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# Legal analysis of the application of raw clause in an agreement

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## Abstract

*The standard agreement for its existence is recognized in trade traffic and has become a habit and need of the community. juridically but the standard agreement does not realize the principle of freedom of contract in full. Because consumers to obtain goods or services needed only have two choices, namely accepting or rejecting the standard agreement. While the principle of freedom of contract prioritizes the freedom and equality of every human being. the principle of freedom of contract also implies that the community has the freedom to make agreements in accordance with their respective interests. The principle of freedom of contract is a principle that gives every person the freedom to make or not make an agreement, make an agreement with anyone, determine the contents of the agreement, the implementation and requirements and determine the form of the agreement, namely written or oral. In general, the form of legal protection against the implementation of the standard agreement has been regulated in Article 18 of Law Number 8 of 1999 concerning consumer protection. The regulation is to provide legal certainty to all the needs of consumers / debtors and to defend their rights if they are harmed by business actors especially in the implementation or implementation of standard agreements.*

***Keywords:*** *law; standard clause; agreement*

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## 1. Introduction

Basically everyone is given freedom by law to enter into an agreement, as stipulated in article 1338 paragraph (1) of the Civil Code (hereinafter referred to as BW) which stipulates that "All agreements made legally apply as laws invite those who make it ". If seen in the article, it can be seen that article 1338 paragraph (1) BW is the source of the entry into force of the principle of freedom of contract. The principle of freedom of contract is a principle that gives every person the freedom to make or not make an agreement, make an agreement with anyone, determine the contents of the agreement and the requirements and determine the form of the agreement, namely written or oral (Salim H.S, 2010: 9).

Pitlo said the background to the growth of the standard agreement was due to socio-economic conditions. Large companies, and government companies establish cooperation within an organization and for their benefit, conditions are unilaterally determined. The opponents generally have a weak position, both because of their principles and because their ignorance only accepts what is offered (Wirjono Prodjodikoro, 1976: 35).

In such circumstances, the consumer does not have the opportunity to be able to make changes regarding the conditions stated in the agreement, he only has the opportunity to take it or leave it agreement. Such agreements are referred to as standard agreements or standard agreements, where the standard agreement is the realization of the existence of the principle of freedom of contract.

The standard agreement cannot be separated from the existence of additional clauses, in addition to the main clause contained in the agreement. The additional clause taken by the author in this writing is the exoneration clause. The definition of an exoneration clause is a clause that contains conditions that limit or even completely erase the responsibility that should be borne by the product distributor

Inclusion of standard clauses in the agreement cannot be denied to be rife by reason of effectiveness and efficiency in transactions. The existence of a standard clause is based on agreement to the agreement so that it acts as an Act for the parties. But on the other hand there are opinions that oppose the inclusion of a standard clause in the agreement, especially based on the principle of balance and justice in contracting.

The principle of freedom of contract, which in Dutch is called vrijheid contracts, implies that people have the freedom to make agreements according to their will and interests. The freedom in question covers (Sutan Remy Sjahdeini, 1993: 47),

1. The freedom of each person to decide whether he will make an agreement or not make an agreement
2. The freedom of each person to choose with whom he will make an agreement
3. Freedom of the parties to determine the form of the agreement
4. Freedom of the parties to determine the contents of the agreement
5. Freedom of the parties to determine how to make an agreement

Freedom of contract gives the parties the freedom to make agreements in any form or format, both written, oral, non-authentic, unilateral, standard and so on, and with content or substance as desired by the parties. Thus according to the principle of freedom of contract, a person generally has a free choice to enter into an agreement (Peter Mahmud Marzuki, 203: 195). The important thing to note is that contractual freedom and the provisions of Article 1338 paragraph (1) of the Civil Code are not independent. The principle is in one complete system and is related to other provisions.

The principle of freedom of contract which can be concluded from the provisions of Article 1338 paragraph (1) of the Civil Code is often not in accordance with the facts that apply in the standard agreement made by business actors. In other words there is a gap between theories (das solen), namely the provisions of Article 1338 paragraph (1) of the Civil Code that reflects the principle of freedom of contract and the prevailing reality or practice (das sein), namely the application of standard agreements in agreements by business actors.

The standard agreement raises (impresses) the pattern of contractual relationships that are unbalanced and biased. the standard contract has long been a problem that raises pros and cons among legal experts. The problem lies in the clauses set unilaterally by business actors and enacted en masse for consumers. In these clauses, there appears to be an imbalance in the position of business actors and consumers who need funds. In such conditions consumers cannot submit revisions to the agreement clauses offered by business actors. consumers can only accept or reject the contents of the agreement set by the bank.

To obtain economic benefits, business actors design agreements that contain unnatural clauses and burden the consumer. In addition, the agreements offered by business actors often contain exoneration clauses or clauses that aim to free or limit the unilateral responsibility of the business actor against the lawsuit of consumers / debtors who carry out their obligations improperly as determined in the agreement. Even though

these clauses should provide legal protection for the parties, especially for consumers / debtors as parties whose position is weak.

The problem being examined is whether the application of standard clauses in an agreement reflects the principle of freedom of contract and how is the legal protection for consumers towards the application of standard clauses in an agreement.

## 2. Method

The type of research used in this paper is Normative research. This research was carried out based on existing legal principles and legal regulations (normative). It focuses on the study of the application of standard clauses in an agreement and forms of legal protection for consumers in the application of standard clauses in an agreement.

The sources of primary legal material in this paper include: Civil Code and Consumer Protection Act while secondary legal material sources used in this study are in the form of theses, theses, dissertations, literature books, legal journals and writings in particular those that relating to the inclusion of standard clauses in an agreement. The source of tertiary legal material in this writing comes from dictionaries, encyclopedias and so on, especially those related to the Baku agreement.

In this study, the technique of obtaining legal materials is used, namely through library research (Library Research), where researchers conduct searches in the form of legislation concerning the Baku agreement, scientific works and so on that have to do with the subject matter in this study.

Legal material analyzed in the form of legal issues relating to the application of standard clauses in an agreement. By first describing the facts in the field regarding the implementation of standard clauses in an agreement.

Furthermore, the results will be interpreted using deductive thinking, namely a way to draw conclusions that depart from general discussion towards specific discussions. After that, the researcher will give a prescription regarding the application of the standard clause in an agreement

## 3. Research results and discussion

The results should summarize (scientific) findings of the study. It should be written in clear and concise. The separation or com-bination of Results and Discussion is accepted. If the result is separated into some subheadings, the subheading should be numbered as following example:

The background underlying the inclusion of the standard clause in an agreement was initially born in order to support the efficiency and effectiveness of the contract. Soedjono Dirdjosisworo argues that the standard agreement (contrac standard), basically is the standardization or standardization of transactions so that transactions can be carried out quickly. Therefore, the agreed conditions are standardized, meaning that they are set as a benchmark for each party that makes an agreement with the businessman concerned.

In the Civil Code itself there are no provisions that provide an understanding of the standard clause. The standard clause is built on the opinions of legal scholars who develop in doctrines and writings that discuss this matter. However, basically there is no uniformity of understanding among legal scholars. However, through the opinions below, it can be described about what is meant by the standard clause.

A standard contract is a written contract made only by one of the parties to the contract, so usually the standard contract is very biased. To be able to cancel it needs to

highlight whether with the contract there has been an erosion of the bargaining position, so that the existence of an element of "agreement" between the parties is actually not fulfilled.

Before the researcher examines further about the inclusion of a standard clause in an agreement relating to the principle of freedom of contract, it is better to first examine the opinions of legal experts both pro and contra of the standard agreement.

Opinions that are pro against the enforceability of standard clauses, namely Stein, state that a standard agreement can be accepted as an agreement based on the fiction of willingness and trust (fictie van wil en vertouwen) which arouses trust that the parties bind themselves to the agreement, if the debtor accepts the agreement voluntarily agree to the agreement (Mariam Darus Badrulzaman: 58). Meanwhile, Asser Ruten added that a person is bound to a standard contract because he has signed the contract, so he must be considered aware, and he wants and is therefore responsible for the contents of the contract. So each person who signs a contract is responsible for what content is signed, so that if there is someone who signs the standard contract form, the signature will raise the belief that the signatory knows and wants the contents of the signed form. Because, it is not possible for people to sign what is unknown.

Meanwhile, Hondius added that the standard agreement has a binding power based on habits (gebruik), which applies to the community and trade traffic.

Munir Fuady (2007: 60) argues that the existence of a standard clause cannot be completely banned, because even though it has the potential to violate the doctrine of contract law, it can also justify some other contractual legal principles, besides the reasons for contractual freedom that are very commonly used in court. Some principles of civil law that strongly support the existence of a standard contract, namely legal principles as follows.

1. Principles of agreement on the wishes of the parties
2. The principle of risk assumption from the parties
3. Principles of obligation to read (duty to read) and,
4. The principle of contract follows habits.

The notion that contradicts the standard agreement is Sluitjer, saying that this standard agreement is not an agreement, because the position of the entrepreneur in the agreement is like a private law maker (legio particulary wetgever). The conditions specified by the employer in the agreement are laws not agreements (Mariam darus badrlzaman, 1994: 52). Furthermore Pitlo said that the standard agreement was a forced agreement (dwang contrac). Although it is theoretically juridical, this standard agreement does not meet the provisions of the law and is rejected by some lawyers. But in reality, community needs run in the direction that is against the law.

The researcher himself in this case does not side with either of these two understandings. On the one hand, researchers see more that the standard agreement is theoretically juridical in contravention of the principle of freedom of contract with the failure of the provisions of the governing law. But on the other hand it cannot be denied that the developments that occur regarding this matter, where in reality, people's needs tend to run in the direction opposite to the wishes of the law and even become a prevailing habit in the community and trade traffic, taking into account good efficiency factors in terms of costs, energy and time, and others. But in this case, the use of this standard agreement should not be allowed to grow wildly and therefore needs to be regulated, with the main consideration being on the aspect of protection for debtors / consumers.

If it is examined more deeply about how the standard agreement is issued, it does not juridically fulfill the elements required by article 1320 jo 1338 paragraph 1 of the Civil Code. Based on the provisions of Article 1320 of the Civil Code, an agreement is declared valid if it has fulfilled 4 (four) cumulative conditions. The four conditions for the validity of the agreement include.

Akat Agree between those who commit themselves. This means that the parties making the agreement have agreed or agreed on the main matters or material agreed upon. And the agreement is considered to be non-existent if given due to mistakes, mistakes, coercion or fraud.

Skills for making an engagement. The meaning of the word proficiency referred to in this case is that the parties have been declared mature by law, namely in accordance with the provisions of the Civil Code, those who are 21 years old, have been or have been married. Capable also means an adult, healthy mind, and is not prohibited by a law to do a certain act. And people who are considered incompetent to do legal acts, namely: people who are not mature, according to Article 1330 of the Civil Code jo. Article 47 of Law Number 1 of 1974 concerning Marriage; people who are placed under guardianship, according to Article 1330 jo. Article 433 KUPerdata; and people who are prohibited by law from carrying out certain legal acts such as those who have been declared bankrupt by the court.

Certain Things. That is, in making an agreement, what is agreed upon must be clear so that the rights and obligations of the parties can be determined.

A Cause That Is Halal. That is, an agreement must be based on legal reasons that do not conflict with the provisions of Article 1337 of the Civil Code, namely: • Not contrary to public order; • Does not conflict with decency; and • Not against the law.

Legal protection for consumers regarding the application of standard clauses in an agreement.

Agreements in the field of business that are generally in the form of standards are always memorable as unbalanced agreements. This is seen by the fact that the various models of standard agreements are often dominated by options that benefit one party, especially those whose economic position is strong.

Inclusion of standard clauses in the agreement cannot be denied to be rife by reason of effectiveness and efficiency in transactions. The existence of a standard clause is based on agreement to the agreement so that it acts as an Act for the parties. But on the other hand there are opinions that oppose the inclusion of a standard clause in the agreement, especially based on the principle of balance and principle of justice and the principle of freedom of contract in contract.

In connection with the principle of freedom of contract as stipulated in Article 1338 paragraph 1 of the Civil Code which reads "All agreements made legally apply as laws for those who make them". On this basis, in the implementation of contracts, especially in the field of business, an agreement or contract that is efficient in terms of time, cost and labor is needed and is effective in terms of content or agreement, business actors often use standard / standard contracts).

But in practice, especially in the standard / standard agreement in the agreement associated with the making of unilateral standard agreements raises various problems where the content or content of the standard agreement shows an imbalance in the bargaining position between the parties. The position between the debtor and creditor is

often lame, where we often find that the contents of the agreement are made with words that are difficult to understand and made in small print. The explanation given by the creditor is also incomplete and unclear so that the debtor only understands a small part of the standard agreement. Often the agreement is only read at a glance and the creditor provides a not-so-deep understanding even though the juridical consequences are high so the debtor often does not know what is his right. Often we find the fact that debtors do not know the nature of making a standard agreement. The debtor or new consumer knows the consequences of jurisdiction where the standard agreement made by the creditor is more concerned with the interests of the business actor than the consumer.

The standard agreement, especially in the practice of the business world is actually still justified and various legislation has actually provided protection to consumers and business actors in a balanced manner. If we carefully examine and construct in Article 18 of Act Number 8 of 1999 concerning Consumer Protection which reads: "(1) Business actors in offering goods and / or services intended for trading are prohibited from making or including standard clauses in each document and / or agreement if.

a. declare the transfer of responsibility of the business actor
b. states that business actors have the right to refuse the return of goods purchased by consumers;
c. states that the business actor has the right to refuse the return of money paid for goods and / or services purchased by consumers;
d. declare power of attorney from consumers to business actors both directly and indirectly to take all unilateral actions relating to goods purchased by consumers in installments;
e. regulate the matter of proof of loss of use of goods or utilization of services purchased by consumers;
f. giving rights to business actors to reduce service benefits or reduce consumer assets that are the object of buying and selling services;
g. states the consumer's submission to regulations in the form of new rules, additions, continuations and / or further amendments made unilaterally by the business actor in the period the consumer uses the services he buys;
h. states that the consumer authorizes the business actor to charge mortgages, liens, or collateral rights to the goods purchased by the consumer in installments. (2) Business actors are prohibited from including a standard clause whose location or shape is difficult to see or cannot be read clearly or whose disclosure is difficult to understand

## 4. Conclusion

The standard agreement for its existence is recognized in trade traffic and has become a habit and need for the community. juridically but the standard agreement does not realize the principle of freedom of contract in full. Because consumers to obtain goods or services needed only have two choices, namely accepting or rejecting the standard agreement. While the principle of freedom of contract prioritizes the freedom and equality of every human being. the principle of freedom of contract also implies that the community has the freedom to make agreements in accordance with their respective interests. Freedom includes: the freedom of the parties to decide whether to make an agreement or not, freedom to choose with whom to make an agreement, freedom to determine the form of the agreement, freedom to determine the contents of the agreement, and freedom to determine how to make an agreement

In general, the form of legal protection against the implementation of the standard agreement has been regulated in Article 18 of Law Number 8 of 1999 concerning

consumer protection. The regulation is to provide legal certainty to all the needs of consumers / debtors and to defend their rights if they are harmed by business actors especially in the implementation or implementation of standard agreements. The aim is to place the position of consumers on par with business actors. According to the Researcher if the implementation of the standard agreement there are differences in the interpretation of the standard contract formulations made by the parties, one legal effort can be made to become a defense or legal protection for consumers so that the implementation of the standard agreement does not burden one party in contracting, especially consumers then the standard contract formulation must use the interpretation of the agreement that does not favor the standard contract maker. The interpretations referred to are: 1). if there is a conflict between the standard clause and the non-standard clause in an agreement then the non-standard agreement is used. 2). The interpretation of the standard clause must be for the loss of the party providing the standard contract. 3). The interpretation of the standard clause must be done by looking more at the parties' intentions than just looking at the words in the contract.

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