



An Exoneration Clause in Standard Agreements: Problems in Consumer Protection

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Abstract

Standard agreements have been applied to the current business world in Indonesia. Problem in this research is relating to the standard agreement contains an exoneration clause that may cause detrimental to consumers. The purpose of this study is to analyze the legal protection in Indonesia for consumers related to standard agreements. The method in this research is normative juridical and the use of the theory of legal protection by Philipus M. Hadjon and the theory of law as a tool of social engineering by Roscoe Pound. Based on the research results, Law Number 8 of 1999 concerning Consumer Protection has provided repressive approaches, namely the protection given at the end and preventive namely the protection provided when a violation occurs. Legal protection has not been able to become a tool in social engineering, changing people's behavior and creating a civilized society. Therefore, the recommendation in this study is that Law Number 8 of 1999 concerning Consumer Protection should be amended by containing strict sanctions for business actors who apply standard agreements containing exoneration clauses in the hope that these sanctions can provide a deterrent effect and can change people's behavior to obey the laws that have been regulated.

A. Introduction

Consumers have the meaning of every person who uses goods and or services available in the community for the purpose of meeting their needs, other people and other living things for various interests without defrauding them. While the essence of consumer protection is aimed at consumers as the last users of a product or service. (Sarah, 2021)

Consumer protection is very crucial in the business sector. Consumer satisfaction is a determinant factor in the development of the business world. Therefore, Indonesia already has legal instruments to regulate the protection for consumers. It is regulated in Law Number 8 of 1999 concerning Consumer

Protection (*Undang-Undang Perlindungan Konsumen/UUPK*). Based on the Law, consumer protection has the meaning of all efforts made to ensure legal certainty to provide protection to consumers. The purpose of the enactment of this Law is also written in Article 3, namely: "to increase the awareness, ability and independence of consumers to protect themselves; elevating the dignity of consumers by preventing them from negative access to the use of goods and or services; increase the empowerment of consumers in choosing, determining and demanding their rights as consumers; create a consumer protection system that contains elements of legal certainty and information disclosure as well as access to information; raise awareness of

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business actors regarding the importance of consumer protection so that an honest and responsible attitude grows in doing business; improve the quality of goods and or services that ensure the continuity of the business of producing goods and or services, health, comfort, security and safety of consumers”.

One of the legal phenomena that occurs is related to consumer protection in today's modern times is the standardization of contracts or agreements. The application of standard agreements often occurs in the business world. The meaning of the written agreement in Article 1313 of the Civil Code states that “an act in which one or more people have bound themselves to one or more people”. Abdulkadir Muhammad argues that an agreement is a consensus (a meeting of mind) of two or more people who have bound themselves to do or not to do something. (Abdulkadir, 1992)

In relation to standard agreements, it is regulated in Article 1 Number 10 of the Law on Consumer Protection which stipulates that “standard clauses are any rules or provisions and conditions that have been prepared and determined in advance unilaterally by business actors as outlined in an agreement. documents and or agreements that are binding and must be fulfilled by consumers.

The problem of a standard agreement is the existence of an exoneration clause. The exoneration clause contains the release of the responsibilities and obligations of business actors and accordingly, the responsibilities are transferred and charged to consumers. (Mariam, 1986). For example, the contents of the exoneration clause according to Munir Fuady are: 1) there is no after-sales guarantee for the sold goods; 2) limiting liability in the event of a breach of the after-sales warranty for the sold goods; 3) imposing improper proceedings; 4) eliminating legal objections to the rights of the recipient of the transfer of rights; 5) regulating a cross guarantee. (Sri, 2019).

An example of the problems related to the exoneration clause is the after-sales guarantees that occurred in Indonesia. It occurred because there is a clause containing an

after-sales warranty service within a certain period of time provided by the manufacturer/ product distributor or creditor to the consumer.

By referring to one of the previous research projects conducted by Raden Ajeng Astrari Sekarwati and Susilowati Suparto entitled “Consumer Protection to Obtain After Sales Service Rights in Indonesia and Europe”, it revealed that the problem with after-sales guarantees is related to consumer protection since it cannot be separated from other stages of consumer transactions. In this circumstance, the *caveat emptor* principle no longer applies. The responsibility is on *caveat vendor* which is commonly known as product responsibility. (Sarah, 2013)

The problems related to the after-sales warranty in Indonesia occurred in the automotive world involving PT. BMW Indonesia. In 2013 PT. BMW Indonesia had a problem with the one of its consumers regarding the damage of a new BMW which he bought about 6 months ago. The damage was a sudden jerk when using the car because its gear position suddenly changes to P (Parking).

The consumers reported to PT. Tunas Mobilindo Parama as the dealer where the car was purchased and demanded repairs. Several months after the report, the incident happened again, which resulted in the consumers demanding the replacement of a new BMW car, but these efforts did not produce any results. (Raden, 2021)

Based on the previous research conducted by Agus Satory entitled “Standard Agreements and Consumer Protection in Business Transactions in the Financial Services Sector: Application and Implementation in Indonesia”, found that the standard agreement applied by financing companies (leasing) still use a standard clause that are detrimental to consumers. It states that the power of attorney from the consumer is given to the Financial Services Business Actor (*Pelaku Usaha Jasa Keuangan/PUJK*), either directly or indirectly to take unilateral actions, one of which is the unilateral withdrawal of vehicles and the authority to execute fiduciary objects without the consent of the consumer. (August, 2015)

Based on the above-mentioned background, the purpose of this study is to analyze consumer protection based on the laws of Indonesia relating to the application of exoneration clause in standard agreements in Indonesian businesses nowadays.

B. Methods

The research method used by this study is qualitative one. The data collection technique utilized a literature study. The data analysis adopted a qualitative descriptive nature. The data sources is mainly secondary data consisting of: 1) primary legal materials, namely Law Number 8 of 1999 concerning Consumer Protection and the Civil Code (*KUHPerdata*); 2) secondary legal materials that were collected from books and scientific journals that examine standard agreements and consumer protection. The data was analyzed by using a juridical basis and a theoretical basis by adopting 2 (two) legal theories, namely the Theory of Legal Protection by Philipus M. Hadjon and Theory of Law as a Tool of Social Engineering by Roscoe Pound.

C. Research and Discussions

1. Consumer Protection based on the Indonesian Laws Pertaining to the Implementation of Standard Agreements in Businesses Nowadays

The development of the business world nowadays triggers the occurrence of various legal phenomena. One of them is the implementation of a standard agreement which is considered easier and more practical in its implementation. However, the problem is when the standard agreement contains an exoneration clause. This is certainly detrimental to consumers.

In terms of providing protection for consumers, Indonesia has regulated it in Law Number 8 of 1999 concerning Consumer Protection. Article 4 describes a set of rights owned by consumers, namely: "the right to comfort, security, and safety in consuming goods and or services; the right to choose goods and or services and to obtain such goods and or services in accordance with the exchange rate and the promised con-

ditions and guarantees; the right to correct, clear and honest information regarding the conditions and guarantees of goods and or services; the right to have their opinions and complaints heard on the goods and or services used; the right to obtain proper advocacy, protection, and efforts to resolve consumer protection disputes; the right to receive consumer guidance and education; the right to be treated or served correctly and honestly and not discriminatory; the right to receive compensation, compensation and or replacement if the goods and or services received are not in accordance with the agreement".

In addition, standard agreements are also regulated by this Law which provided that standard agreements are allowed if they do not contradict the provisions as stipulated in Article 18. The provision stipulates that "Business actors are prohibited from including standard clauses in the agreement if it declares the transfer of responsibility of the business actor. It also stipulates that business actors have the right to refuse the return of goods purchased by consumers and they have the right to refuse to return the money paid for goods and or services purchased by consumers. In this regard, the power of attorney from consumers to business actors is directly or indirectly to take all actions unilaterally relating to goods purchased by consumers in installments. It also regulates that the matter of proving the loss of the use of goods or the use of services purchased by consumers and gives the right to business actors to reduce the benefits of services or reduce the assets of consumers who are the object of buying and selling services. The provision states that declares the submission of consumers to the regulations in the form of new, additional, continued and/or continued changes made unilaterally by business actors when consumers use the services they have purchased. Furthermore, it states that consumers may authorize business actors to impose mortgages, liens or rights. guarantee for goods purchased by consumers in installments.

Regarding the agreement, it has also been regulated in the Civil Code (*KUHPerda-*

ta). Article 1313 of the Civil Code states that an agreement is an act by which one or more people bind himself to one or more other people. Meanwhile, a standard agreement is an agreement made unilaterally which contains certain clauses that have a strong position for the party who made it, which ultimately results in losses for the weak party which can lead to abuse of the situation. It can also be interpreted as an agreement in which it contains certain conditions made by the creditor only while the debtor does not participate in making it so that the debtor is on the side having no choice in the standard agreement. (Rizki, 2021)

The Civil Code also regulates the principle of freedom of contract. This principle has the same legal force as the provisions in the law. This principle has the meaning that the parties are given the freedom to regulate the agreement as long as it does not conflict with the law, public order and morality. Article 1338 paragraph 1 states that the agreement that has been made by the parties is the law for the parties who enter into it.

Standard agreements made in the business world do not conflict with the principle of freedom of contract because the parties are free to make their own agreements. This means that the party who will conclude the agreement is still given the right to agree (take it) or reject the agreement submitted to him (leave it). (Niru, 2018)

The standard agreement which contains an exoneration clause is one of the controversies in the application of the standard agreement. According to Shidarta, the exoneration clause means a clause that contains conditions that limit and or remove the responsibility and or obligations of the creditor (seller). (Jeni, 2016) According to Mariam Darus Badruzaman, the characteristics of a standard agreement containing an exoneration clause are as follows: (Miru, Yodo, 2014)

The substance of the agreement is made unilaterally, namely the creditor;

- a. The debtor is not included in making the agreement;
- b. The substance of the agreement is made in accordance with the needs of the

creditor and the debtor is in a position to be forced to accept the agreement;

- c. Made in written form;
- d. Already mass-produced or individually.

Based on several previous studies, several cases of standard agreements containing clauses exoneration such as:

- 1) In the standard clauses set by PT. Citra Van Titipan Kilat (TIKI), there were several clauses that contradict the rules of Article 18 of the UUPK, consequently these clauses were null and void and TIKI was obliged to adjust the standard clauses with the UUPK rules. (Fikri, 2016)

- 2) The consumer as the plaintiff was the losing party in the defend their rights as consumers since the plaintiffs as debtors were in a weak position. This occurred in the case of Sular and Puji Rahayu as the plaintiffs who sued Bank SUMUT Jakarta Branch. Their relationship between the two parties began with the Credit Agreement Number: 001/KCKJ-APK/KAL/2013 dated March 20, 2013. In the agreement, the plaintiff provides collateral in the form of a plot of land with an area of 124m² (one hundred and twenty-four square meters) along with a permanent building on it with an area of 234m² (two hundred and thirty-four square meters) located on Jalan Andara, Gg. Mosque No. 42, Kel. Jati Baru Base, Cinere, Depok City, West Java. However, in the mid-2015, the business was not in good condition, causing late payments and the plaintiff received a warning letter from the bank on February 9, 2015, which principally states that the plaintiff's credit facility was doubtful and threatened to auction the goods as the credit guarantee. On March 2, 2015 the plaintiff received a further warning letter containing the same thing but it added with the threat of auctioning the collateral goods through the State Property and Auction Service Office (*Kantor Pelayanan Kekayaan Negara dan Lelang/KPKNL*). Nevertheless, the plaintiff continued to make the installments and tried

to meet the bank officials to ask for a rescheduling or waivers of the installments. However, the bank did not respond to these requests at all. In addition, in the provisions of the Closing Article in the credit agreement of the parties stating that: "both parties choose" the domicile of the Registrar of the District Court in Medan...", while the domicile of the plaintiff is in the city of Depok, and the domicile of the bank as the defendant is in Central Jakarta. (Sharifah, Putra, Nurdin, 2015)

- 3) The warning that appears on the Gojek application was categorized as an exoneration clause. This study found that a unilateral statement from PT Gojek could be categorized as an exoneration clause and was approved by the consumer even though the consumer did not explicitly state that he received a warning and or statement that appeared on the Gojek application. (Ida, 2021)
- 4) The case regarding electronic vouchers from online transportation contained a clause in the form of a unilateral statement by suddenly stopping or changing the clause in the voucher. In addition, the changes to the provisions in the voucher were not given confirmation or notification from the online transportation party, thus it was detrimental to consumers. The provisions in the voucher contain an exoneration clause because there was only a unilateral statement from the online transportation party which transferred the responsibility as a business actor. (Kadek, Dedy, 2020)
- 5) Based on the opinion of the Head of Sub-Directorate for Services and Complaints of the Directorate of Consumer Protection under Industry and Trade Office (*Dinas Perindustrian dan Perdagangan/Disperindag*), it was stated that almost every sale and purchase agreement between entrepreneurs and consumers contains standard clauses. More than 90% of the inclusion of standard clauses is

in the sale and purchase agreement of any goods which is detrimental to consumers, especially in terms of taking motorbike loans, houses and so on. The number of standard clauses that harm consumers can be seen from the many protests from the consumers to producers. This was also admitted by the Chairman of the Indonesian Insurance Council (*Dewan Asuransi Indonesia/DAI*). (Online Law, 2021)

- 6) Other cases can be found on the parking card sheet where the card says "parking managers are not responsible for any damage and loss in any form" or shopping receipts found with the statement "items that have been purchased cannot be exchanged or returned". (Jein, 2016)

Based on the examples of the above-mentioned cases, it can be seen that the formation of a standard agreement is not wrong because the Civil Code contains the principle of freedom of contract. However, the problem is if it contains an exoneration clause which ultimately harms consumers. In this case, there is a need for protection for consumers concluding a standard agreement containing an exoneration clause.

The meaning of legal protection in this regard is to provide protection in the form of human rights that are not fulfilled due to the actions of others. This protection is given for the purpose that everyone can enjoy their rights as human beings that have been protected and guaranteed by the law state. (Satjipto, 2021)

Based on the Theory of Legal Protection by Philipus M. Hadjon, legal protection is divided into 2 (two) types, namely: (Muchsin, 2003)

1. Preventive legal protection which has the meaning of legal protection provided with the aim of preventing disputes from occurring. Hence, the legal protection is given before the dispute occurs. In the case of standard agreements containing exoneration clauses that occur in the Indonesian business world today, Indonesia has

provided legal protection for consumers as regulated in Law Number 8 of 1999 concerning Consumer Protection and the Civil Code. The Laws, particularly in Article 18 Paragraphs 1 to 4, emphasizes that standard agreements are allowed to be made if they do not violate the provisions of Article 18 paragraph 1. This is also in line with the principle of freedom of contract in the Civil Code. The provisions regulated in Article 18 Paragraph 1 show that the law in Indonesia has provided the preventive legal protection in order that the standard agreement does not violate the laws.

2. Repressive protection means that legal protection is provided for the purpose of resolving disputes. This means that the dispute has occurred and the law gets involved to resolve the dispute. In relation to the issue of standard agreements containing exoneration clauses that occur in the Indonesian business world today, Indonesia has also provided repressive protection. This can be seen from the regulation in Article 18 paragraph 3 of the Law on Consumer Protection which emphasizes that if a business actor makes a standard agreement that violates the provisions of Article 18 paragraph 1, the agreement made is null and void. This is a form of legal protection provided by law for consumers in a repressive approach.

However, even though Indonesian law has provided the legal protections for consumers in the case of standard agreements containing an exoneration clause. The cases remain to occur in the today's business world. This shows that Indonesian laws have not been able to become a tool in engineering people's behavior and or changing people's behavior to obey the laws that have been made.

Based on the Theory of Law as a Tool of Social Engineering by Roscoe Pound, law is a tool to engineer, regulate and change society. The change in question is a change

in the pattern of thinking that is in harmony with the law and leads to development. This can lead to legal progress and create a civilized society. The meaning of civilized according to Roscoe Pound are: 1) Everyone can control the goals that are useful for what they find, what they create, what they get in the social and economic order which at that time held power; 2) Everyone can expect that others will not attack him; 3) Everyone can expect that the people with whom they deal in general relations will act in good faith or fulfill the promises they are able to; will run companies based on the morality of society; will replace the same item in case of mistake. (Munir, 2013)

By referring to this theory, it may be said that Law Number 8 of 1999 concerning Consumer Protection has not been able to become a law that changes people's behavior and provides change and creates a civilized society. This is evidenced by the existence of phenomena and or cases related to the application of standard agreements which are still found to contain exoneration clauses which ultimately harm consumers. Even though the Law on Consumer Protection has clearly regulated the provisions in making standard agreements, in reality there are still cases that are not in line with the Law. By adopting the category of civilized society according to Roscoe Pound, it can be submitted that the application of the Law on Consumer Protection has not been able to create a civilized society because:

- 1) consumers are always the party that is disadvantaged by business actors due to the existence of an exoneration clause in which business actors transfer their responsibility to the consumers;
- 2) a standard agreement containing an exoneration clause shows that there is no good faith from business actors in being responsible for the goods and or services sold. For example, a grocery receipt that is received when paying for goods at the cashier says "items that have been purchased cannot be returned or exchanged for other goods". This shows that if there is damage to the goods and or it is

found that the purchased goods have expired, then the business actor will not make compensation. It is obvious that there is bad faith from business actors because they release responsibility for the goods and or services they sell to consumers.

D. Conclusions

Businesses in Indonesia nowadays have arisen various new legal phenomena such as the implementation of standard agreements. This standard agreement is not against the law in Indonesia because it is allowed as stipulated in the principle of freedom of contract in the Civil Code and in Law Number 8 of 1999 concerning Consumer Protection. However, the problem is if the standard agreement contains an exoneration clause which transfers of responsibility for business actors that disadvantage consumers. If these phenomena are analyzed by the Theory of Legal Protection, the relevant existing laws in Indonesia have provided preventive and repressive protections. Yet, they have not been able to engineer, change society and create a civilized society. Therefore, the recommendation in this study is the need for a revision of Law Number 8 of 1999 by strengthening legal sanctions for business actors who enter into standard agreements that are not in accordance with the provisions in Article 18 Paragraph 1 of Law Number 8 of 1999.

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