

# EXONERATION CLAUSE IN ONLINE BUYING

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## *Abstract*

*The inclusion of standard clauses in an agreement or document is still often found in online transactions. With the inclusion of the standard clause, of course, it raises problems regarding the validity of the agreement in the perspective of Article 18 of the Republic of Indonesia Law Number 8 of 1999 in conjunction with Article 1320 of the Civil Code. In other words, whether the agreement that includes standard clauses has legal force or is null and void. Then with the inclusion of standard clauses in an agreement, and this causes losses to consumers, then whether consumers can claim compensation from business actors in the perspective of Law No. 8/1999.*

*The conclusion that can be drawn is that in a normative juridical manner the inclusion of a standard clause (exoneration) in the agreement between business actors and consumers can be canceled because it is contrary to Article 18 of the Republic of Indonesia Law Number 8 of 1999.*

*Effective supervision is needed from the Ministry of Trade and Industry and the Indonesian Consumers Foundation (YLKI) on the inclusion of standard clauses by business actors in an agreement or document on goods and/or services in the context of consumer protection.*

**Keywords:** *Clause, Exoneration, Transaction, Online*

## **Introduction**

Consumer protection is an integral part of sound business activities. In a healthy business activity there is a balance of legal protection between producers and consumers. The absence of balanced protection leaves consumers in a weak position. Moreover, if the product produced by the producer is a limited type of product, the producer can abuse its monopolistic position, and this of course will harm consumers.

The losses experienced by these consumers can arise as a result of the existence of a legal agreement between producers and consumers, as well as as a result of unlawful acts (*onrechtmatige daad*) committed by producers.

Agreements made between the parties do not always run smoothly in the sense that each party is satisfied, because sometimes the recipient does not receive the goods or services as expected. If the buyer, in this case the consumer, does not receive the goods or services as agreed, then the producer has defaulted, so that the consumer suffers a loss.

Default of one of the parties in the agreement is the failure to fulfill the conditions stated in the agreement. This is usually more experienced by the weak or has a high dependence on other parties, because the requirements are one-sided/more burdensome to the weak. This is because these requirements have been stated in a standard agreement or standard agreement. Such agreements are commonly used

and play an important role in business law which is generally based on efficiency-oriented values.<sup>1</sup>

Furthermore, in Article 18 paragraph (2) of the Republic of Indonesia Law Number 8 of 1999 it is stated that “Business actors are prohibited from including standard clauses whose location or shape is difficult to see or cannot be read clearly, or whose disclosure is difficult to understand.”

The juridical consequences of violating the provisions of Article 18 paragraphs (1) and (2) above, then based on the provisions of Article 18 paragraph (3) of the Law of the Republic of Indonesia Number 8 of 1999 the standard clause is declared null and void. In addition, violations of these provisions based on the provisions of Article 62 paragraph (1) of the Law of the Republic of Indonesia Number 8 of 1999 shall be punished with imprisonment for a maximum of 5 (five) years or a maximum fine of two billion rupiahs.

In the Elucidation of Article 18 of the Law of the Republic of Indonesia Number 8 of 1999 it is stated that “The prohibition on the inclusion of standard clauses that are detrimental to consumers is intended to place the position of consumers on par with business actors based on the principle of the validity of contracts.”

According to the principle of freedom of contract, everyone is free to make an agreement regardless of its content or form, as long as it does not conflict with the law, public order, and morality. Thus, the application of the principle of freedom of contract is not absolute, but is limited by law, public order, and morality.

Article 1320 of the Civil Code stipulates several conditions for the validity of the agreement, including the existence of an agreement between the parties. With this condition, the birth of the agreement is based on the agreement of the parties’ will, without any coercion, fraud or error.

Therefore, the agreed terms of an agreement as stipulated in Article 1320 of the Civil Code are in line with the provisions of Article 18 of the Republic of Indonesia Law Number 8 of 1999 which prohibits business actors from including standard clauses or known as exoneration clauses in a document or agreement. This standard clause is made unilaterally by business actors which generally contains provisions and requirements for the transfer of responsibility, thereby harming consumers.

The inclusion of standard clauses in an agreement or document is still often found in online transactions. With the inclusion of the standard clause, of course, it raises problems regarding the validity of the agreement in the perspective of Article 18 of the Republic of Indonesia Law Number 8 of 1999 in conjunction with Article 1320 of the Civil Code. In other words, whether the agreement that includes standard clauses has legal force or is null and void. Then with the inclusion of standard clauses in an agreement, and this causes losses to consumers, then whether consumers can claim compensation from business actors in the perspective of Law No. 8/1999.

## **Method**

In this case, the author uses normative legal research methods, which are legal research conducted by researching and using legal materials, namely primary legal materials, secondary legal materials, tertiary legal materials obtained from library research. This research also uses a statutory approach and a conceptual approach.

## **Discussion / Results and Discussion**

### **Consumer Protection in Indonesia**

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1 Peter Mahmud Marzuki. Tanpa Tahun. *Pembaharuan Hukum Ekonomi Indonesia*. Surabaya : Universitas Airlangga, page.8.

Consumer protection is all efforts that guarantee legal certainty to provide protection to consumers. With the existence of consumer protection, it is hoped that it will become a desire for all nations in the world to realize relationships of various dimensions that are related to each other and have dependencies between consumers, business actors and the government as regulators.

In development in the economic field, the government is obliged to provide guidance, direction and protection in order to create a healthy climate and world development, especially the world of trade. With the Law of the Republic of Indonesia Number 8 of 1999, it is hoped that the position of weak consumers can be protected legally.

One of the forms of protection for consumers from arbitrary actions by business actors is the prohibition of using standard clauses in an agreement. This is stipulated in Article 18 of the Republic of Indonesia Law Number 8 of 1999, business actors in offering goods and/or services that are shown to be traded are prohibited from making and/or including standard clauses in every document and/or agreement which contains, among others:

1. Transfer of responsibility for business actors;
2. Refusal of business actors to accept goods purchased by consumers;
3. Granting power of attorney from consumers to business actors to take all unilateral actions regarding goods to be purchased by consumers in installments;
4. Regulating the matter of proving the loss of use of goods or services purchased by consumers;
5. The submission of consumers to regulations made unilaterally by business actors when consumers use the services they buy.

Furthermore, it is determined that business actors are prohibited from including standard clauses whose location or shape is difficult to see or cannot be read clearly or which expresses them difficult to understand. Every standard clause stipulated by the business actor in the document or agreement mentioned above is declared null and void by law. This means that from the beginning there was never an agreement and no and there was never an engagement.

The provisions of Article 18 of the Republic of Indonesia Law Number 8 of 1999 are intended to place the position of consumers on par with business actors based on the principle of freedom of contract. However, in reality this provision has not been implemented properly. Because there are still business actors who include standard exoneration clauses in their purchase receipts, for example in garment trade, electronics and others which consequently harm consumers. Consumers are forced to accept with a heavy heart because they are driven by needs.

### **Setting Exoneration Clause**

Article 1 number 10 of the Law of the Republic of Indonesia Number 8 of 1999 states that “Standard clauses are any rules or provisions and conditions that have been principled and determined in writing unilaterally for business actors, which are set forth in a document and/or agreement that is binding and must be fulfilled by the consumer, from this provision, it can be said that the standard clause is part of the standard agreement.

The essence of a standard agreement according to Hondius as quoted by Salim HS is that “The contents of the agreement are not discussed with the other party, while the other party is only asked to accept or reject its contents.”<sup>2</sup> Then according to Mariam Darus Badruzaman that “A standard agreement is an agreement whose contents are standardized and set forth in a standard agreement.”<sup>3</sup> Furthermore,

2 Salim H. S. 2007. *Perkembangan Hukum Kontrak Di Luar KUHPerduta*. Buku Satu. Jakarta : PT. Raja Grafindo Persada, page.146.

3 Mariam Darus Badruzaman. 1980. *Perjanjian Baku (Standard Contract) Perkembangan di Indonesia*. Bandung : Alumni, page.4.

according to Ahmadi Miru, a standard contract is a contract whose clauses have been set or drafted by one of the parties.<sup>4</sup>

Gras and Pitlo stated the background of the birth of the standard agreement as follows:

- a. Gras said that the birth of the standard agreement was partly the result of changes in the composition of society. Standard agreements are usually made by corporate organizations;
- b. Pitlo said that the background to the emergence of a standard agreement was the socio-economic situation. Large companies, semi-government companies or government companies enter into cooperation between organizations and for their interests determine certain conditions unilaterally. The opposing party, who generally has an economic position, is weak, either because of his position or because of his ignorance, only accepts what is offered.<sup>5</sup>

With regard to the standard agreement or contract, Mariam Darus Badruzaman stated the characteristics of the agreement as follows:

It contains a unilateral decision by a party with a strong (economic) position:

1. The public (debtors) do not participate in jointly determining the contents;
2. Driven by the needs of the debtor forced to accept the decision;
3. Certain forms (written);
4. Prepared in writing in advance in bulk and collectively.<sup>6</sup>

Based on the characteristics mentioned above, it shows the different positions of the parties when the standard agreement is made, does not provide an opportunity for the debtor to enter into negotiations with the entrepreneur (creditor). The debtor does not have the power to express his will and freedom in determining the contents of the agreement.

Standard clauses included in the agreement are usually called exoneration clauses. According to Ri-jken, an exoneration clause is a clause included in an agreement whereby one party avoids fulfilling the obligation to pay full or limited compensation that occurs due to breaking a promise or violating the law.<sup>7</sup>

The exoneration clause which is usually contained in the agreement as an additional clause on the essential elements of an agreement, is generally stated in the standard agreement, the clause is a clause that could be detrimental.

Money consumers generally have a weak position when compared to producers, because the burden that should be borne by producers, with the existence of this clause, becomes the burden of consumers.

If in an agreement, the position of the parties is not balanced, then the weak party is usually not in a state of complete freedom to determine what is desired in the agreement. In this case, the party who has a stronger position usually uses the opportunity to determine certain clauses in the standard agreement, so that the agreement that should be made/designed by the parties involved in the agreement, is not found in the standard agreement, because the format and the content of the agreement is designed by the party who wants to be stronger.

Because it is the party with a stronger position who designs the format and content of the agreement, it can be ascertained that the agreement can contain clauses that are beneficial to him, or relieve/eliminate certain obligations that should be his responsibility. In this case, the weak party is harmed by the stronger

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4 Ahmad Miru. 2010. *Hukum Kontrak Penanganan Kontrak*. Jakarta : PT. Raja Grafindo Persada, page.39.

5 Mariam Darus Badruzaman, *Op.Cit*, page.7.

6 *Ibid*.

7 *Ibid*, page.9.

party, usually known as the abuse of the situation.<sup>8</sup>

To make an agreement or contract must be based on certain principles. One of the principles of agreement that is quite important is the principle of freedom of contract, that everyone may or is free to make any agreement, both regarding its content and form as long as it does not conflict with the law, decency, and public order.

Based on the principle of freedom of contract, if the agreement made by the parties does not conflict with the law of morality or public order, then the agreement is binding and must be carried out in good faith. This is official with Article 1338 paragraph (1) of the Civil Code which stipulates that “all agreements made legally valid as law for those who make them.”

Furthermore, an agreement must meet the conditions specified in Article 1320 of the Civil Code, namely: agreed, sufficient, certain things, and because things are lawful. Agreeing as one of the conditions of the agreement determines that the birth of the agreement is based on the will of both parties without any coercion, fraud, and error. What is desired by one party, is also desired by the other party. In other words, that the birth of the agreement is based on the free will of both parties in determining the form and content of the agreement or the existence of demand and supply.

In relation to the inclusion of standard clauses in the agreement between consumers and business actors in the field of trading activities, the substance of the agreement has been designed and made unilaterally by business actors, and consumers only accept or reject it. In this case, the position of the parties is not balanced on rights and obligations. The position of business actors is stronger, compared to consumers. Because it is driven by a need, consumers inevitably have to accept the standard clauses that have been set by business actors. Thus, the inclusion of a standard clause in the agreement between consumers and business actors does not fulfill the principle of freedom of contract and conditional as stipulated in Article 1320 of the Civil Code.

Regarding the existence of a standard agreement or standard agreement, there are 2 (two) different opinions according to legal experts as follows:

Sluijtea stated that a standard agreement is not an agreement, because the position of the entrepreneur is like that of a private legislator (*Lecif Particuliee Weetqever*).<sup>9</sup> Meanwhile, Pitlo stated that the standard agreement is a forced agreement (*Dwang contract*).<sup>10</sup>

Stein stated that the standard agreement can be accepted as an agreement based on the fiction of the existence of will and service (*Fietie Van Wil en Vertrouwen*) which arouses the belief that the parties are bound by the agreement. If the debtor receives the agreement document, it means that he voluntarily agrees to the contents of the agreement.<sup>11</sup> Then Asser Rutten stated that everyone who signs the agreement is responsible for the content and what he signed.<sup>12</sup>

Indonesian legal scholars such as Sutan Remy Sjahdeini stated that:

The validity of the standard agreement is no longer required because the standard agreement of its existence has become a reality, namely by the widespread use of standard agreements in the business world for more than 80 years. This fact was formed because the standard agreement was born from the needs of the community itself. The business world cannot exist without standard

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8 Ahmadi Miru dan Sutarman Yodo, *Op.Cit*, page.115.

9 Mariam Darus Badruzaman, *Op.Cit*, page.105.

10 *Ibid*.

11 Sutan Remy Sjahdeini. 2009. *Kebebasan Berkontrak dan Perlindungan Yang Seimbang Bagi Para Pihak Dalam Perjanjian Kredit Baik di Indonesia*. Jakarta : PT. Pustaka Utama Grafiti, page.79.

12 *Ibid*.

agreements.<sup>13</sup>

Thus there are 2 (two) different opinions regarding the existence of a standard agreement, namely on the one hand stating a standard agreement is not an agreement where there is coercion by one party, while the other party states that the standard agreement is an agreement because it has been accepted and signed by the parties.

Standard agreements have advantages and disadvantages, the advantages of standard agreements are that they are more efficient, can contain simpler business practices, and can be signed immediately by the parties. This can be beneficial, especially for mass contracts, namely contracts made in large volumes, while the weakness of standard agreements is the lack of opportunity for the opposing party to negotiate or review the clauses in the contract in question, so that standard contracts have the potential for clauses to occur. one-sided.<sup>14</sup>

Based on the description above, it can be said that the inclusion of standard clauses in the agreement between consumers and business actors in the field of trade in goods and/or services is contrary to Article 18 of Law of the Republic of Indonesia Number 8 of 1999, so that the agreement can normatively be cancelled.

## Conclusion

Based on the description that has been put forward, a conclusion can be drawn, that in a normative juridical manner the inclusion of a standard clause (exoneration) in the agreement between business actors and consumers can be canceled because it is contrary to Article 18 of the Republic of Indonesia Law Number 8 of 1999.

Effective supervision is needed from the Ministry of Trade and Industry and the Indonesian Consumers Foundation (YLKI) on the inclusion of standard clauses by business actors in an agreement or document on goods and/or services in the context of consumer protection.

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<sup>13</sup> *Ibid.*

<sup>14</sup> Munir Fuady. 2007. *Hukum Kontrak (Dari Sudut Pandang Hukum Bisnis)*. Buku Kedua. Bandung : PT. Citra Aditya Bakti, hlm.78.

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