


# Problems in the Application of the Principle of Freedom of Contract in Commercial Property Lease Agreements

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Article Info	ABSTRACT
<p><b>Keywords:</b> Freedom of Contract Principle, Lease Agreement, Commercial Property, Standard Agreement</p>	<p>The development of business activities in Indonesia has driven high demand for commercial property, making lease agreements a frequently used legal instrument by business actors. This research aims to examine the problems of implementing the freedom of contract principle in commercial property lease agreements in Indonesia. The research method used is normative legal research with statutory and conceptual approaches, utilizing secondary data consisting of primary, secondary, and tertiary legal materials analyzed qualitatively. The research results show that the implementation of the freedom of contract principle faces problems in the form of unequal bargaining positions between property owners and tenants due to the widespread use of standard agreements drafted unilaterally. Many clauses are found to burden tenants such as imposing all repair costs, unilateral rent increases, and termination of agreements at any time by owners. Legal protection efforts can be made through the application of the good faith principle and proportionality principle as well as the provisions of Article 18 of the Consumer Protection Law which prohibits standard clauses that transfer business actor responsibilities. Therefore, the freedom of contract principle must be limited to achieve fairness for all parties.</p>
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## INTRODUCTION

The development of business activities in Indonesia has driven high demand for commercial properties such as shophouses, office buildings, shopping centers, and various other types of business premises. The need for strategically located business spaces has made commercial property lease agreements one of the most frequently used legal instruments by business actors. Legally, lease agreements are regulated in the Indonesian Civil Code (Kitab Undang-Undang Hukum Perdata/KUH Perdata), particularly from Article 1548 to Article 1600. Article 1548 of the Civil Code describes a lease as an agreement in which one party promises to provide enjoyment of an item to another party for a specified period, with payment agreed upon by both parties. As part of the law of obligations, commercial property lease agreements follow the general principles of contract law applicable in Indonesia.

The principle of freedom of contract is one of the important principles that holds a central position in Indonesian contract law. The existence of this principle can be inferred from the provisions of Article 1338 paragraph (1) of the Civil Code, which states that all

agreements made legally have the force of law for the parties who make them. The word "all" in this article implies that everyone has the right to make any agreement as long as it is done legally and does not violate laws, moral norms, and public order as regulated in Article 1337 of the Civil Code.

Although the principle of freedom of contract provides broad autonomy to the parties, its application in the practice of commercial property lease agreements faces various serious problems. The phenomenon of imbalance in agreements can be seen in various types of contracts, especially standard contracts that often contain unfair clauses. In the book "Contract Law: The Principle of Proportionality in Commercial Contracts," AgusYudhaHernoko discusses that commercial business contracts that emphasize respect for partnership and business continuity should consider equality in the exchange of rights and obligations between the parties involved. However, in reality, commercial property lease agreements often experience an imbalance in bargaining positions between property owners and tenants.

The main problem frequently encountered is the use of standard or boilerplate agreements prepared by property owners. According to Article 1 point 10 of Law Number 8 of 1999 concerning Consumer Protection, standard clauses refer to any rules or provisions and conditions that have been prepared and determined in advance unilaterally by business actors. These clauses are set forth in documents and agreements that are binding and must be fulfilled by consumers. With agreements prepared unilaterally, the position between property owners and tenants becomes unequal. Tenants often do not have the opportunity to negotiate the clauses contained in the agreement. This condition contradicts the essence of the principle of freedom of contract, which requires free and equal agreement between the parties.

In the practice of commercial property lease agreements, clauses that burden tenants are frequently found. For example, clauses requiring tenants to bear all repair costs even when the damage was not caused by their fault, clauses giving owners the right to increase rent unilaterally without clear limits, or clauses exempting owners from all forms of losses experienced by tenants during the lease period. It is not uncommon to find clauses stating that the owner may terminate the agreement at any time for certain reasons, while the tenant does not have the same right. Supreme Court Decision Number 3134 K/PDT/2010 dated July 26, 2011 affirms that tenants acting in good faith need legal protection. Thus, the lease agreement must remain valid until the agreed time expires, even though ownership of the leased object has changed hands. This is in accordance with Article 1576 of the Civil Code, which states that sale and purchase transactions do not cancel existing lease agreements.

Another problem that often occurs is related to the inclusion of exoneration clauses in commercial property lease agreements. Exoneration clauses refer to clauses that reduce or limit the liability of one party. Clearly, Article 18 of the Consumer Protection Law prohibits the inclusion of standard clauses that lead to the transfer of responsibility from business actors. Clauses that violate this provision will be considered null and void, so business actors need to adjust standard clauses that conflict with these legal provisions. Nevertheless, in practice, many commercial property lease agreements still contain such prohibited clauses,

indicating that the implementation of the principle of freedom of contract still requires stricter supervision and limitations to achieve justice in contracting.

The development of the principle of freedom of contract in civil law practice in Indonesia shows that this principle is no longer absolute but is limited by principles of propriety, justice, and public order. Several Supreme Court jurisprudences affirm legal protection for parties harmed due to positional imbalances in contracts. This shows a paradigm shift from a liberal approach to a more just approach. With the recognition of universal principles such as good faith and fair transactions in the business world, the main focus is ensuring that differences in interests between the parties involved are regulated through mechanisms for balanced distribution of obligations. The principle of proportionality regulates the exchange of rights and obligations of the parties in contracting according to their proportions, from before the contract is made until the contract is executed.

Based on the background described above, this research aims to examine in depth the problems of applying the principle of freedom of contract in commercial property lease agreements in Indonesia. This research will analyze how the principle of freedom of contract is applied in the practice of commercial property lease agreements, what legal problems arise from the application of this principle, and what legal remedies can be taken to provide protection to aggrieved parties. Additionally, this research aims to examine the role of the principle of good faith and the principle of proportionality in achieving a balance of rights and obligations between parties in commercial property lease agreements. Thus, this research is expected to contribute to the development of civil law science, particularly in the field of contract law, and serve as a reference for legal practitioners, business actors, and the general public in understanding their rights and obligations in commercial property lease agreements.

## METHODS

The object of this research is commercial property lease agreements covering shophouses, office buildings, kiosks, and business spaces in shopping centers between property owners and tenants. This research is descriptive in nature with the aim of providing data as detailed as possible regarding humans, situations, or other phenomena. This descriptive research begins by collecting data related to the discussion and then interpreting that data to obtain a clear understanding of the phenomena being studied. In this context, the author will describe the problems in implementing the principle of freedom of contract in commercial property lease agreements, as well as the legal consequences resulting from such implementation.

The type of research used is normative legal research, also known as library research, which is conducted by examining library materials or secondary data. This data includes primary, secondary, and tertiary legal materials. This research analyzes legal norms in legislation related to the principle of freedom of contract and lease agreements, as well as analyzes their application in the practice of commercial property lease agreements in Indonesia.

The approaches used in this study include the statutory approach and the conceptual approach. In the statutory approach, analysis is conducted on all legal rules related to the legal issues being studied, including the Civil Code focusing on provisions regarding agreements and leases, as well as Law Number 8 of 1999 concerning Consumer Protection. Conversely, the conceptual approach is conducted by understanding various views and doctrines developing in the legal field, particularly related to the principle of freedom of contract, the principle of good faith, the principle of proportionality, and standard agreements.

In this research, the data sources collected consist of secondary data obtained through literature study. Secondary data includes primary legal materials such as the Civil Code, Law Number 8 of 1999 concerning Consumer Protection, Government Regulation Number 44 of 1994 concerning Occupation of Houses by Non-Owners, and court decisions related to the research topic. Academic books, legal journals, research results, scientific articles, and opinions of legal experts related to contract law and the principle of freedom of contract are also included. Additionally, tertiary legal materials in the form of legal dictionaries and encyclopedias are used to clarify legal terms used in this research.

Data collection techniques are conducted through document study or literature study by reading, studying, and analyzing legal materials related to research problems. This literature study is conducted to obtain theoretical foundations and information needed to answer the research questions that have been established. All legal materials that have been collected are then inventoried and classified systematically according to the problems being studied.

The data analysis approach applied in this research is qualitative analysis. The collected data is then processed qualitatively by presenting the data in the form of sentences structured systematically, clearly, and in detail. Qualitative analysis is conducted by interpreting the provisions of legislation related to the principle of freedom of contract and lease agreements, then connecting them with legal theories and expert opinions to subsequently draw conclusions to answer the problems being studied. Conclusions are drawn using the deductive method, which is a thinking approach from general matters to specific conclusions related to the issues being studied in this research.

## RESULTS AND DISCUSSION

### **Definition of the Principle of Freedom of Contract and Commercial Property Lease Agreements**

An agreement is a legal act that requires the parties involved to fulfill certain obligations that have been agreed upon. Based on Article 1313 of the Civil Code, an agreement is described as an act in which one or more persons make a commitment to one or more other persons. For an agreement to be declared valid and have binding legal force, the agreement must comply with the four conditions in Article 1320 of the Civil Code, namely the existence of consent from the related parties, the capacity to make a commitment, the existence of a specific subject matter, and a lawful cause. These four conditions are cumulative, meaning all conditions must be met simultaneously for the agreement to be legally valid.

The principle of freedom of contract is one of the fundamental principles in Indonesian contract law. This principle is contained in Article 1338 paragraph (1) of the Civil Code, which states that agreements made legally have legal force equivalent to law for the parties involved. In the context of this article, the word "all" indicates that everyone has the freedom to make any agreement, with anyone, and with any content, as long as the agreement is made legally and does not conflict with law, moral norms, and public order as regulated in Article 1337 of the Civil Code. According to Subekti in his book *Contract Law*, the principle of freedom of contract gives the parties the freedom to determine the contents of the agreement as they wish, and the agreement will bind them as law would.

In his book titled "*Contract Law: The Principle of Proportionality in Commercial Contracts*," AgusYudhaHernoko explains that the principle of freedom of contract can be found implicitly in Article 1338 of the Civil Code. This principle grants authority to the parties to establish or choose the basis of the agreement they will form, determine the object of the agreement, determine the format of the agreement, decide whether to follow or deviate from supplementary legal provisions, and choose with whom the agreement will be made. However, this freedom is not absolute. The parties need to pay attention to the limitations set by applicable regulations, namely they must not conflict with mandatory law, public order, and moral norms.

Provisions regarding lease agreements are specifically contained in Book III Chapter VII of the Civil Code, covering Articles 1548 to 1600. Based on Article 1548 of the Civil Code, a lease is defined as an agreement in which one party commits to providing enjoyment of an item to another party for a certain period, with payment of a price agreed upon by the second party. From the formulation of this article, it can be concluded that the main elements in a lease agreement involve the parties, namely the lessee and the lessor, the existence of a lease object which can be movable or immovable property, the existence of a specified lease period, and the mutually agreed rental price.

According to R. Subekti, lease agreements, similar to sale and purchase agreements and various other agreements, are consensual in nature. This means that the agreement for a lease is considered valid and legally effective when both parties have reached an agreement on the main elements, namely the item to be leased and the amount of the rental price. Therefore, lease agreements do not need to fulfill special formalities to be considered valid, although in practice written agreements are highly recommended to prevent future disputes. This differs from certain agreements that require a written form or notarial deed as a condition of validity.

Commercial property in lease agreements includes various types of buildings used for business or commercial activities, such as shophouses, office buildings, kiosks in shopping centers, business spaces in malls or plazas, warehouses, and industrial buildings. Commercial property lease agreements have different characteristics from residential property leases. In commercial property leases, the transaction value tends to be higher, the duration is longer, and involves various additional clauses related to business operations such as maintenance costs, service charges, parking fees, and provisions regarding renovation or interior changes. Due to the high economic value and significant impact on the

continuity of the tenant's business, commercial property lease agreements require special attention in their preparation so that the rights and obligations of the parties can be protected in a balanced manner.

In lease agreements, there are a number of rights and responsibilities that must be complied with by each party involved. According to Article 1550 of the Civil Code, the owner or lessor is obligated, based on agreement alone without requiring a special promise, to deliver the leased item to the lessee. Additionally, they must maintain the condition of the item so that it remains usable according to its purpose and allow the lessee to use the item comfortably during the lease period. Meanwhile, the lessee also has obligations as regulated in Article 1560 of the Civil Code, namely to use the leased item as a good head of household would according to the purpose that has been agreed upon and to pay the rental price at the specified time.

### **Problems in Implementing the Principle of Freedom of Contract in Commercial Property Lease Agreements**

The implementation of the principle of freedom of contract in commercial property lease contractual relationships in practice often gives rise to various legal problems. One of the most fundamental issues is the imbalance in bargaining positions between property owners and prospective tenants. In commercial property lease transactions, property owners are generally in a stronger position because they have full control over the object to be leased. This condition is exacerbated by the high demand for strategic locations for business activities, so prospective tenants often have no choice but to accept terms determined unilaterally by property owners. According to Sutan Remy Sjahdeini in his article titled "Freedom of Contract and Balanced Protection for Parties in Bank Credit Agreements in Indonesia," the principle of freedom of contract will be achieved fairly if the parties to the contract have equal standing.

Another problem that often arises is the use of standard or boilerplate agreements in commercial property lease transactions. Mariam DarusBadruzaman in her book *Various Business Laws* explains that a standard agreement is an agreement whose contents are standardized and set forth in a certain form, where one party has prepared standard terms on an agreement form and the other party is only in a position to accept or reject the agreement. The use of standard agreements in commercial property leases does provide efficiency in the transaction process, but on the other hand also has the potential to cause injustice to tenants. Tenants often do not have the opportunity to negotiate or change the contents of the agreement, so they must accept all clauses that have been determined by the property owner even though some of them may be detrimental to their interests.

In the practice of commercial property lease agreements, there are various clauses that often cause problems for tenants. The clause on charging all repair costs to the tenant is one of the most commonly found. Yet according to Article 1551 of the Civil Code, the lessor should be obligated to deliver the leased item in a fully maintained condition. Other problematic clauses include provisions for unilateral rent increases without clear limits, provisions for unilateral termination of the agreement by the property owner without clear reasons, clauses transferring all risks to the tenant, and clauses prohibiting the tenant from

filing any objections or claims against the property owner. Such clauses clearly do not reflect the true principle of freedom of contract because they are made without a balance of will from both parties.

Law Number 8 of 1999 concerning Consumer Protection (UUPK) has regulated limitations on the inclusion of standard clauses in agreements. Article 18 of UUPK expressly prohibits business actors from including standard clauses stating the transfer of business actor responsibility, stating the right of business actors to refuse acceptance of goods purchased by consumers, stating the right of business actors to refuse refunds for goods or services purchased by consumers, stating the granting of authority from consumers to business actors to take unilateral action regarding goods purchased by consumers, and stating that consumers are subject to regulations in the form of new rules, additions, continuations, or further changes made unilaterally by business actors. Standard clauses containing such matters are declared null and void by law. Although UUPK is more aimed at protecting consumers in the narrow sense, these provisions can serve as a reference in assessing the validity of clauses in commercial property lease agreements.

One common problem that often arises in commercial property lease agreements is related to breach of contract by one of the parties. Breach of contract, or default, occurs when one party fails to fulfill their obligations in accordance with the agreement. Several forms of breach of contract in this context include late payment of rent, delivering property that is not in good and proper condition, using property not in accordance with the agreed purpose, making changes or renovations without the owner's consent, and subleasing the property to third parties without permission. According to Article 1243 of the Civil Code, the party harmed by breach of contract is entitled to claim reimbursement of costs, losses, and interest. However, in reality, dispute resolution due to breach of contract in commercial property lease agreements often requires a long time and high costs.

Problems regarding termination of lease agreements also often cause disputes between property owners and tenants. Based on Article 1570 of the Civil Code, if a lease agreement is made in written form, then the agreement will end by operation of law when the specified period has passed without any notice being required. However, in practice, there are often differences in interpretation regarding the end of the lease period, automatic lease extension, and the tenant's priority right to extend the lease period. Problems also often arise when the property owner wants to terminate the lease agreement before the end of the agreed period, for example because they want to sell the property or use it for their own purposes. In this case, Article 1576 of the Civil Code actually protects the tenant's interests by affirming that transfer of ownership through sale and purchase does not terminate a pre-existing lease agreement. However, clauses in standard agreements often deviate from this provision by giving the owner the right to terminate the lease unilaterally.

### **Legal Protection Efforts and Application of the Principles of Good Faith and Proportionality in Commercial Property Lease Agreements**

To address various problems in implementing the principle of freedom of contract in commercial property lease agreements, adequate legal protection efforts for the parties are needed, especially tenants who are often in a weaker position. These legal protection efforts

can be made through the application of other contract law principles that function as limiters and balancers of the principle of freedom of contract, namely the principle of good faith and the principle of proportionality. Both principles play an important role in realizing justice and balance in the contractual relationship between property owners and tenants.

The principle of good faith is a principle that requires the parties to execute agreements with honesty, propriety, and fairness. Article 1338 paragraph (3) of the Civil Code explicitly affirms that agreements must be executed based on good faith. According to Ridwan Khairandy in his book *Good Faith in Contracts in Various Legal Systems*, good faith in agreements has two meanings, namely good faith in a subjective sense and good faith in an objective sense. Good faith in a subjective sense relates to the inner attitude or honesty of a person in making an agreement, while good faith in an objective sense relates to propriety and fairness in the execution of agreements. In commercial property lease agreements, the application of the principle of good faith requires property owners not to include clauses that clearly harm tenants and requires tenants to use the leased object according to the agreed purpose and pay rent on time.

Article 1339 of the Civil Code also supports the implementation of the principle of good faith by stating that agreements are not only valid for matters expressly stated therein, but also for all matters which by the nature of the agreement are required by propriety, custom, or law. This provision provides a legal basis for judges to assess whether a clause in a commercial property lease agreement complies with applicable propriety and custom. If there are clauses that conflict with propriety, the judge may declare such clauses non-binding even though they have been agreed upon by the parties. Thus, the principle of good faith functions as a correction mechanism against abuse of the principle of freedom of contract by parties with stronger bargaining positions.

The principle of proportionality plays an important role in creating fairness in commercial property lease agreements. AgusYudhaHernoko states that this principle serves as the basis for the exchange of rights and obligations of the parties involved, according to their portions in the overall contract process. This principle differs from the principle of balance, which emphasizes more on mathematical balance between performance and counter-performance. The principle of proportionality emphasizes more on the fair and reasonable distribution of rights and obligations by considering the capabilities and contributions of each party. In commercial property lease agreements, the application of the principle of proportionality can be seen from the proportional distribution of risk burdens between owners and tenants, determination of reasonable rental prices according to the conditions and facilities provided, and fair distribution of maintenance responsibilities between the parties.

Implementation of the principle of proportionality in the pre-contract phase provides opportunities for the parties to negotiate and exchange rights and obligations in a balanced and fair manner. Therefore, negotiation processes conducted in bad faith or by exploiting weaknesses in the other party's bargaining position are not proportional and must be rejected. In the contract execution phase, the principle of proportionality ensures that the implementation of agreement clauses must be carried out proportionally according to the

proportion of rights and obligations that have been agreed upon. If disputes occur, the principle of proportionality becomes the basis for judges to assess whether an agreement has fulfilled the principle of fairness or not. Disproportionate agreements may be requested for cancellation or modification by the aggrieved party through available legal mechanisms.

Other legal protection efforts can be made through effective and efficient dispute resolution. Article 6 paragraph (1) of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution states that disputes or differences of opinion in civil matters can be resolved by the parties through alternative dispute resolution methods based on good faith. These alternative methods include consultation, negotiation, mediation, conciliation, and expert assessment. Dispute resolution through non-litigation channels has several advantages compared to litigation, namely faster process, lower costs, confidential nature, and can maintain good relations between the parties. In the practice of commercial property lease agreements, it is advisable to include clauses regarding dispute resolution mechanisms that give the parties the opportunity to resolve disputes through deliberation first before bringing the case to court.

If litigation is unsuccessful, the parties can take the litigation route by filing a lawsuit to the district court. According to Article 1266 of the Civil Code, cancellation of an agreement on the basis of breach of contract must be requested through a judge and does not occur automatically. The aggrieved party may file a breach of contract lawsuit demanding performance of the agreement, cancellation of the agreement, compensation, or performance of the agreement accompanied by compensation. If there are standard clauses that conflict with Article 18 of UUPK, then those clauses can be declared null and void by the court. Supreme Court decisions in several lease cases have also provided protection to tenants by canceling agreements deemed unfair or contrary to public interest, thus showing that freedom of contract can no longer be interpreted absolutely.

To prevent disputes in the future, parties to commercial property lease agreements should pay attention to several important matters in drafting agreements. Agreements should be made in writing containing complete identities of the parties, a clear description of the leased object, lease period, amount and payment mechanism of rental price, detailed and balanced rights and obligations of each party, provisions regarding maintenance and repairs, provisions regarding renovation or modification of the leased object, provisions regarding termination of the agreement, and dispute resolution mechanisms. Agreements made before a notary in the form of notarial deeds will have stronger evidentiary power in court. With proper and balanced agreement drafting based on the principles of good faith and proportionality, the problems in implementing the principle of freedom of contract in commercial property lease agreements can be minimized.

## CONCLUSION

The application of the principle of freedom of contract in commercial property lease agreements in Indonesia faces various serious problems. The main problem lies in the imbalance of bargaining positions between property owners and tenants, where property owners generally have a stronger position because they control the object to be leased. This

condition is worsened by the widespread use of standard agreements prepared unilaterally by property owners, so tenants do not have the opportunity to negotiate the clauses contained therein. As a result, many clauses are found that burden tenants, such as charging all repair costs to the tenant, unilateral rent increases without clear limits, termination of the agreement at any time by the owner, and transfer of all risks to the tenant. Such clauses clearly deviate from the essence of the principle of freedom of contract, which should be based on free and equal agreement between the parties.

Legal protection efforts against these problems can be made through the application of the principle of good faith as regulated in Article 1338 paragraph (3) of the Civil Code and the principle of proportionality which regulates the distribution of rights and obligations of the parties fairly according to their respective proportions. The principle of good faith requires the parties to make and execute agreements with honesty and propriety, while the principle of proportionality ensures that the exchange of rights and obligations is carried out reasonably by considering the capabilities and contributions of each party. Additionally, Article 18 of the Consumer Protection Law also provides protection by prohibiting the inclusion of standard clauses that transfer business actor responsibility, where clauses that violate this provision are declared null and void by law. Dispute resolution can be pursued through non-litigation channels such as negotiation and mediation which are faster and cheaper, or through litigation to court if deliberation fails. Thus, the principle of freedom of contract in commercial property lease agreements can no longer be interpreted absolutely, but must be limited by the principle of good faith, the principle of proportionality, and provisions of legislation to create justice and.

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