

# Analysis of The Principle of Freedom of Contract In A Work Agreement Containing Non-Competition Clause

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## ABSTRACT

Legal relations between workers and companies is inseparable from work agreements. The formation of work agreements between workers and companies must be in accordance with legal requirements and agreement principles. One of the principles used is the principle of freedom of contract as stipulated in Article 1338 *Burgelijk Wetboek voor Indonesie* (BW). However, the existence of a company that includes a non-competition clause in a work agreement is one of the preventive measures in order to maintain the company's trade secrets which results in limited space for workers and is contrary to several laws and regulations. This study aims to analyze the principle of freedom of contract in a work agreement that contains a non-competition clause.

This is a normative juridical method research with a comparative approach to compare laws and regulations governing the principle of freedom in contracting with non-competition clause of the work agreement. Analytical descriptive is used to describe the principle of freedom in contract with the theory of non-competition clause, thus, this research is qualitative research. However, the principle of freedom of contract cannot be interpreted as absolutely free, the essence must be a balance between the rights and obligations of workers and companies in work agreements. In the inclusion of non-competition clauses, it can limit the movement of workers to find work and this clause basically contradicts several regulations relating to the right to get a job. Work agreement containing non-competition clause does not meet the legal agreement. Therefore, it can be canceled by law based on the provisions of Article 52 paragraph (3) of Law Number 13 Year 2003 concerning Labor.

**Keywords:** the principle of freedom of contract, Non-competition clause

## 1. INTRODUCTION

The lack of jobs and the high qualifications demand in finding workers creates many requirements for workers. However, this condition still makes many people willing to be bound by any situation and with many conditions determined by the company, even with unnegotiated work agreements.

Agreement according to Article 1313 *Burgelijk Wetboek* (BW) or better known as the Civil Code is an "Act where one person or more ties himself to one person or more." In the case of work, an agreement arising from an agreement is called work agreement, where the rights and obligations

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between the company and workers are contained in it. Work agreements according to Article 1 number 14 of Act Number 13 of 2003 concerning Manpower (Labor Law) state that, "Work agreements are agreements between workers/laborers with employers that contain work conditions, rights, and obligations the parties."

Work agreements made by companies and workers bind both parties according to their respective rights and obligations. This is in accordance with the provisions of Article 1338 paragraph 1 BW states that, "All agreements made in accordance with the law apply as laws for those who make them." The provisions of the Article contain the principle of freedom of contract. With the existence of the principle of freedom of contract, the work agreement and the contents of the free agreement are determined by the worker and the company and are binding as the Act for the parties.

Non-competition clause according to The Law Dictionary (Featuring Black's Law Dictionary 2<sup>nd</sup> Edition) is defined as, "A clause in a business sale transaction that denied access to the seller from conducting a similar business in the specified area for a certain period of time, usually three years." Definisi yang dijabarkan oleh *The Law Dictionary* fokus kepada kondisi dimana antara para pihak tidak boleh melakukan pekerjaan yang sama dalam periode tertentu. The work agreement contains a non-competition clause; where workers may not do the same work for a certain period. This is one of the preventive measures taken by the company to maintain the company's trade secrets that have economic value.

The existence of the principle of freedom of contract allows companies and workers to make a non-competition clause in the employment agreement between them. However, non-competition clauses limit the space for workers because indirectly when workers have quit the company, workers are not allowed to work in similar company both within a certain period of time and unlimited time. This is contrary to Article 27 paragraph (2) of the 1945 Constitution which states that, "Every Citizen has the right to work and livelihood that is appropriate for humanity."

*Non-competition clause* tersebut menimbulkan pro kontra, di sisi lain adanya kekosongan hukum dimana klausula ini dilarang secara tegas oleh pemerintah dalam suatu peraturan perundang-undangan sehingga perusahaan masih dapat menggunakannya, ketidakpahaman pekerja pun membuat klausula ini dianggap dapat digunakan dan merupakan suatu kewajiban bagi pekerja walaupun sudah tidak bekerja pada perusahaan tersebut.

Based on the brief description above, the authors are interested in analyzing the principle of freedom of contract in a work agreement containing non-competition clause.

## 2. METHOD

The approach method used in this study is Normative Jurisdiction with the reason that this study uses a statute approach and conceptual approach to legislation governing agreements, the principle of freedom of contract, non-competition clause in work agreements. Those aspects are then compared with each other with use the basis of applicable legislation and existing legal theory.

This study uses specification descriptive analysis because it describes the laws and regulations that apply with the principle of freedom of contract and the theory of non-competition clause. Therefore, this research is a qualitative research, i.e a method that emphasizes the research process on the formulation of the problem to construct a complex and holistic legal phenomenon<sup>3</sup>.

## 3. FINDING AND DISCUSSION

### General Review of Work Agreements

Agreement in the provisions of Article 1313 Burgelijk Wetboek voor Indonesie (BW) or also known as the Civil Code is an "Act where one person or more ties himself to one or more people." The agreement must fulfill the legal conditions of the agreement in accordance with Article 1320 BW, they are:

1. The agreement of those who bound themselves;
2. Skills for creating an engagement;
3. A particular subject matter;
4. A cause that is not forbidden.

Legal relations between workers and companies are basically contained in an agreement called a work agreement. Workers according to Article 1 number 3 of Act Number 13 of 2003 concerning Manpower (Labor Law) are, "Every person who works by receiving wages or other forms of remuneration." While employers in Article 1 point 5 of the Manpower Act are defined as:

- a. An individual, partnership, or legal entity that runs a self-owned company;
- b. Individuals, partnerships, or legal entities that independently run the company are not theirs;
- c. Individuals, partnerships, or legal entities located in two Indonesia represent the companies as referred to in letters a and b domiciled outside the territory of Indonesia.

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<sup>3</sup> Petrus Soerjowinoto, Et.al, 2006, *Buku Pedoman Metode Penelitian Karya Hukum & Skripsi*, Semarang: Fakultas Hukum Unika Soegijapranata, p. 5.

Work agreement must fulfill the basic requirements as stated in Article 52 (1) of the Manpower Act, namely:

- a. Both side agreement;
- b. Ability or ability to carry out legal actions;
- c. The existence of the work agreed; and
- d. The promised work does not conflict with public order, decency, and legislation.

In his book Lanny Ramli said that for the validity of the labor agreement, formal material requirements and requirements were requested. The material requirements are the legal requirements of an agreement, namely<sup>4</sup>:

1. Prohibited from containing rules that require an employer to only reject or accept workers from particular group only, whether in relation to religion, national or national class, or because of political beliefs or union members of a society.
2. Prohibited from containing rules that require a worker to only work or not be able to work for an employer of a group, whether in relation to religion, national or national group, or because of political beliefs or members of an association.
3. Prohibited from containing rules that are contrary to the Law on public order and moral conduct.

There are 2 (two) legal consequences of a work agreement that are not in accordance with the legal terms of the work agreement according to Article 52 paragraph (2) and (3) of the Manpower Act, namely:

- (1) Work agreements made by the parties that are contrary to the provisions referred to in paragraph (1) letters a and b can be canceled.
- (2) Work agreements made by the parties that are contrary to the provisions referred to in paragraph (1) letters c and d are null and void by law.

In seeking employment, workers are protected by the state as stated in a number of laws and regulations, namely:

1. Article 27 paragraph (2) of the 1945 Constitution which states that, "Every Citizen has the right to work and livelihood that is appropriate for humanity."

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<sup>4</sup> Lanny Ramli, 2008, *Hukum Ketenagakerjaan*, Surabaya: Airlangga University Press, p. 28.

2. Article 38 paragraph (2) of Law Number 39 of 1999 concerning Human Rights which states that, "Every person has the right to freely choose the job he likes and has the right to fair employment conditions."
3. Article 5 of Law No. 13 of 2003 Employment which states that, "Every workforce has the same opportunity without discrimination to obtain employment."  
Article 61 paragraph (1) of the Manpower Act states matters which cause the end of an agreement. Work agreements can expire if:
  - a. Workers die;
  - b. End of work period;
  - c. The existence of court decisions and/or stipulation of institutions for settlement of industrial relations disputes that have permanent legal force; or
  - d. There are certain circumstances or events that are included in the work agreement, company regulations, or cooperation agreements that can cause the end of the employment relationship.

## **Overview of the Principle of Freedom of Contract**

Agreement law contains several important principles which are the basis of the parties' will in achieving the goal. Some of these principles are<sup>5</sup>:

1. The principle of consensualism, with the adjustment of the will of the agreement.
2. The principle of binding power, both parties are bound by an agreement in the agreement they made.
3. The principle of freedom of contract, everyone is free to hold and determine the contents of the agreement.

The freedom for the community to be able to make their own agreement rules that deviate from what is provided by BW, makes the terms of the agreement will be able to reach unlimited areas<sup>6</sup>. This is an openness for one party with the other party to make a bond without any restrictions other than those regulated by BW provisions. Through the agreement, the community is given the freedom to set their own business needs, whether it is enough to use what is provided by the rules in BW, welcome to use it<sup>7</sup>. This provision is a principle of freedom of contract provided by a regulatory designer on the basis that business / economic activities will continue to

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<sup>5</sup> I made Sara, Et.Al., 2018, *Aspek Hukum dalam Bisnis*, Sidoarjo: Indomedia Pustaka, p. 6.

<sup>6</sup> Moch. Isnaeni, 2017, *Selintas Pintas Hukum Perikatan (Bagian Umum)*, Surabaya: PT. Revka Petra Media, p. 77.

<sup>7</sup> *Ibid*, p. 78.

develop and this is one way of adjusting regulations. According to Article 1338 BW which states that, "Agreements made legally apply as laws for those who make them."

The scope of the principle of freedom of contract is interpreted by Sutan Remy Sjahdeini as follows<sup>8</sup>:

1. Freedom to make and not make agreements;
2. Freedom to choose with whom he wants to make an agreement;
3. Freedom to choose causa agreement to be made;
4. Freedom to determine the object of an agreement;
5. Freedom to determine the form of an agreement;
6. Freedom to accept or deviate optional legal provisions.

However, the freedom of the parties to make the contents of the agreement cannot be interpreted as absolute freedom, but still there must be limits. Indeed, the principle of freedom of contract contains an understanding of the balance of rights and obligations of the parties. The freedom of the parties to make an agreement does not always reflect the balance of the position of the parties in the agreement<sup>9</sup>. One party is often charged more rights than the other party because the position of one party is weaker. Implementation of freedom of contract must pay attention to several things, namely<sup>10</sup>:

1. Freedom of contract alludes directly to aspects of justice. The freedom of contract that is reflected in the clauses of the agreement must pay attention to the balance aspects of the rights and obligations of each party. The balance of rights and obligations is not in the same and equal sense, but the balance in question is a balance that takes into account the position or position and the proportion of rights and obligations that should be on the part of each party.
2. Freedom to contract is limited by general norms, such as propriety, decency, and other general norms.

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<sup>8</sup> Sutan Remy Sjahdeini, 1993, *Kebebasan Berkontrak dan Perlindungan yang Seimbang bagi Para Pihak dalam Perjanjian Kredit di Indonesia*, Jakarta: Institut Bankir Indonesia, p. 61.

<sup>9</sup> <https://drive.google.com/file/d/0B5UQVcJ8Df8WR1hFd1BUNC1ZZG8/view> diunduh pada tanggal 19 April Pukul 15.49 WIB.

<sup>10</sup> *Ibid*

3. Freedom to contract is also limited by the principle of propriety in imposing obligations on other parties. Even if the parties are free to declare their will regarding an achievement that will be borne by another party, this still has to pay attention to the factual ability of the party to be burdened with obligations. Compliance is therefore one measure that limits the application of the principle of freedom of contract.

### **Overview of Trade Secrets**

In Indonesia, the protection of trade secrets has been regulated in Law Number 30 of 2000 concerning Trade Secrets. Trade secrets are defined as Article 1 paragraph (1) Trade Secret Law as, "Trade Secrets are information that is not known by the public in the field of technology and / or business, has economic value because it is useful in business activities, and is kept confidential by the owner of the Trade Secret . In practice certain steps can be taken to maintain trade secrets including<sup>11</sup>:

1. Disclose trade secrets only to people who need to know them on the basis of a trade secret agreement.
2. Make trade secret agreements with employees or third parties.
3. Store confidential data by creating a secret code.
4. Store confidential documents in a safe place and cannot be easily accessed by employees or other parties.
5. Include the word "secret" on the outside of the confidential document.
6. Limiting employee access to other units or departments of a company.
7. Prohibiting employees from working outside specified working hours.

Basically the government has protected the company in terms of trade secrets as Article 17 of the Trade Secret Law states that, "Violations of trade secrets can be subject to a maximum jail sentence of 2 (two) years and/or a maximum fine of Rp. 300,000,000.00 (three hundred million rupiah). "

### **Overview of Non-Competition Clause**

Non competition clause according to The Law Dictionary (Featuring Black's Law Dictionary 2<sup>nd</sup> Edition) is defined as a clause in a business sale transaction that denied access to the

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<sup>11</sup> Iman Sjahputra Tunggal dan Heri Herjandono, 2000, *Rahasia Dagang (Trade Secret) Seluk Beluk Tanya Jawab, Teori dan Praktek*, Jakarta: Harvarindo, p. 28-29.

seller from conducting a similar business in the specified area for a certain period of time, usually three years<sup>12</sup>.

Generally, non-competition clauses are used by companies in the form of articles which state that they may not work in similar companies in a certain time. This was proposed by the company in an effort to prevent the company from experiencing losses related to trade secrets. In a work agreement generally a non-competition clause is included, as follows:

While in a work relationship, workers will not, without the consent of the company, be involved in other employment relationships, freelance work, consulting work, both paid and voluntary, unless prior written approval from the Company has been obtained. As of the signing of this agreement up to 24 (twenty four) months from the last date of work, the worker will not:

- a. Conduct, establish or obtain ownership or top ownership or top economic interests; or
- b. Employed, involved or subject to any way as an advisor to;

Every business that is similar can compete, either directly anywhere in Indonesia.

Non competition clause can be interpreted as an obligation to do nothing. In Article 1234 BW states that an agreement which is a form of achievement / obligation is "to do nothing". So actually the person concerned is burdened with a "prohibition" to do a certain legal act.

The Netherlands is one of the countries that has become Indonesia's guideline for the implementation of its law, the application of the non competition clause itself in the Netherlands has been applied with certain conditions concerning the type of work agreement, namely:

“The inclusion of a non-competition clause in a Dutch fixed-term employment agreement concluded for a maximum duration of six months is not permitted. This is indeed possible in fixed-term employment contracts lasting longer than six months, but only if the employer can demonstrate that a compelling business or service interest exists for the inclusion of such a clause. Justification of this interest is required in the employment agreement. Without justification, the clause is not valid. For permanent employment contracts, the requirement of justifying a compelling business or service interest in the employment agreement does not apply”.<sup>13</sup>

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<sup>12</sup> Moch. Isnaeni, Op.Cit., p.185.

<sup>13</sup> <https://www.amsadvocaten.com/practice-areas/employment-law/the-non-competition-clause/>  
downloaded on 15 August 2018 at 23.00 WIB.



The above statement is one example that a non-competition clause can be used in a work agreement provided that the type of work agreement has a period of more than 6 (six months), but it will not apply to employment agreements with permanent workers. Other provisions regarding non-competition clause, namely:

“A non-compete clause prohibits employees for a certain period beyond the term of their employment contract from being directly or indirectly active or involved in a business performing similar activities. Starting point is that a non-compete and non-solicitation clause are not valid in temporary contracts. The reason for this is that it would doubly disadvantage the employee: such a provision obstructs the transition to another job while it is clear from the beginning of the contract that it is just a temporary one. A provision is valid only if it contains the substantial business interests which require such a provision. If the employer has provided reasons but they fail to convince the court, the provision can be declared void retrospectively”.<sup>14</sup>

This statement explains that non competition clauses can be used only in non-permanent employment agreements. In addition, the employment agreement that has a non-competition clause will be followed by a penalty clause. The purpose of the penalty clause is that if the worker is proven to violate the provisions of the non-competition clause, the worker must pay a fine in the amount specified in the agreement. This is considered as a form of material or immaterial loss from the company.

The principle of freedom of contract that arises from *Burgelijk Wetboek voor Indonesie* (BW) basically enables the existence of the creation of non-competition clauses in work agreements for workers and companies along with the times to prevent any trade secret leaks by workers who stop in the company. However, the principle of freedom of contract is not merely free, but means free is limited because of other laws and regulations.

Actually, there is no direct provision of legislation that prohibits the use of non-competition clauses. So that for the company it is still possible to use this clause in the work agreement. Indeed, basically the government has protected the company in terms of trade secrets as Article 17 of the Trade Secret Law states that, "Violations of trade secrets can be subject to a maximum of 2 (two) years imprisonment law and / or a maximum fine of Rp. 300,000,000.00 (three hundred million rupiah). "

Even though it has been protected by the government, delinquents from workers who seek profit from the economic value of the trade secrets still occur. The company also thinks that one of

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<sup>14</sup><https://www.russell.nl/publication/non-compete-clause-non-solicitation-clause-temporary-contract> downloaded on August 15, 2018 at 23.10 WIB.

the preventive measures is to use a non-competition clause on the basis of the principle of freedom of contract. However, if the principle of freedom of contract is broadly interpreted, it is feared that there will be more provisions from companies that will violate the basic principles of legislation. So that the principle of freedom of contract must be strictly limited so that it is not misinterpreted.

#### **4. CONCLUSION**

Not all work agreements contain non-competition clauses, but there are still some companies that still use this clause, generally this is an attempt by the company to maintain the trade secrets that workers know while working at their company so that they are not known by other companies. This article is expected by the company to be able to keep workers from taking advantage of the economic value of trade secrets with other companies if the worker has quit his job.

Companies with the principle of freedom of contract can basically make a clause like this with Article 1338 Burgelijk Wetboek voor Indonesie (BW). Employers and workers if they agree to implement this article as a company right and obligation for workers. However, the principle of freedom of contract cannot be interpreted as absolutely free, the essence must be a balance between the rights and obligations of workers and companies in work agreements. In the inclusion of a non-competition clause it can limit the movement of workers to find work and this clause basically contradicts several regulations relating to the right to get a job. So that it can be said that the work agreement which contains the provisions of this clause does not meet the legal requirements of the agreement. If it continues to be applied, then this clause can be declared null and void in accordance with the provisions of Article 52 paragraph (3) of Law Number 13 Year 2003 concerning Labor.

#### **SUGGESTION**

The principle of freedom of contract indeed frees the company and workers to make the contents of the agreement or agreement in accordance with the agreement of the parties. However, this freedom is relative where there are some things that are not contradictory. Therefore Article 1338 Wetboek voor Indonesie Burgelijk can also be used in an agreement called a confidentiality agreement. Generally a confidentiality agreement is an accesoir agreement from a work agreement as a preventive effort for the company to maintain trade secrets. The contents of the confidentiality agreement essentially regarding the obligations of workers while still working or if they have stopped working to keep all known secrets about the company while they work, do not allow to

provide such information to any party and are bound by Law No. 30 of 2000 concerning Trade Secrets .

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