


Legality and Proof of Unwritten Agreements from a Civil Law Perspective

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Abstract

Introduction: Making agreements in Indonesia can be done in written and unwritten form. This is in accordance with the principle of freedom of contract in the Civil Code. Unwritten agreements are also very often carried out in the business world because they are more efficient. However, unwritten agreements are problematic because they are very difficult to prove in civil court.

Purposes of the Research: There are 2 (two) objectives in this research, namely first, to analyze the legal strength of unwritten agreements from the perspective of civil law books and second, to analyze evidence in civil courts for cases of breach of contract in unwritten agreements. Then to find the right legal solution in resolving default problems in civil court.

Methods of the Research: The research method used in this research is normative juridical. This method uses literature study techniques. The type of data used comes from primary data, namely the Civil Code and legal principles, namely freedom of contract. then the secondary legal material used is in the form of previous research articles which examine the validity of unwritten agreements.

Results of the Research: Based on the research results, it was found that unwritten agreements have binding legal force. However, in reality it is very difficult to prove it in court because evidence in civil law comes from written letters. Therefore, the solution that can be offered is the need for preventive and repressive legal efforts.

Keywords: Legality; Proofing; Unwritten Agreements; Civil Law.


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INTRODUCTION

Contract law in Indonesia cannot be separated from the Netherlands Burgerlijk Wetboek. Implementation of Burgerlijk Wetboek for the Nederlands-Indisch (current Dutch East Indies Indonesia) started on May 1, 1848 based on Staatsblaad Number 23 of 1847, implementing the Burgerlijk Wetboek voor Nederlands-Indisch application using the principle The concordance, namely the implementation of Burgerlijk Wetboek in the Netherlands, was implemented also in Indonesia. The use of the Civil Code in Indonesia is still the same today uses content from Burgerlijk Wetboek voor Nederlands-Indisch even though some articles are no longer valid.¹ In Indonesia, an agreement made must pay attention to several treaty principles, including:² a) The principle of freedom of contract; b)

¹ Taufik Hidayat Lubis, "Hukum Perjanjian Di Indonesia," *SOSEK: Jurnal Sosial Dan Ekonomi* 2, no. 3 (2021): 177-90.

² Merry E and Mamengko Rudolf Sam Maramis Stephanie Nathania and Kalalo, "Kajian Hukum Tentang Keabsahan Jual Beli Online Pada Aplikasi Facebook," *LEX ADMINISTRATUM* 11, no. 2 (2023).

Principle of consensualism; c) The principle of *pacta sunt servanda*; d) The principle of good faith.

One of the legal principles adopted in contract law is the "principle of freedom of contract", which means that every person is free to enter into an agreement containing the terms of any kind of agreement, as long as the agreement is made legally and in good faith, and does not violate public order and decency. This freedom is the embodiment of free will, the emanation of rights and human rights. Freedom of contract is one of the important principles in contract law. In the nineteenth century, freedom of contract was highly exalted and dominated. The existence of the principle of freedom of contract cannot be separated from the influence of the liberal economic philosophy. Where in the field of economics the *Laissez Faire* school developed, pioneered by Adam Smith, which emphasized the principle of non-government intervention in economic activities and the workings of markets. In the field of contract law, the influence of the *Laissez Faire* school is manifested in the form of limiting government interference with private contracts that regulate relationships between legal subjects, both individuals and legal entities. As long as these private contracts do not conflict with the law, public order, propriety and decency.

Usually there is always an agreement that forms the basis for carrying out business activities. This can be done using either a written agreement or an unwritten agreement, also known as an oral agreement. Looking at the existence of unwritten agreements as the basis for the formation and implementation of business activities, many business activities use this form of unwritten agreement. There is also previous research conducted by Helina Hoirunnisa and Martoyo with the title "Analysis of the Legal Strength of Unwritten Gold Online Arisan Agreements in Jember Regency". The results of this research show that unwritten agreements in online social gatherings are valid and binding for those who make them based on the principle of freedom of contract. Unwritten agreements in online social gatherings still have legal force by attaching valid evidence in accordance with the ITE Law. Then the legal remedy that is taken if one of the parties defaults is to carry out negotiations that were agreed upon at the beginning of the agreement.³ In this research, we will also discuss the legality and proof of unwritten agreements which are not even made online.

An unwritten agreement is the agreement chosen when carrying out a business activity considering that an unwritten agreement is easier or does not require a long time to create an agreement. When compared to a written agreement, the process of reaching agreement on a written agreement takes a very long time, namely starting from the parties carrying out a negotiation, then the concepts of agreement from the negotiation are outlined in a written agreement. Based on this, there are 2 (two) problem formulations discussed in this research, namely first, what is the legality of unwritten agreements from a civil law perspective? Second, what is the evidentiary strength of an unwritten agreement in a civil court?

METHODS OF THE RESEARCH

The research method used in this research is normative juridical using literature studies and statutory regulations.⁴ The type of data used comes from secondary data consisting of

³ Helina Hoirunnisa and Martoyo Martoyo, "Analisis Kekuatan Hukum Pada Perjanjian Tidak Tertulis Arisan Online Emas Di Kabupaten Jember," *Rechtenstudent Journal UIN KHAS Jember* 3, no. 2 (2022): 160-71.

⁴ David Tan, "Metode Penelitian Hukum: Mengupas Dan Mengulas Metodologi Dalam Menyelenggarakan Penelitian Hukum," *NUSANTARA: Jurnal Ilmu Pengetahuan Sosia* 8, no. 8 (2021), <https://doi.org/10.31604/jips.v8i8.2021.2463-2478>.

primary legal materials, namely the Civil Code, principles of civil law, namely the principles of contract law. Secondary legal materials are articles and books that discuss agreements, legal principles in agreements and agreements from a civil law perspective.

RESULTS AND DISCUSSION

A. Legality of Unwritten Agreements from Civil Law Perspective

Agreements have various definitions. Some say an agreement is a contract. In general, an agreement is a bond entered into by 2 or more legal subjects who mutually bind themselves to each other to do or not to do an act that has conditions and sanctions that have been agreed upon by both parties, both orally and in writing.⁵ Wirjono Projodikoro explained that the definition of an agreement is an agreement as a legal link regarding property and assets between two parties in which one party is considered to have promised to do something, while the other party has the right to demand the implementation of the agreement.⁶ Article 1313 of the Civil Code states: "Agreement is an act by which one or more people bind themselves to one or more other people."

The system of legal regulation of agreements is an open system. This means that everyone is free to enter into agreements, both those that have been regulated and those that have not been regulated by law. It can be concluded from the provisions contained in Article 1338 paragraph (1) of the Civil Code, which reads "All agreements made legally are valid as law for those who make them". In other words, it gives the parties the freedom to: Make or not make an agreement; Enter into an agreement with anyone; Determine the contents of the agreement, its implementation and requirements and; Determine the form of the agreement, namely written or oral. Article 1338 is the basis for the principle of freedom of contract which is also the basis for making agreements in written form.

Legal principles are the broadest basis for the birth of legal regulations. This means that legal regulations can eventually be returned to these principles. Principles function as guidelines or direction based on orientation where the law can be enforced.⁷ However, the "freedom" regulated in Article 1338 is not unlimited freedom. The application of the principle of freedom of contract is not absolute, the Civil Code provides restrictions or provisions on it, the essence of these restrictions can be seen, among others: a) Article 1320 paragraph (1) of the Civil Code states that an agreement is invalid if it is made without the agreement of the party making it; b) Article 1320 paragraph (2) of the Civil Code, freedom is limited by the ability to make an agreement; c) Article 1320 paragraph (4) in conjunction with Article 1337 of the Civil Code, concerns causes that are prohibited by law or contrary to good morals or contrary to public order; d) Article 1332 of the Civil Code Limits the freedom of the parties to make an agreement regarding the object of agreement; e) Article 1335 of the Civil Code, there is no legal force for an agreement without cause, or a cause that is false or prohibited; And f) Article 1337 of the Civil Code, prohibits agreements if they conflict with the law, good morals or public order.

⁵ Rudy Haposan Siahaan, *Hukum Perikatan Indonesia: Teori Dan Perkembangannya* (Malang: Inteligencia Media, 2017).

⁶ Zuhriati Khalid, "Analisis Juridis Kedudukan Perjanjian Kemitraan Antara Pengemudi Jasa Angkutan Online Dan Perusahaan Provider Ditinjau Dari Aspek Hukum Keperdataan," *Jurnal Hukum Kaidah: Media Komunikasi Dan Informasi Hukum Dan Masyarakat* 18, no. 3 (2019): 114-23.

⁷ Niru Anita Sinaga, "Peranan Asas-Asas Hukum Perjanjian Dalam Mewujudkan Tujuan Perjanjian," *Binamulia Hukum* 7, no. 2 (2018): 107-20.

With regard to the scope of the principle of freedom of contract, according to Sutan Remi Sjahdeini the principle of freedom of contract according to Indonesian contract law includes the scope of: a) Freedom to make or not make agreements; b) Freedom to choose the party with whom he wishes to make an agreement; c) Freedom to determine or choose the cause of the agreement that will be made; d) Freedom to determine the object of the agreement; e) Freedom to determine the form of an agreement; f) Freedom to accept or deviate from the provisions of the law optional (aanvullend, optional).⁸

Based on these provisions, agreements made in unwritten form are permissible according to the Civil Code as long as the legal conditions for the agreement are fulfilled as regulated in 1320 of the Civil Code. Then the agreement is a law for the parties who make it. As a "law" the agreement becomes positive law for the parties who make it. According to Bagir Manan "positive law is a collection of written and unwritten legal principles and rules which are currently in force, and are generally or specifically binding, enforced by or through the government or courts in Indonesia". This description of positive law provides the understanding that positive law consists of written law, in the sense of law that is deliberately implemented by institutions or organs that have the authority to form laws, and laws that are formed in the process of community life without being determined by institutions or organs that have authority to form laws. Meanwhile, for unwritten law, it is necessary to positivize unwritten law, which is initiated by the judge through legal discovery (rechtsvinding/law finding), namely the process of finding legal principles or principles that live and apply in society, then formulate them as a basis for decision making. by the judge.⁹ This shows that a positive law should be written. If it is not written, it is necessary to posit the law by a judge through legal discovery.

Therefore, it cannot be denied that although the Civil Code provides an opportunity for agreements to be made in unwritten form as regulated in Article 1388 of the Civil Code through the principle of freedom of contract as long as it does not conflict with the terms of the validity of the agreement as regulated in Article 1230 of the Civil Code, the law does not. Written law has many weaknesses compared to written law.¹⁰

B. Proving Unwritten Agreements in Civil Court

Civil law is the totality of legal rules, both written and unwritten, which regulate the relationship between one legal subject and another legal subject in family relationships and in social interactions. According to Riduan Syahrani, civil law is the law that regulates legal relationships between one person and another person in society which focuses on individual interests.¹¹ Civil law provides legal protection to prevent vigilantism and to create an orderly atmosphere. One of the duties of a judge in court to resolve civil cases is to investigate whether there is a legal relationship or not regarding the basis of the lawsuit filed by the plaintiff. Apart from that, you also know the truth of the incident in question objectively through proof.

Evidence here is intended to obtain the truth of an event and aims to establish the legal relationship between the two parties and implement a decision based on the results of the evidence. The law of evidence in civil procedural law occupies a very important and very

⁸ Agus Yudha Hernoko, *Hukum Perjanjian Asas Proporsionalitas Dalam Kontrak Komersial* (Yogyakarta: Laksbang Mediatama, 2008).

⁹ Slamet Suhartono, "Hukum Positif Problematik Penerapan Dan Solusi Teoritiknya," *DiH: Jurnal Ilmu Hukum* 15, no. 2 (2019): 372134.

¹⁰ Rokilah, "The Role of the Regulations in Indonesia State System," *Ajudikasi: Jurnal Ilmu Hukum* 4, no. 1 (2020): 29–38.

¹¹ Titik Triwulan Tutik, *Pengantar Hukum Tata Usaha Negara Indonesia* (Jakarta: Prestasi Pustakaraya, 2010).

complex place in the litigation process. The situation of complexity is increasingly complicated, because evidence is related to the ability to reconstruct past events as truth. Even though the truth that is sought and realized in the civil justice process is not absolute truth, but is relative truth or even quite probable, searching for such truth still faces difficulties.¹²

The evidentiary process as one of the procedural processes in formal civil law is one of the most important processes. A case in court cannot be decided by a judge without prior evidence. Proof in the juridical sense itself is not intended to search for absolute truth. This is because the evidence, whether in the form of confessions, testimony or letters submitted by the parties to the dispute, may be false or forged. In fact, when examining every case submitted to him, the judge must provide a decision that is acceptable to both parties.¹³ In civil procedural law, regarding evidence in court there are 5 (five) pieces of evidence regulated in Article 1866 of the Civil Code which states that: 1) Written proof; 2) Evidence with witnesses; 3) Estimate; 4) Recognition; and 5) Oath.

Based on Article 1320 of the Civil Code, it is emphasized that there is no requirement that an agreement be made in writing. Thus, unwritten agreements/oral agreements also have binding force between the parties making the agreement/engagement. It is not uncommon for data relationships between parties to only take the form of agreements, but are not supported by evidence. In such problems, do not use workarounds non-litigation through litigation is also very difficult, because every argument that will be put forward must be there proven. This problem often occurs in oral agreements, where one of the parties his performance declined because according to him there was never an agreement. Therefore, evidence needs to be built so that legal action can be completed based on clear demands. In the formulation of Article 1865 of the Code Civil Law states that: "whoever claims a right must prove it". Therefore, if a legal incident occurs as mentioned above, legal evidence must be established so that legal action can be taken without valid evidence there is no basis for a solution.

For example, borrowing and borrowing money from hand to hand without proof of receipt, without any witness, while both parties acknowledge that the act was committed. In the formulation of Article 164 HIR, Article 284 RBg, and Article 1866 of the Civil Code, it is stated: "evidence that can be used to prove an argument consists of: written evidence; witness evidence; estimate; confession; and swear. Confession outside of court is not binding, so to strengthen the confession it must be legally constructed with witnesses. This legal construction with witnesses can be carried out for all legal acts without evidence, including agreements made orally, but provided that the witness has no family relationship with the parties (the formulation of Article 1910 of the Civil Code) and the witness is capable of acting according to the law (formulation of Article 1330 of the Civil Code).¹⁴ Therefore, it can be seen that normatively proving an unwritten agreement in civil court can be done, but empirically there are many challenges in proving it in litigation.

¹² Yahya Harahap, *Hukum Acara Perdata: Tentang Gugatan, Persidangan, Penyitaan, Pembuktian, Dan Putusan Pengadilan* (Jakarta: Sinar Grafika, 2007).

¹³ Sufirman and Khalid Hasbuddin Azhar Fachrizal and Rahman, "Analisis Hukum Putusan No. 29/Pdt. G/2019/PN Sgm Tentang Kekuatan Pembuktian Pada Perkara Perdata," *Qawaniin Jurnal Ilmu Hukum* 2, no. 1 (2021).

¹⁴ Jessica Esther Warouw, "Pembuktian Perjanjian Tidak Tertulis Di Hadapan Pengadilan Ditinjau Dari Kitab Undang-Undang Hukum Perdata Dan Rechtreglement Voor De Butengewesten," *LEX PRIVATUM* 9, no. 10 (2021).

CONCLUSION

An agreement is law for the parties who make it. Agreements can be made in written and unwritten form. This is in line with the regulations in Article 1338 of the Civil Code regarding the principle of freedom of contract. Therefore, making an agreement in unwritten form is valid as long as it does not conflict with Article 1230 of the Civil Code. However, because an agreement is a law for the parties who make it, unwritten law has many weaknesses compared to written law. Then, proving unwritten agreements in civil court also has various obstacles and barriers because agreements made in unwritten form must be accompanied by other evidence as regulated in Article 1866 of the Civil Code. This is of course an obstacle because it is very difficult to fulfill because witnesses as other evidence to confirm the existence of the unwritten agreement must come from witnesses who have no family relationship with the parties. Therefore, the recommendations given in this research are: 1) preventive measures or efforts need to be made before the agreement is made. So when making the agreement, make it a habit to involve witnesses who are not related to the parties or at least an agreement can be made in electronic form so that it can be proven in court if a dispute arises because an agreement in electronic form can also make things easier and shorten time. 2) It is necessary to take repressive measures or efforts after a dispute occurs, namely by resorting to mediation if it is difficult to fulfill other elements of evidence as regulated in Article 1866 of the Civil Code.

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