

**Controle do Contrato de Princípio da Liberdade no Sistema de Venda de Projeto Pré**

**Control of Freedom Principle Contract in the Pre Project Selling System**

**Control del Contrato de Principio de Libertad en el Sistema de Venta del Proyecto**

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**Resumo**

A venda pré-projeto é a venda antes da construção do projeto, onde o imóvel que está sendo vendido é apenas uma figura ou conceito. Esse conceito de marketing se tornou uma tendência na era moderna, especialmente para o desenvolvedor. O princípio da liberdade de contrato em um contrato é uma base obrigatória em termos de contratos nas transações de venda pré-projeto. No contrato do cliente feito no formulário de redação padrão que foi previamente preparado pelo desenvolvedor. Isso significa que todos os termos e condições foram estabelecidos pelo próprio desenvolvedor e, em seguida, o consumidor precisará apenas aprovar ou rejeitar o contrato sem a capacidade de alterar ou adicionar algo ao conteúdo do PPJB. Esses acordos geralmente não são considerados suficientes pelos interesses de outras partes, por isso está sendo questionado se ainda dá liberdade aos consumidores. A ausência de regras relativas à venda pré-projeto nos regulamentos estatutários aplicáveis ao controle da proteção do consumidor não é ideal. O governo precisa fazer regulamentos sobre esse assunto.

**Palavras-chave:** Princípio do Contrato de Liberdade; Pré-Venda do Projeto; Acordo.

### **Abstract**

The Pre Project Selling is sale before project was built where the property being sold is just a picture or concept. This marketing concept has become a trend in the modern era, especially for the Developer. The freedom principle of contract in an agreement is a must-have foundation in terms of agreements in the pre-project selling transactions. In customer contract made in the standard writing form that has been previously ready by developer. This means that all the term and condition has been made by the developer itself, and then the consumer will only do so need to approve or reject the contract without the ability to change or add anything to the PPJB content. Those agreements are commonly not considering enough the interests of other parties so it is being questioned whether it still gives consumers freedom. The absence of rules regarding Pre Project Selling in the Statutory Regulation that applicable to made controlling consumer protection is not optimal. The Government needs to make regulations on this matter.

**Keywords:** Freedom Contract Principle; Pre Project Selling; Agreement.

### **Resumen**

La Venta previa al proyecto es la venta antes de que se construyera el proyecto donde la propiedad que se vende es solo una imagen o un concepto. Este concepto de marketing se ha convertido en una tendencia en la era moderna, especialmente para el desarrollador. El principio de libertad del contrato en un acuerdo es una base imprescindible en términos de acuerdos en las transacciones de venta previas al proyecto. En el contrato del cliente realizado en el formulario de escritura estándar que ha sido previamente preparado por el desarrollador. Esto significa que todos los términos y condiciones han sido establecidos por el propio desarrollador, y luego el consumidor solo tendrá que aprobar o rechazar el contrato sin la capacidad de cambiar o agregar nada al contenido de PPJB. Esos acuerdos comúnmente no se consideran lo suficiente como los intereses de otras partes, por lo que se cuestiona si aún da libertad a los consumidores. La ausencia de reglas con respecto a la venta previa al proyecto en los reglamentos legales que se aplican para controlar la protección del consumidor no es óptima. El gobierno necesita hacer regulaciones sobre este asunto.

**Palabras clave:** Principio del Contrato de Libertad; Venta Previa al Proyecto; Acuerdo.

## 1. Introduction

Freedom Contract is principle can enable the parties who make the Agreement according to their wishes. Supporting from this principle is based on by the dynamics of the free market economy and individualism in citizen. The thought of freedom of contract have the purpose to bring optimal welfare. The finding from freedom principle in Article 1338 paragraph (1) Civil Code stated in "for those who make applicable law, all treaties are made lawfully." The article has the connection with description from freedom principle contract, from the word "all" which concludes the freedom to: 1. Freedom on making agreement or not is made free. 2. Agreement with anyone made free. 3. The form of the Agreement is set free. 4. The contents and terms of the agreement made are free. 5. Choice of law is held freely. The freedom contract which is includes the freedom to choose parties with whom the agreement will be made. (Hernoko, 2016).

The meaning of scope is someone can reject or choosing in accordance with agreement that made with other people based on subjective or objective considerations themselves. The freedom contract in generally can cause unfair which is due to the unequal bargaining position of the parties. The freedom contract is experiencing limited development through statutory regulations, public order, and decency. Freedom contract that conclude provision article 1338 paragraph (1) Civil Code, is stated that all contract (agreement) which is made lawfully valid as Constitutional for them who made it. According to Civil Code that applicable in Indonesia, the contract freedom comes from individual freedom so it is the starting point is individual interest too. Thus, it can be understood that individual freedom gives him freedom to contract. The consensualism principal that applies according to Indonesia Agreement Law establishes the freedom contract principle. One of the parties that make an agreement without an agreement then the agreement made can be canceled. People no coercion to gives the agreement. The agreement principle or it called with *Contradictio in terminis*. But if the coercion happens because there is no agreement it is a choice. So the repulsion attitude that results in agreement or treaty that was not implemented.

In agreement law provisions in Indonesia, whosoever one gets freedom in the matter of choosing to make a deal according to who he wants. In statutory regulation only arrange about good or not proficient provisions in a person make agreement. Where it is mention in Constitution in the article 1330 of Civil Code. Then in article 1331 civil code it also added about agreement provisions, if already done the agreement with the people who are not

capable of law then those agreements still valid in legal eyes except the parties are concerned about it.

In statutory regulation there are also no rules about prohibiting a person from making an agreement he wants. It is just for the certain agreement must also made in the certain form example land purchase agreement must from PPAT. From it while the law provision in constitution not managed about the form a certain agreement then the free parties in determine the agreement form that they wants. It is can also the agreement in oral, written, authentic deed until private deed.

The freedom contract principal can it be said that the principle is absolutely free? If according to the provisions of the Civil Code, The freedom contract principle of do not fully have absolute freedom but still any limits of the conditions.

In article 1320 paragraph 1, that the agreement or contract said not yet valid if there is no agreement of the parties. So those provisions are limited by agreement or at least both the parties. Then in article 1320 paragraph 2 is person freedom in things make an agreement is limited in relation to its legal standing. In article 1330, people who are not yet mature and people that get obtaining efficacy is not permitted to make an agreement in any form.

In article 1320 paragraph 3 related to agreement object must determined previously. Achievement in the agreement must be fulfilled by both parties. So what was promised must be clear. The reason why a achievement in agreement must determined is while the achievement is not implemented by one of the party then the agreement is cancelled then the agreement is null and void or it is deemed that no agreement has ever taken place.

In Article 1320 Juncto Article 1337 all parties cannot get freedom to make the agreement that prohibit by Constitution. In statutory regulation provisions related to lawful reasons if not prohibit or contradicting with the existing regulatory norm. The legal consequences if the agreement is still being done then the agreement will cancelled for the sake of law.

While about the agreement object that regulated in article 1332 it stated that only tradable goods or the goods that have the economic only becomes agreement project. Related to freedom contract also stated in article 1338 paragraph 3 is in held an agreement must have good intentions on the agreement. It is from the parties can have unlimited freedom related with the clauses but still obligate a good intentions element in arranged. An agreement is based on having the bad intention then it can cancel by law.

According to Prof. Asiskin Kusuma Atmaja gives response related to limited on the freedom contract principle, Judge have the authority to check and analyze related examine in

depth related to the contents of the contract in a court sessions if the content of the contract is contradicting with the norms conditions that prevailing in society. It can conclude the regulation article 1338 freedom contract is not a principle that is not immediately inviolable, but while the Judge feels it needed to check the contract in the trial this is become causing one of the parties which is not free to describe the will he wants.

Example one of the examples in selling flats in article 42 and article 43 related the marketing regulations a flats can be done then binding become a Sale and Purchase Commitment Agreement (*PPJB*). Then the regulation in article 43, the implementation *PPJB* the building must be at least 20% standing. This is actually invited poisoning in Flats Constitutional where the buyer must be careful.

In field fact is often the owner or housing project proponent is able to fulfilling the provisions. Therefore in selling the flats with the Pre Project Selling system must given a mail order previously because the customer is already advance payment. But if in the journey not fulfilling the provisions that required in constitution, housing project proponent have initiative to do order of agreement on customer.

Pre Project Selling is a marketing system that done while not yet does a build. The reason for doing a system like this example this is because build a multi-storey buildings starting from residential, offices, until recreation centre example mall in Indonesian area developed very rapidly until impact on business property marketing competition in cooperate the potential customer.

From payment process also have the scheme which is facilitated by the seller, until promoting to the potential customer to more maximum. This agreement result of both two parties still recorded in Sale and Purchase Agreement or *PPJB*. In regulation article 1233 Civil Code, each well-formed binding because agreement of both two parties, both also well according to the next law *AJB* (Deed of sale & purchase) in front of Land Deed Making Officer (*PPAT*).

In terms of the preliminary agreement is not regulated in Civil Code, but stated in article 42 paragraph 1 statutory regulation Number 1 in 2011 About Housing and Settlement Areas which is Row House, single house and/or Flats that still in building process can be promoting from system of preliminary agreement of sale and purchase in accordance with the applied statutory regulation. Based on the practice related the agreement stated in the form of contract. Contract formation based on the interest of both two parties that who will bind themselves to the contract. Contract formation from paragraph to paragraph in the contract is needed communication and negotiation that must which should not harm any party.

A sale and purchase agreement must have obligations that must to fulfill by each the parties before later the execution of the promise in the contract clause can reached. Preliminary agreements can be used to minimize disputes in purchase and sale related the installment payment. The most important is the principal content is clauses that contain about the obligation and the parties rights. (Christie, 2012)

In understanding of preliminary agreements according Munir Fuady is an agreement in accordance with the freedom contract principle. The article 1338 paragraph 1, is both the parties have the freedom to enter the agreement both in terms of content or disputes, as long as in accordance with the provisions of constitutions and not contradicting with the norm that applied in the citizen with a good intentions between the party with another (Fuady, 2001)

In the regulation article 1457 Civil Code is if an agreement has been made then there is an obligation of one of the parties to submit a material, and then the other party is obligation to do a payment. The meanings of sale and purchase agreement in that article are obligatoire agreement and it also called material agreement which means that the agreement made then the material object changes hands to another new owner. Submission of those material or transfer of material after has made a payment then the new owner can change those material owner names. (Satrio, 1995)

Good intentions in sale and purchase agreement later will be given legal protection by the State, then in the article 1458 stated that sale and purchase considered to have occurred if an agreement was made regarding goods and prices.

But in the practice is there have been many contractual practices that have been outlined in formal clauses that the later form then it called standard agreement. In the sale and purchasing practice that often used is standard agreement. Standard contract like this are already used by business people because it is more practical. The standard contract in generally has made by one of the party even more practically in the form of forms. When the contract or form is the entrepreneur is more towards providing assistance to fill the data in the unfulfilled form. The weakness from the standard contract like this is buyer party it cannot do a negotiation with the buyer party until it seem impressed biased (Fuady, 2001). There is no opportunity to be able to negotiate the standard clause is very big loss. Therefore, this study aims to know about a Control of Freedom Principle Contract in the Pre Project Selling System.

## **2. Methodology**

In this research is using Juridical Normative with statue approach. The Juridical Normative is a research which is viewed from an internal perspective that makes legal norms as an object of research (Diantha, 2016) The data resources in this research are using data analyzed in primary and secondary legal materials. The primary law data is statutory regulation while for the secondary law data is collecting from the research or doctrine of law figures and literature.

Then the data is analyzed and linked to the issues that will be raised, it called the legal regulation of controlling the freedom contract principal in the pre-project selling system.

## **3. Discussion**

How to promote the flats with information models only, which in fact the housing unit has not been built at all is the way used by most property developers now. Moreover, what is being promoted by them is only in the form of sketch and location plans, especially in terms of their reliability not yet being fulfilled. The strategy like this it is also called Pre Project Selling marketing (Simamora, 1996)

This strategy is considered by property developers to be the most reasonable and is very profitable, because later down payment that already payment by customer will be used as capital to build buildings. In this thing also happened an agreement and mutual trust between the developer and the consumer who will be committed to giving their obligations to pay off the remaining payment when the housing unit has been established in accordance with the agreement. (Purbandari, 2013).

This strategy concept became developer have the very safe financial turnover. Capital expenses for construction work are greatly aided from the down payment given by consumers, where the construction is usually a minimum of 20-30%.

Eventually the system like this make the position of property entrepreneurs are become increasingly safe, because there is not any speculation later harm or be denied by consumers. The agreement is already reached and has its own payment schedule.

Quoted from the statement of Erwin Kallo related to some basic rather than the purchasing concept with pre-project selling system, which is (Majalah Estate, 2006:22) :

- a. Consumers must be careful in asking the legality first;



- b. If later the housing unit will be owned and inhabited alone, it would be good to choose a strategic location of the unit as needed;
- c. Facts in the field of housing units that are marketed under the Pre Project Selling system are cheaper than those of ready-made or already established housing units;
- d. It is certain that before making a down payment, consumers are required to already have a home ownership credit that has been approved by the Bank;
- e. Ensuring the completion of the project construction is also in accordance with the schedule given by the developer;
- f. Stay careful of all the clauses and articles per article contained in the agreement, do not let consumers be harmed.

Besides some of above must also be examined in relation to the condition of national property prices which are influenced by many factors in Indonesia.

In applied law, the prevailing sales system like this is not prohibited, and is even permitted under the provisions of the Law on the Arrangement of the Flats. As stated in Article 42 paragraph 1 of the Law on Flats, it is stated that property businesses or developers can do marketing before a flats are established.

The statutory regulation is giving the related legal certainty with a system like this does not yet exist, therefore return to the contract or clause agreed upon by both parties as outlined in the PPJB (Simamora, 1996). The formation of the PPJB occurred because both parties stated the initial will that would later carry out buying and selling in the actual process (Hartanto, 2015). In this agreement like this only called obligatoire agreement where the agreement like this only state that the housing units only transfer of property rights, but is not yet stated as ownership right (Fuady, 1999) Later it needed the other agreement or it called as (zakelijke overeenkomst) which later becomes the basis for the surrender of these objects which can have legal consequences as ownership rights.

Basically the same is related to PPJB which only includes the rights and obligations of the parties that bind themselves. Related to the transfer of rights to PPJB is usually called AJB or Sale and Purchase Deed. Therefore, this is the reason for PPJB which is still called the obligatory agreement.

PPJB agreed upon where the fact is seen as a standard clausa that cannot be contested or negotiated by the prospective consumer is deemed appeared to the existence of an element of coercion and on the basis of these consumer needs, Even though it looks like that, but if it is reviewed again, it is related to one of the PPJB elements which must make it a standard clause, the developer party must continue to provide services and accommodate consumers



wishes to the maximum extent possible. This is a form of the phenomenon of abuse of circumstances or called *misbruik van omstandigheden* is losing the freedom rights from buyer or customer in this agreement that stated in the standard contract (Kurniawan & Parameswary, 2014)

Wirjono Prodjodikoro give an opinion that is a cause mentioned in an agreement is the content and purpose that resulted in the agreement being made (Wirjono P,2000) One of the example is in the property sales, submission of the ownership status of the property is the obligation of the property developer and that have the obligation to do a payment is customer

Causa that used in the agreement must be related with the purpose rather than making the agreement. A cause of agreement must be one of the conditions that is permissible should be understood in terms of the freedom contract principle. Basically, the parties will indeed get freedom in determine the content rather than the agreement. The cause or *causa* becomes one of the factor in the form in the case of engagement formation although have the freedom but still in the limitations that still contain propriety and fairness in an agreement. If the engagement that wants related to prohibit by the statutory regulation then, naturally the engagement was null and void (Prodjodikoro, 2000)

Then in the regulation makes PPJB should not conflict with applicable law. The understanding of this PPJB is a sale and purchase agreement made by the parties whose object of the agreement is the land and building on it after the obligations and rights are fulfilled, the transfer of the object will be carried out. If a PPJB is held for a reason that is not prohibited by law then the PPJB engagement is legal before the law. This is also in line with the provisions of article 1338 paragraph 1 where all agreements which are made lawful before the law shall apply to become laws for all parties involved in the agreement.

The scope of the freedom contract basis according to the agreement law in Indonesia which is:

- a. Have a freedom in arrange or not a binding;
- b. Freedom in choosing the party while arrange the engagement;
- c. Freedom to determine the cause and *causa*;
- d. Able to have the freedom in determining the agreement object;
- e. Freedom to determining the form of an agreement;

Freedom to gives or deviate the statutory regulation which is optional (Rahman, 2003).

The Sale and purchase agreement in relation to a sale and purchase agreement that uses a pre project selling strategy is one of the example written agreement that made by developer that have the higher power or position rather than the generally the usual agreement

was made. The Definition of standard agreements is an agreement that have conditions where these conditions are determined by one of the party that do the binding. The position of standard agreement or it also called with binding in the form of standards which is actually an individual freedom untill the entrepreneur have a freedom in determining business attitude.

The standart clause in binding Pre Project Selling that made by property developer of a project makes the customer position become unbalanced and notsportif so that it will harm consumer.

This view is arguably the consumer doesnt has no choice to do the negotiation. The consumer can get or not continue the binding process (Muhammad, 1992) Which then puts the consumer in a very weak position. The standard agreement provision haswhich has less content to protect consumers. the clause will be shaped like a form that has become the provisions of the developer that contents of the clause are standardized. The consumer will only fill in blanks such as personal data and nominal installments. There are also provisions outside the standard clause that made by the developer there is also an agreement related to compensation. This clause mention that the developer pays compensation in full as a result of an illegal act or a breach of contract (wanprestasie), the clause is called also exoneration agreement (Miru, 2011) This provision is regulated in the article 18 Constitution Number 8 in 1999 regarding Inclusion of Raw Clause. Imbalance of the Pre Project Selling of the binding of the pre project selling agreement related to the conditions resulted in an imbalance of position between the developer and the consumer. This view occurs because of the related related to the build message agreement determined and made in standard by enterpreneur or property developer whose position is higher than potential customers. The form of standard agreement like this always considered detrimental to consumers, whereas this form of agreement is more practical.

Basically and in fact standard agreements are not often gives the right protection to customer. The enterpreneur only selfish which is only profit oriented or profit. The agreement models like this is often only makes consumer obligations a priority that must be fulfilled immediately, whereas the consumer is also have not a few rights. This condition makes unbalanced between both the parties that do a binding. The law sanction that listed in the agreement also always provides an imbalance, example compensation that gives by the developer because wanprestasie related to example the building process.

Rajeswari Kaniah and Anwar Fazal quoted by Yusuf Sofie stated in the standard clause practice is often listed the except point or exemption clause (Shofie, 2000) One of the example meaning from exception is related to delivery of ready-made building units to

consumers, then if there is negligence by the consumer in terms of payment to a consumer delay will charge fines or penalties. Then the developer waived related to sanctions or penalties for submitting unit delays.

The view of Prof Moch Isnaeni in the Pre Project Selling can be seen from the the point of view of the provisions of BW become focus rather than scientific field assesses that BW was originally formed for the purpose of facilitating increasingly complex business activities along with the times. Pre Project Selling agreement is one of the form of Business development must get the cover by the provision in BW.

The Pre Project Selling issues if examined from the perspective of the law then that used is BW aand Constitution Number 5 in 1960 about Basic Rules for Agrarian Principles. When UUPA published it will override the legal provisions in the Book of Civil Code II that arrange about earth, waater, with all the wealth contained therein. Then Prof. Moch Isnaeni then provide a more narrow view of the control aspects of the freedom contract basis in the Pre Project Selling system (Shofie, 2000). Pre Project Selling is an agreement which is not regulated precisely in the provisions of Book III BW. Generally it also called nameless agreement. The beginning of the formation of the term Pre Project Selling is based on the provision in article 1338 paragraph 1 BW that commonly called freedom contract basis or also called as Principle of Pacta Sunt Servanda.

Therefore, there is also a PPJB which accommodates the flow more rather than pre project selling. Related to the existence of PPJB, it does not necessarily solve the problem and no hole problems will appear, but instead makes PPJB no longer provide legal protection to consumers which makes the consumer's position has a very low bargaining power will be a standard clause in pre project selling agreement.

Nevertheless on the facts field related to the pre projrct elling agreement there is no legal protection that can provide clarity to citizen. Therefore there is one support solution is PPJB. For this reason, the government should immediately make regulations that able to gives legal protection related pre project selling in Indonesia.

#### **4. Conclusion**

Property marketing with pre project selling system not yet have the legal protection brings an influence for customer related there is no legal certainty regarding the status of the building. With the sense that the opportunity for default arises by the developer brings very big loss for consumer.

The standard clause that guides the creation of the Sale and Purchase Binding Agreement does indeed begin the freedom contract basis. According to applied Civil Law in Indonesia, stated that every contract (agreement) which is made lawfully applies as a law for those who make it.

The resources is from freedom contract is individual freedo, until individual freedom so that is the starting point is individual interest too. Thus it can be understood that individual freedom gives him freedom to contract.

But in freedom contract practice in PPJB instead it was abused by the property Developer for consumers are not given the choice to add or change content rather than the PPJB contract.

## **5. Suggestion**

Based on the conclusion above it is recommended to the regulators namely the government to be able to provide a clear legal umbrella and protection for customer. Until consumers do not hesitate and be afraid in choosing the developer.

Development actors in making standard agreements are more expected to consider the position of consumers in order to avoid the occurrence of vague clauses in understanding which often puts consumers in a weak position. Therefore, the third party which can be considered as having the authority to supervise is government or property developer associations.

The consumer it is expected to always be more vigilant in buying property which is marketed from pre-project selling system. Moreover, the consumer is expecting to notice the standard clauses in the agreement set by the development agent.

Viewing the rampant violations committed by development actors in marketing with the pre-project selling system and the absence of sanctions gives by development actor on the marketing violation. The writer gives suggestion that immediate revision to Constitution for collecting the regulation in the constitution. Provisions that need to be completed is the provision about the sanction for development actor who do marketing with a pre-project selling system that is not appropriate with the statutory regulation.

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