

## ABSTRAK

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### **Kebebasan Berkontrak yang Berkeadilan Dalam Kontrak Konstruksi Migas**

Sesuai konstitusi, Negara Kesatuan Republik Indonesia adalah negara hukum yang menganut faham negara kesejahteraan. Dalam rangka mewujudkan kesejahteraan rakyat sebagaimana diamanatkan dalam Pasal 33 UUD 1945, pemerintah memberikan mandat kepada Kontraktor Kontrak Kerja Sama/KKKS untuk mengelola Migas negara. Dalam pelaksanaan pekerjaannya, KKKS menggunakan kontrak model EPC dan O&M yang tunduk kepada Pedoman Tata Kerja SKK MIGAS No.: PTK-007/SKKMA0000/2017/S0 dan mengacu pada prinsip-prinsip dasar bagi sahnya perjanjian sebagaimana diatur dalam Pasal 1320 KUHPdata. Sementara itu, pengertian kontrak kerja konstruksi diatur dalam Undang-Undang Nomor 2 Tahun 2017 tentang Jasa Konstruksi. Sementara itu, aspek keadilan dalam kontrak mendasarkan pada UNIDROIT *Principles of International Commercial Contract*, dan *Federation Internationale Des Ingenieurs-Conseils*. Penelitian disertasi ini menelaah tiga permasalahan hukum mengenai pengaturan tentang prinsip kebebasan berkontrak dalam kontrak konstruksi Migas menurut ketentuan hukum Indonesia, dan implementasinya serta bagaimana idealnya pengaturan mengenai kebebasan berkontrak disektor Migas di Indonesia yang berkeadilan dan berkepastian hukum. Untuk mengkaji ketiga permasalahan hukum tersebut digunakan teori perjanjian, teori sistem hukum, teori keadilan, teori perubahan dan *economic analysis of law*. Sebagai penelitian interdisiplin dan kualitatif, analisis penelitian ini bersifat deskriptif dengan menggunakan metode yuridis normatif dengan didukung metode penelitian hukum empiris. Hasil penelitian menyimpulkan bahwa secara normatif pengaturan mengenai kebebasan berkontrak telah cukup memadai. Namun, dalam pelaksanaannya masih menimbulkan permasalahan yang terkait dengan aspek keadilan dan keseimbangan atau kesetaraan para pihak. Lebih dari itu, penjabaran asas kebebasan berkontrak pada pengaturan operasional di sektor Migas mengandung norma-norma yang tidak seragam sehingga menimbulkan ketidakpastian hukum dan menyudutkan pada posisi lemah pelaksana kontrak. Serta diperlukan optimalisasi dewan sengketa untuk memberikan posisi berimbang bagi pada pihak. Untuk itu, pedoman kontrak konstruksi Migas perlu disempurnakan dengan menambahkan norma-norma yang lebih menjamin keadilan, kepastian hukum dan efisiensi.

*Keyword:* Kebebasan Berkontrak, Berkeadilan, dan Kontrak Migas.

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### **Fair Freedom of Contract in Oil and Gas Construction Contract**

In accordance to the Constitution, the Unitary State of the Republic of Indonesia is a rule of law state which embraces the welfare state understanding. In order to actualize the people's welfare as mandated in Article 33 of the 1945 Constitution, the government gave a mandate to the Cooperation Contract Contractors (KKKS) to manage the state oil and gas. In carrying out their work, KKKS uses EPC and O&M model contracts that are subject to the SKK MIGAS Work Procedure No: PTK-007 / SKKMA0000 / 2017 / S0 and refer to the basic principles for the validity of the agreement as regulated in Article 1320 of the Civil Code. Meanwhile, the understanding of construction work contracts is regulated in Law Number 2 of 2017 on Construction Services. Meanwhile, the justice aspect in the contract has its basis on the UNIDROIT Principles of International Commercial Contract, and the Federation Internationale Des Ingenieurs-Conseils. This dissertation research examines three legal issues regarding the regulation of the principle of freedom of contract in oil and gas construction contracts according to the provisions of Indonesian law, and their implementation as well as how ideal arrangements for contracting rights in the oil and gas sector in Indonesia are fair and with legal certainty. To study the three legal problems, agreement theory, legal system theory, justice theory, change theory and economic analysis of law are used. As an interdisciplinary and qualitative research, the analysis of this research is descriptive using the normative juridical method supported by empirical legal research methods. The results of the study concluded that normatively the regulation regarding freedom of contract was sufficient. However, in its implementation it still causes issues related to aspects of justice and the balance or equality of parties. Moreover, the elaboration of the principle of freedom of contract in the operational arrangements in oil and gas sector contains non-uniform norms that give rise to legal uncertainty and cornering contract executors at a weaker position. It is also necessary to optimize the dispute board to provide a balanced position for the parties. For this reason, guidelines for oil and gas construction contracts need to be improved by adding norms that better ensure fairness, legal certainty and efficiency.

*Keywords:* Freedom of Contract, Fairness, Oil and Gas Contract