

## VALIDITY OF EXONERATION CLAUSE IN STANDART CONTRACT

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### Abstract

The purpose of this article is to find out whether the existence of an exoneration clause in the *standard contract* can be recognized as valid in the agreement. The research method used is normative legal research that describes various legal issues related to standard contracts, agreements as regulated in article 1338 of the Civil Code that all agreements made in accordance with the law apply as law for those who make them. The approach used is the statutory approach and the conceptual approach. By using secondary data consisting of primary, secondary and tertiary legal materials. Based on the results of the study, it can be seen that in the standard contract there is an exoneration clause. The exoneration clause/standard contract does not fulfill the principle of responsible freedom of contract. The principle of freedom of contract is closely related to the content of the agreement, namely the freedom to determine "what" and with "who" the agreement is made. Therefore, a motor vehicle loan agreement with a finance company containing a standard clause is still valid as long as it fulfills the requirements contained in Article 1320 of the Civil Code.

**Keywords: Validity, exoneration clause, standard contract.**

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### INTRODUCTION.

In the current global era, the business world is developing rapidly. Business actors are always looking for new breakthroughs in developing their business. Breakthroughs made by business people in business development have given birth to various forms of business formats. In the legal world, adequate legal institutions are needed to regulate a business in a country, in order to create legal certainty and protection for the parties involved in this business.

The business relationship in its implementation is of course based on an agreement or contract. An agreement or contract is a series of agreements made by the parties to bind themselves to each other. In the field of everyday life, the term agreement is often used, even though it is only made orally. But in the business world, the agreement is a very important thing because it involves the field of business involved. Bearing in mind that in contract law, it is a form of manifestation of

legal certainty. Therefore, in practice every agreement is made in writing in order to obtain a legal force, so that the goal of legal certainty can be realized.

In connection with the agreement Article 1313 of the Civil Code provides the definition: "An agreement is an act by which one or more people bind themselves to one or more other people." In contract law, the principle of freedom of contract is known, meaning that everyone is free to enter into an agreement in any form, in its form, content and to whom the agreement is intended. This principle can be concluded from Article 1338 paragraph (1) of the Civil Code which reads: "All agreements made legally shall apply as law for those who make them".

The purpose of the article above is that in general an agreement can be made freely to make or not make an agreement, is free to enter into an agreement with anyone, is free to determine its form and conditions, and is free to determine its form, namely written or unwritten and next. However, in its development in Indonesia, standard forms of contracts have emerged, where a contract has been prepared in advance by one party and the other party is only faced with the choice to accept or reject the agreement. There have been

so many areas of life in Indonesia that are controlled by standard *contracts*, whether accompanied by an exoneration clause or not. For example, when people want credit at the bank, enter into a lease agreement, send goods, etc., without realizing it, that person has actually bound themselves to a standard contract.<sup>1</sup>

Formally in Indonesia, the legal rules regarding standard contracts have not been clearly regulated, so further studies are needed. Law is basically for the protection of human interests. In every legal relationship, including an agreement, there must be a balance between the parties so that there is no conflict of interest. But in reality this is not always the case. There is always the possibility that one of the parties has a stronger position both in terms of economy and mastery of technology or a specific invention. In this relationship, the one who is facing each other is between two opponents of the promise, not the partner of the promise. This will be more visible if the standard contract is accompanied by conditions containing the exception of responsibility or liability for an event, which should be borne by the party who

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<sup>1</sup> Kelik Wardiono, 2014, *Perjanjian Baku Klausul Eksonerasi dan Konsumen*. Yogyakarta: Ombak, p. 35.

unilaterally has determined the contents of the agreement (*the exoneration clause*).<sup>2</sup>

In this condition, one of the parties has more opportunities to benefit from an agreement. Often the drafting parties determine the terms that are quite burdensome, especially since the contract is presented in the form of a standard contract, because the provisions in the agreement can be used to anticipate possible losses to their parties. From the description of the background above, the author raises the following problems: Is there an exoneration clause in a standard contract or a *standard contract* that can be recognized for its validity in the agreement?

## RESEARCH METHODS

Methodology in essence seeks to provide guidance on the ways in which a scientist studies, analyzes and understands the environments he faces. Research is an attempt to collect and discover the relationships that exist between carefully observed facts and legal norms and legal theories about contracts and the principle of freedom of contract.<sup>3</sup>The study in this writing is *normative juridical*, which describes various legal issues related to standard contracts, agreements as regulated in article 1338 of the Civil Code that all agreements

made in accordance with the law apply as law for those who make them. The agreement cannot be withdrawn other than by agreement of both parties, or for reasons determined by law. The agreement must be carried out in good faith. Legal research is carried out to solve legal issues that arise. The results to be achieved from a legal research are prescriptions on what should be done on the issues raised.<sup>4</sup>

A normative research must use a statutory approach, because what will be studied are various legal regulations related to standard contracts with the principle of freedom of contract. For this reason, law must be seen as a closed system with various characteristics. In order to facilitate the understanding of the writer's line of thought, it is equipped with the use of a conceptual approach, which is carried out by referring to legal principles. These principles can be found in the views of scholars or legal doctrines.<sup>4</sup> The data used in this article is secondary data, which consists of primary legal materials, secondary legal materials. Primary legal materials consist of the Civil Code and Law Number 8 of 1999 concerning Consumer Protection.

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<sup>2</sup> Sudikno Mertokusumo, 1991, *Kapita Selekta Hukum Perdata Hukum Perdata*, Purwokerto: Fakultas hukum Universitas Jenderal Soedirman, p. 54

<sup>3</sup>Soemitro. 1990. *Legal Research Methodology*. Jakarta: PT. Rineka Cipta, p. 10

<sup>4</sup> Peter Mahmud Marzuki, 2005, *Penelitian Hukum*, Jakarta: Kencana., p.96

## DISCUSSION.

### The validity of the Exoneration Clause in the Standard Contract.

The use of standard contracts today shows one side of the dominance of the modern economy by business entities or companies. Firms create contracts as part of stabilizing their external market relations.<sup>5</sup> For reasons of uniformity and efficiency, the company has formulated all or most of the clauses of the agreement unilaterally. The debtor does not have the opportunity to negotiate the contents of the agreement. Consumers only have the choice of *take it or leave it*.

People want the agreement or contract to still uphold the universal principles that apply in contract law, namely the principle of freedom of contract, the principle of freedom to choose the applicable law and the principle of freedom to determine jurisdiction. The reality is different where there is a tendency for business actors to close a transaction by first having prepared contract formats which are generally printed (*modelled draft of contract*) to be signed by their contracting partners. Contract (*freedom of contract*) of its contracting partners to be able to negotiate on a balanced basis the content of the

agreement that it can accept.<sup>6</sup>

The contract law regulatory system in Book III of the Civil Code is an *open system*, or also known as *aanvullend recht*. This means that everyone is free to enter into agreements, both those that have been regulated and those that have not been regulated by law.<sup>7</sup> This can be concluded from the provisions contained in Article 1338 paragraph (1) of the Civil Code, which reads: "All agreements made legally apply as law for those who make them." Subekti argues that in matters of agreement, we are allowed to make laws for ourselves.<sup>8</sup> This provision contains the principle of freedom of contract. The principle of freedom of contract is also called the principle of consensual autonomy, which determines the existence of agreement.

The principle of freedom of contract is one of the main principles, because this principle can accommodate the needs of the community in conducting business transactions which are constantly evolving along with technological developments. The position of the principle of freedom of contract is further strengthened by the provisions of Article 1319 of the Civil Code, which contains: " All agreements , both those

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<sup>5</sup> Ridwan Khairandy, 2007, Keabsahan Perjanjian Standar Pasca Berlakunya Undang-Undang Perlindungan Konsumen, Paper, Jogjakarta: Universitas Islam Indonesia, p. 1.

<sup>6</sup> Ricardo Simanjuntak, 2003, Akibat dan Tindakan-Tindakan Hukum Terhadap Pencantuman Klausula Baku Dalam Polis Asuransi Yang bertentangan dengan Pasal 18 Undang-

Undang No. 8 Tahun 1999 tentang Perlindungan Konsumen," Jurnal Hukum Bisnis, Volume 22 Nomor 2, p. 53 .

<sup>7</sup> Salim H.S., 1998. Perkembangan Hukum Kontrak Innominat di Indonesia, Jakarta: Sinar Grafika, P. 7

<sup>8</sup> Ibid. p. 14.

that have a special name, or those that are not known by a certain name, are subject to the general rules contained in this chapter and last chapter." In other words, the original provisions of 1319 of the Civil Code recognize the existence of agreements other than those contained in the Civil Code.

The use of the term contract and agreement is in line with some scholars who provide the same understanding between contract and agreement. This is because the focus of the author's study is based on the perspective of *the Bugelijk Wetboek (BW)* or the Civil Code, where an agreement or agreement (*overeenkomst*) has the same meaning as a contract.

A standard contract is a contract whose clauses have been set or drafted by one of the parties. The use of standard contracts in contracts that are usually carried out by other parties, based on Article 1338 paragraph (1) of the Civil Code is ideal if the parties seen in a contract have a balanced bargaining position with one another. If in an agreement, the position of the parties is not balanced, the weak party is usually not in a state that is truly free 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 contract, so that the agreement that should be made or designed

by the parties involved in the agreement, is no longer found in the standard contract because of the format and content of the contract. Designed by a party in a stronger position. Because it is the party who designs the format and content of the contract who has a stronger position, it can be ascertained that the contract contains clauses that are beneficial to him or relieve or eliminate certain burdens or obligations that should be in its form which can be known as an exoneration clause. As an example of a standard clause in a credit agreement, the contents of which are as follows: each of the following events is an "event of Default" based on this agreement:

1. The consumer does not pay if or when the installment is due or the installments or other obligations arising under this agreement, which is enough to prove by the passage of time;
2. The consumer does not maintain or the consumer does not make major changes to the insurance required by Article 7 (insurance) of this agreement;
3. Consumers do not fulfill or carry out a condition or other requirement stated expressly or impliedly
4. in this agreement or any agreement, document or guarantee intended by this agreement;
5. Every statement, guarantee or information made by the consumer based on this

agreement or in any agreement, document or guarantee intended by this agreement, which has been/must be made and/or delivered and/or implemented by the consumer, turns out to be untrue or not in accordance with reality. ;

6. The consumer's assets, either partially or wholly, are confiscated, transferred to another party, or become the object of a case which in the opinion of the creditor himself may affect the consumer's ability to repay his obligations under this agreement;
7. Any event or series including but not limited to any changes to government obligations, which in the opinion of the creditors themselves have resulted in or could result in or cause an adverse change in the consumer's financial or commercial position, or in any other way could result in or have a very adverse effect on the consumer's ability to perform its obligations under this agreement;
8. The consumer stops running his business, or any of the assets owned or used by the consumer, including but not limited to goods, is threatened or subject to confiscation or execution, or the property is subject to confiscation, confiscation, or punishment, or any other action that interferes with the consumer's use of the goods or if the creditor on a reasonable basis may consider itself to be insecure with respect to its legal rights or financial interests under this agreement;
9. The collateral is transferred or pledged to a third party, without obtaining prior written approval from the Creditor;
10. The consumer and/or goods are involved in a criminal or civil case and therefore in the opinion of the creditor himself, the consumer is unable to complete his obligations under this agreement;
11. Consumers and/or companies affiliated with Consumers are negligent, do not carry out obligations, or default based on this agreement or other financing facilities provided by creditors or together with other third parties;
12. Consumers and/or companies affiliated with Consumers do not make payment of obligations when due or default in the implementation of any of the obligations under any agreement in which the Consumers and/or companies affiliated with consumers are in debt or may become indebted;
13. The Consumer demands, takes an action or allows an action that states or implies that the Consumer is the owner of the goods; or
14. The consumer defaults, or an event of default occurs based on the contract or other

agreement between the creditor and the consumer;

15. consumer or guarantor (ie another party who under this agreement bears or guarantees the payment of the consumer's debt) submits an application to be declared in a state of bankruptcy or suspension of payment of debts (*surseance van betaling*) or does not pay the debt to the party;
16. the third billable (maturity) is a bankruptcy application filed against the consumer and/or guarantor at the request of any party;
17. the consumer or guarantor dies, is dissolved or makes a decision to dissolve (if the consumer and guarantor are a company) or continues to be sick or permanently disabled, and in the opinion of the creditor himself the consumer is unable to settle his obligations under this agreement, except if the recipient and/or successor of rights/experts the heirs, with the approval of the creditor, declare that they are capable of fulfilling the consumer's obligations under this agreement;
18. the consumer is under custody (*Onder Curatele Gesteld* ) or for any reason that causes the consumer to be incompetent or no longer entitled or authorized to carry out management actions, or ownership of and to his wealth, either partially or wholly.

19. If the consumer does not submit the original documents relating to the owner of the goods as collateral to the creditor.

In the next clause it is stated that: Thus, the consumer will no longer control the goods without the permission of the business actor and the Consumer will expressly not take any legal remedies including further demands to the Consumer, however:

1. Consumers must immediately return goods to business actors in accordance with this agreement, and/or all goods that have been given/delivered by business actors to consumers according to this agreement; and
2. The consumer shall without delay pay the entire amount owed under this agreement, including but not limited to:
  - a. All amounts of Principal Payable and additional fees that must be paid but have not been paid, together with interest and late payment penalties according to the rates stated in the agreement.
  - b. All fees and costs incurred by business actors including but not limited to legal fees, notary fees, repossession fees, storage, transportation, insurance, repair and sale or disposal of goods in any way whatsoever, from the date of issuance of the said fees or costs. Until

completion of all obligations must be paid by the consumer.

3. business actors can immediately decide and cancel this agreement without the need for a warning with a bailiff letter or other letter or a court decision/decision to carry out one or more of the following:
  - a. take appropriate measures to recover all payables under this agreement, including but not limited to all legal fees and attorney's fees in connection with the performance of the provisions of this agreement and any agreements referred to in or purported to be in this agreement and obtain compensation damages for breach of this agreement.
  - b. exercise its rights against the guarantor, and take whatever action is necessary to carry out any guarantees given in relation to the obligations of the Consumer or the guarantor.
  - c. without notice or billing, which is expressly excluded by the consumer, business actor or one of their agents or representatives, may control, secure and enter offices, factories, warehouses or other buildings where goods may be found and open every gate, door or fasteners and release and unload other items in which they are located and physically lift them, all without liability to the consumer or other parties for damage to property, buildings or otherwise.
  - d. sell or otherwise dispose of (including rental to third parties), use (or decide not to do any of the foregoing) any and all goods and the consumer agrees that the consumer will not, and hereby waives any and all rights to apply for object to the matters mentioned above or file a claim against one of the goods from the business actor or any third party.
  - e. any sale or release of goods, according to the business actor's own policy, may be carried out by public auction or direct sale or other transaction with or without notification to consumers, and the business actor may reject or accept any offer at the time of sale or disposal by other means. Business actors have no obligation or obligation to provide accountability to consumers regarding the sale or disposal by any other means, use or possession of *goods*, or in connection with the results received by business actors from these matters.
  - f. If there is an excess of the proceeds from the sale of the goods, it will be returned to the consumer after calculating the net sales proceeds of the goods with arrears



of late fees and the rest of the consumer's investment or goods according to the main agreement including but not limited to costs incurred by the business actor regarding with the taking and possession of goods. However, if it is not sufficient, then the shortage remains the responsibility and obligation of the consumer to pay it to the business actor no later than 7 (seven) working days after the bank has been notified;

- g. Take other actions permitted under this agreement or under applicable laws and regulations.

The first clause point 1 which states that "Consumers do not pay if or when one of the installments is due or its installments or obligations arising under this agreement, it is sufficient to prove that the time has passed". Followed by the second clause which reads "Thus, the consumer will no longer control the goods without the permission of the creditor and the consumer will expressly not take any legal action including further claims against the creditor".

Followed by point 3 which states "The creditor can immediately decide and cancel this agreement without the need for a warning with a bailiff's letter or other letter or a court decision". Leased by consumers, if at any time

there is arrears in installment payments or overdue, then the creditor can execute the goods rented by the consumer (the object of the leasing agreement) without the need for notification to the consumer.

The clause used as the basis for the policy of business actors to withdraw the object of the *leasing agreement* is prohibited because it has violated the provisions of Article 18 paragraph (1) letter d of Law Number 8 of 1999 concerning Consumer Protection which prohibits business actors from declaring consumers to authorize business actors either directly or indirectly to take all unilateral actions related to goods purchased by consumers in installments.

The main problem regarding the inclusion of aggravating clauses in a standard agreement is the validity of the aggravating clauses. In other words, to what extent is the attachment of the parties to these clauses if an incriminating clause is included, for example, an exoneration clause in a standard agreement or by stating by one party to the other that for a legal relationship between them a clause applies concerned, then the other party is automatically bound to the clause and to that clause there are no longer any juridical challenges.

There are no statutory provisions or jurisprudence that specifically provide basic rules that must be considered if a party to an agreement requires that the aggravating clauses

in a standard agreement apply to the legal relationship between his party and his promise partner. <sup>9</sup>In Indonesia, Law Number 8 of 1999 concerning Consumer Protection has regulated the inclusion of standard clauses in documents and/or agreements in order to provide protection to consumers who are often harmed by business actors. The regulation of standard clauses in a document and/or agreement is regulated in the provisions of Article 18 of Law Number 8 of 1999 concerning Consumer Protection which states:

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. Declaring the transfer of responsibility of business actors;
    - b. To state that business actors have the right to refuse to return goods purchased by consumers;
    - c. To declare that business actors have the right to refuse to return the money paid for goods and/or services purchased by consumers;
    - d. Declare the granting of power of attorney from consumers to business actors, either directly or indirectly, to take all unilateral actions related to goods purchased by consumers in installments;
  - e. Regulates the matter of proving the loss of the use of goods or the use of services purchased by consumers;
  - f. Give rights to business actors to reduce the benefits of services or reduce the assets of consumers who are the object of buying and selling services;
  - g. To declare that consumers are subject to regulations in the form of new, additional, continued, and/or follow-up changes made unilaterally by business actors while consumers are taking advantage of the services they have purchased;
  - h. To declare that the consumer authorizes the business actor to impose mortgage, lien, or guarantee on goods purchased by consumers in installments;
2. Business actors are prohibited from including standard clauses whose location or shape is difficult to see or cannot be read clearly, or whose disclosures are difficult to understand;
  3. Every standard clause that has been determined by the business actor in the document or agreement that meets the

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<sup>9</sup> Sutan Remy Sjahdeini, 1993, *Kebebasan Berkontrak Dan Perlindungan yang Seimbang bagi Para pihak dalam Perjanjian*

Kredit Bank di Indonesia, Jakarta: Institut Bankir Indonesia, hlm. 87.

provisions as referred to in paragraphs (1) and (2) is stated as limit by law;

4. Business actors are required to adjust standard clauses that are contrary to this Law.

With this provision, business actors should be required to make adjustments or harmonization to the standard clauses contained in documents and/or agreements made contrary to Law Number 8 of 1999 concerning Consumer Protection. In principle, Law Number 8 of 1999 concerning Consumer Protection does not prohibit business actors from making standard contracts for every document and/or agreement on business transactions for trading goods and/or services, as long as and as long as the standard contract and/or clause does not include prohibited provisions and not formed as prohibited in Law Number 8 of 1999 concerning Consumer Protection.<sup>10</sup>

In relation to the provisions of Article 18 paragraph (3) of Law Number 8 of 1999 concerning Consumer Protection, it is very interesting which states that each standard clause contains matters referred to in Article 18 paragraph (1) and Paragraph (2) of Law No. 8 of 1999 About Consumer Protection is null and void. Standard clauses according to the

provisions of Article 1 number 10 of Law Number 8 of 1999 concerning Consumer Protection states: "Standard clauses are any rules or provisions and conditions that have been prepared and determined in advance unilaterally by business actors as outlined in a document and/or a binding agreement and must be fulfilled by consumers.

Looking at the provisions governing Law Number 8 of 1999 concerning Consumer Protection, it can be seen that basically a violation of the provisions of the standard clause does not cancel (by law) the agreement containing the standard clause, but only cancels (by law) the standard clause. If the provisions concerning standard clauses are regulated and prohibited in Article 18 paragraph (1) and paragraph (2) of Law Number 8 of 1999 concerning Consumer Protection, then these provisions clearly limit or reduce the performance that must be carried out by business actors. The provisions regulated in Law Number 8 of 1999 concerning Consumer Protection are *lex specialis* provisions against the provisions of Article 1320 in conjunction with Article 1337 of the Civil Code which are *lex generalis* in nature.

Elucidation of Article 18 paragraph (1) of Law Number 8 of 1999 concerning Consumer

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<sup>10</sup> Ibid. p. 103

Protection states that the purpose of setting the provisions for the inclusion of standard clauses is to place the position of consumers on par with business actors based on the principle of freedom of contract. Thus, the enactment of Article 18 paragraph (1) of Law Number 8 of 1999 concerning Consumer Protection will empower and prevent consumers from being a weak party in contracts with business actors so as to equalize the position of business actors with consumers. Furthermore, in Law Number 8 of 1999 concerning Consumer Protection there are 3 (three) articles that describe the product responsibility system in consumer protection law in Indonesia, namely the provisions of Article 19, Article 23, and Article 28.<sup>11</sup>

In addition, an agreement containing standard clauses must also reflect the principle of legal certainty. The principle of legal certainty or also known as the principle of *pacta sunt servanda* is a principle related to the consequences of the agreement. The principle of *pacta sunt servanda* is the principle that judges or third parties must respect the substance of contracts made by the parties, as befits a law. Intervene on the substance of the contract made by the parties. The principle of *pacta sunt*

*servanda* can be concluded in Article 1338 paragraph (1) *Burgelijk Wetboek (BW)*. This principle was originally known in church law. In church law it is stated that an agreement occurs when there is an agreement between the parties who do it and is strengthened by an oath. This implies that every agreement entered into by both parties is a sacred act and is associated with elements. However, in subsequent developments, the principle of *pacta sunt servanda* was given the meaning of *pactum*, which means agreement that does not need to be strengthened by oaths and other formalities.

#### **CLOSING**

Credit agreements with finance companies containing standard clauses are still valid as long as they meet the requirements contained in Article 1320 of the Civil Code. If the credit agreement does not meet the subjective requirements, it can be canceled through the cancellation of the agreement through the court. Then if it is related to objective conditions, then the agreement is said to be null and void. Currently, the issue is no longer the validity of the agreement with standard clauses, but regarding the contents of the agreement, namely whether or not there are clauses prohibited by the Consumer Protection Act.

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<sup>11</sup> Inosentius Samsul, 2004, *Perlindungan Konsumen Kemungkinan Penerapan Tanggung Jawab Mutlak*, Jakarta: Pasca sarjana Fakultas Hukum Universitas Indonesia. p. 143.

Likewise, what needs to be considered regarding the content of the agreement contains or not clauses that contain irrationality and impropriety. In making the standard clauses of the credit agreement, the debtor does not pay attention to the suitability of the agreement principles, namely consensualism, freedom of contract and *pacta sunt servanda*. This can be shown by the existence of the principle of freedom of contract, it does not mean that the creditor can make a standard clause that is detrimental to the debtor, even though in the end the debtor agrees or signs the agreement due to a weak position or a party who needs it more.

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