of life that has a style as a *zoon politicon*. It is through this interaction that man meets the needs of his life, it will be inevitable in various ways, whether from the needs of clothing, food, or boards, and will not be excluded from anything else, this is called natural demands (Isnaeni, 2016). In the reality of life which is actually valid, every human being in fulfilling the necessities of life requires interaction between individuals or between groups. As an example of the form of interaction in question is in business activities such as buying and selling transactions, contracts, trade transactions, leasing transactions (Apdillah et al., 2022). In social reality, these activities are really needed by business people who aim to earn income that is profitable or profit oriented.

The creation of this business activity when viewed from the rails of civil law rules, ideally there is always an agreement that forms the foundation for carrying out business activities using either a written agreement or an unwritten agreement. Seeing the phenomenon of life today, the author highlights the activities of agreements in unwritten form or often referred to as verbal agreements. Because not a few business people carry out business activities with verbal agreements which sometimes have good, sometimes bad impacts. An unwritten agreement actually has more weaknesses. When faced with a legal issue, the legal strength of this verbal agreement is weak because the proof process is quite difficult, there is no real physical evidence that can be used as a reference to comply and comply with the agreement made. This verbal agreement or unwritten agreement prioritizes the principle of trust or emotional closeness between individuals. However, the fact is that not everyone can be trustworthy in carrying out the rights and responsibilities in the spoken agreement. Not even a few verbal agreements were broken, because the loopholes for breaking them were very easy.

Agreements made verbally or without written documentation can be either beneficial or harmful. As such, this study aims to investigate the validity and presence of unwritten agreements within the context of civil law. Through legal analysis, particularly within the principles of contract law, this study aims to provide a comprehensive understanding of the advantages and disadvantages of unwritten agreements.

2. RESEARCH METHODS

Normative case studies, in the shape of legal behavior products like reviews of laws were used in normative legal research. Law, conceived of as a norm or rule that applies in society and becomes a reference for everyone's conduct, was the primary focus of the study. This normative legal research focuses on positive law inventory, legal principles and doctrine, legal discovery in in concrete cases, legal systematics, level of synchronization, comparative law and legal history (Ali, 2021).

3. RESULTS AND DISCUSSION

3.1. Agreements Made in Unwritten Form Reviewed in Civil Law

3.1.1. The meaning of the Agreement

An agreement or contract in definition is defined as a speech that is thrown at another person and must be fulfilled or carried out according to what was said before. In the context of the definition that in the agreement there are 2 or more people, one who makes promises and the other who receives promises. Article 1313 of the Civil Code states that: "An agreement is an act committed by 2 or more people in which one person binds himself to one or more other people".

In article 1313 of the Civil Code in the editorial there is an element of engagement as stated in the word "binding himself to one or more people". In essence, it is true that the emergence of an agreement is based on an agreement and this is stated in article 1233 of the Civil Code that "Every agreement that is born because of an agreement/agreement, then an agreement arises based on an agreement made by the parties to create an engagement relationship with legal consequences that appear in the agreement". The definition of engagement refers to Sinaga (2020) view that "engagement is a legal relationship between two people or two 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". According to Article 1234 of the Civil Code, "every engagement is to grant something, to do something, or not to do something" describes the rights and obligations of the parties involved in the legal relationship of the engagement. The actions in the engagement associated with the agreement constitute an obligation for one party and a privilege for the other party, who receives something based on the parties' agreement.

Re-recording the understanding of the meaning of the agreement as stated in article 1313 of the Civil Code, experts also argue about the agreement, starting from the opinion of Salim (2021) what is meant by "an agreement is a legal act based on an agreement between two or more people to cause legal consequences permitted by law". Meanwhile, according to Hartana (2016) states that "an agreement is a legal relationship regarding property between two parties, in which one party promises or is deemed to have promised to do something or not to do something, while the other party has the right to demand implementation that promise". In line with the version of Soeikromo (2013) who argues that "an agreement is a legal relationship of wealth/property between two or more people, which gives strength to one party's rights to obtain achievements and at the same time obliges the other party to fulfill achievements".

3.1.2. Agreement Form

Judging from its form, there are 2 types of agreements, namely written and unwritten (verbal) agreements. In simple terms, the written agreement is the promised points written in written form, while the unwritten (verbal) agreement promised is only spoken and only enough with the agreement of the parties.

3.1.3. Unwritten Agreement

The author will be emphasizing on unwritten or verbal agreements, which are frequently used by business individuals in their activities. These agreements are usually made by simply stating something between the parties involved. In business negotiations, verbal agreements are commonly used to come to a mutual understanding. To illustrate, let's consider the example of durian trade in traditional markets, where buyers and sellers bargain over the price of the durian, and after the bidding process is finished, they reach an agreement on the price without any written documentation.

Once the agreement on the price of the durian is made, the seller delivers the durian to the buyer, and the buyer pays the agreed amount. Written documentation is not required in this scenario as the agreement is made verbally, and the delivery of goods purchased doesn't need a written agreement to be referred to. In business activities, especially between buyers and sellers as illustrated in the example above, verbal agreements are sufficient to save time and minimize the possibility of disputes or violations of the agreement. Even if the purchased goods are not as expected, for instance, if they are rotten, the issue can still be handled amicably without the need for proof of purchase as the verbal agreement already exists. However, if the purchase involves a large quantity of items and the agreement is solely verbal, it can be risky for both parties involved.

Verbal or unwritten agreements are generally considered to be agreements that are very weak in nature, because unwritten or verbal agreements are more difficult to prove because they will be easily denied by the party making the promise if the scale of comparison is with a written agreement which is point by point which is translated in

written form. so that the parties making the agreement must submit and comply with the agreement that has been agreed upon and formulated in writing, and strengthened by the signatures of the parties that mark the agreement. Even though in fact a written agreement will not be completely avoided from denial by the parties, for example in a state of error or compulsion that requires aborting the agreement.

A verbal (unwritten) agreement is considered to be weaker when compared to a written agreement, but that does not mean that an unwritten agreement has no rules which becomes a valid agreement, because an unwritten agreement is also legally valid. If the reference is to Article 1320 of the Civil Code, the following conditions must be fulfilled to determine the validity of a verbal or written agreement:

- a. Agree to be bound;
- b. A certain thing;
- c. A certain reason;
- d. A lawful reason.

The first two requirements, agreement and competence, can be thought of as subjective, while the third and fourth requirements, a topic and a lawful cause, are more clearly objective. The arrangement can be terminated legally if the subjective conditions are not met, but it will be null and void if the objective conditions are not met. Since the four legal terms of the agreement do not need to be in paper, this applies equally to a verbal agreement. In accordance with these four criteria, the presence of an unwritten agreement is also inseparable from the principles of civil law. Looking at several civil law principles, unwritten agreements can be based or analyzed on civil law principles as follows:

1) The Principle of Freedom of Contract

The principle of contract freedom is one of the reasons why implicit agreements exist. One of the pillars of contract law is the principle of contract freedom, which is universally recognized by the legal systems of all nations as a foundational principle capable of ensuring flexibility and intensified market activity. The freedom to contract, which is based on the freedom to determine the form, type, and content of the agreement, appears to be threatened by the challenges of the times and is resistant to deteriorate as a result of rapid progress. This principle is one of the tenets of the Human Rights that always uphold the dignity of the individual's will as a social being. Freedom of contract is an essential principle for the development of individuals in both their private and social lives, leading some experts to emphasize that it is a fundamental human right that must be respected.

According to Harianto (2016), “the principle of freedom of contract according to Indonesian contract law covers the following scope”:

- a. Freedom to make or not to make agreements.
- b. The freedom to choose the party with whom to enter into an agreement;
- c. Freedom to determine or choose the cause of the agreement made;
- d. Freedom to determine the object of the agreement;

Freedom to the terms of an agreement, including the freedom to accept or deviate from the provisions of the law which are optional (*aanvullend*, optional).

In practice, this principle of freedom of contract is generally used as a basis for the use of standard contracts governing consumer transactions with business actors. A standard contract is a written agreement that is only made by one of the parties, and frequently, the contract has been printed (or *boilerplated*) in the form of specific forms

by one of the parties. In this case, when the contract is signed, the parties typically only fill out certain informative data with little to no changes to the clauses, and the other party has little to no opportunity to negotiate or change the clauses that have been printed. In Article 1 point 10 of Law no. 8 of 1999 concerning Consumer Protection stipulates that “Standard clauses are any rules or conditions and conditions that have been prepared and determined in advance unilaterally by business actors as set forth in a binding document or agreement and must be fulfilled by consumers”. When referring to Article 1320 of the Civil Code in conjunction with Article 29 paragraph (2) Compilation of Sharia Economic Law, there are actually several conditions that limit the application of the principle of freedom of contract in accordance with the terms of a valid agreement:

- a. There is an agreement between the parties;
- b. The ability of the parties to enter into agreements;
- c. There is a certain object;
- d. There is a cause that is not contrary to law.

Referring to the provisions of Article 1320 of the Civil Code, it can be assumed that there is a deviation from the application of the principle of freedom of contract in the standard business activity contract, because a business agreement that occurs is not due to a balanced negotiation process between the parties, but the agreement occurs by means of one party having prepared conditions - standard conditions (standard clauses) on A form of agreement that has been printed and presented to the other party for approval with almost no room for negotiation on the terms offered.

2) The principle of *Pacta Sunt Servanda*

Principle of *Pacta Sunt Servanda* is also an implementation of article 1338 paragraph (1) of the Civil Code. In this case, *pacta sunt servanda* derived from the Latin word meaning “promises must be kept”. The norms contained in positive law are formulated as: every agreement made legally applies as a law for those who make it.

This principle is contained in Article 26 of the Vienna Convention on the Law of Contracts 1969. There are several exceptions to this principle, for example when the contents of the agreement conflict with *jus cogens* (norms that may not be violated under any circumstances). The principle of the *clause rebus sic stantibus* (as stated in Article 62 of the 1969 Vienna Convention) also allows a state to terminate an agreement if there has been a fundamental change in circumstances as long as that condition underlies the state's intention to be bound by this agreement.

An agreement is considered binding when it is carried out in accordance with the concept of *pacta sunt servanda*, which states that an agreement, whether written or verbal, is to be carried out in accordance with all of its terms.

3) The principle of good faith

Article 1338, paragraph (3) of the Civil Code stipulates that all agreements must be carried out in good faith, so every agreement that has been made and mutually agreed upon must be carried out in good faith. It can be concluded from this article that good faith is the foundation for implementing the agreement. The parties must adhere to the principle of good faith when making or implementing agreements, i.e., when carrying out the agreement, they must abide by compliance and decorum standards. In addition to what is expressly stated in an agreement, a contract is binding on everything that is required by decorum, custom, and the law due to the nature of the contract. The principle of good faith has two meanings, namely: (Arifin, 2020)

- a. Good faith in an objective sense means that an agreement must be implemented

with due observance of the norms of decorum and decency, which means that the agreement must be implemented so that neither party is harmed. The result is that the judge may conduct a review of the agreement's terms if enforcing it would be contrary to the principles of good faith.

- b. Good faith in a subjective sense, namely the concept of good faith that resides within an individual's interior attitude. Good faith is typically interpreted as honesty in legal contexts. Good faith in the implementation of the agreement entails compliance, i.e. an evaluation of a party's behavior in terms of carrying out what has been promised, and seeks to prevent one party from engaging in inappropriate or arbitrary behavior.

J.M. van Dunbe categorizes the phases of contracting as pre-contract, contract implementation, and post-contract. Since the pre-contract phase, when the parties begin negotiating, and throughout the contract implementation phase, good faith must exist.

At the pre-contract stage, good faith entails notifying or explaining and examining material facts pertaining to the sale and purchase of the keris (kris) being negotiated. According to the determinations of the Hoge Raad, all parties to the negotiations were acting in good faith.

- 4) The principle of consensualism

The principle of consensualism can be concluded in article 1320 paragraph (1) of the Civil Code. In this article one of the conditions for the validity of the agreement between the two parties. The agreement has been born since the agreement was reached. the agreement is binding when the agreement is stated or spoken, so there is no need for certain formalities. Except in cases where the law provides certain formality requirements for an agreement that requires it to be written (Matompo & Harun, 2017).

3.2. The Advantages and Disadvantages of Forming and Implementing Unwritten Agreements

Verbal agreements or what are often called unwritten agreements, in daily activities and business activities, verbal agreements are often used, either consciously or not. An unwritten agreement, if the comparison scale is with a written agreement, in certain respects, for example providing a sense of security and proving the agreement, of course this is an advantage over a written agreement. However, in terms of its use, verbal agreements are more often used by traditional communities in business activities.

Verbal or unwritten agreements as agreements are used in business activities because these verbal agreements are easier to use and do not have to take a long time to reach an agreement. If the scale of comparison is a written agreement, the process of reaching an agreement on this written agreement requires a relatively long time because there are a series of processes that must be gone through and through the stages of negotiation, and after reaching these stages it is described in written form and signed for proof that the parties must submit and comply with the agreement.

This is different when compared to an unwritten agreement. In an unwritten agreement, it is only sufficient to negotiate verbally on the basis of trust in reaching an agreement. If an agreement has been reached, the parties can carry out directly all the things that have been agreed upon. Based on all the things that have been described above, it can be concluded that an unwritten agreement or a verbal agreement has advantages and disadvantages. The advantages and disadvantages of unwritten agreements include: (Vijyantera, 2020)

- 1) Advantages of unwritten agreements:
 - a. It doesn't take long to reach an agreement
 - b. The formation and implementation of the agreement is based on the trust of each party.
 - c. Addition or reduction of agreement clauses can be done quickly.
 - d. Strengthening a sense of trust in interactions and business activities.
 - e. The existence of a sense of trust is able to create a good relationship even after the end of the agreement.
- 5) Disadvantages of unwritten agreements:
 - a. Points in the agreement are easy to deny or not acknowledge because they are not stated in writing.
 - b. It is less secure when used as evidence in a litigation process because it only depends on the recognition of the parties who made and implemented the agreement.

Based on the weakness of the unwritten contract, efforts can be made to cover up the weakness of the unwritten contract, namely prepare at least 2 (two) witnesses to prove the agreement of the parties to enter into an unwritten agreement. All transactions in unwritten contracts must also be accompanied by receipts or payment receipts or receipts to avoid disputes in the future.

4. CONCLUSION

Based on the research on civil law, it can be concluded that an unwritten contract can be considered as a valid contract, as long as it does not violate Article 1320 BW. This is because the principle of freedom of contract allows parties to make and carry out contracts, including unwritten agreements, which is supported by other contract law principles. However, there are advantages and disadvantages of using unwritten contracts. On the one hand, written contracts are more time-efficient and establish trust in making and executing contracts. On the other hand, unwritten contracts are prone to disputes because everything that has been agreed upon needs to be proven.

To effectively utilize unwritten contracts in practice, it is recommended to have at least 2 witnesses present when closing the contract, as well as to maintain a record of all payment slips, receipts, and invoices for every transaction that occurs during the execution of the contract. This can help to ensure that there is evidence to support any disputes that may arise in the future, and can also help to establish a clear understanding of the terms and obligations of the contract for all parties involved.

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