

Coup D'Etat Consumers' Right Through Standard Form Clause in the Form of Notary Deed

Prisilia Anggraini Evelyn Terisno¹, Andrian Julius², & Yuliana Angela³

¹*Universitas Airlangga, Surabaya, Indonesia*

²*Universitas Airlangga, Surabaya, Indonesia*

³*Universitas Airlangga, Surabaya, Indonesia*

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Abstract: When ensuring the significance of business people, the rights and obligations of each party have to be defined under an agreement. Due to the complex process of making a complete and comprehensive contract, for time efficiency, business people generally have formulated the agreed terms and conditions prior to making the contract. In Indonesia, an agreement as mentioned above is called a standard form contract or "Standard Clause Contract" based on Law Number 8 Year 1999 regarding Consumer Protection. According to article 18, the Law of Consumer Protection states that the application of a standard clause requires heeding some of the restrictions that are listed under the Law in relation to the objective of preventing consumers who are not familiar with the law to incur losses. In Indonesia, for the agreement to have an ideal value of verification based on Burgerlijk Wetboek article 1870, business people in general will ask for the agreement to be taken to a notary to change its status to that of an authentic deed. Issues will arise if the standard form contract between the business people and their consumers is initiated without the authentic deed status. Therefore, the restriction in the Law of Consumer Protection article 18 could be applied. However, when the standard form contract status has been changed into an authentic deed, the condition of the Law of Consumer Protection article 18 can no longer be applicable. This issue arises based on normative jurisdiction reviews whereby the terms and conditions of the standard form contract have to be concluded by business people before the consumers agree to the contract. Nevertheless, authentic deeds, especially notary deeds, often states, either implicitly or explicitly, that the whole contract formation is initiated in the presence of the notary, and not made prior by business people. This fact is justified by the characteristic of an authentic deed that has an ideal strength of verification in the justification by a notary as the general officials if some events have actually taken place

1 INTRODUCTION

Under the provisions of Article 1233 of Burgerlijk Wetboek, it states that alliances are born from agreements and laws. In his book, Subekti states that "The alliance born out of the agreement, is required by two person or parties making an agreement, whereas the legal borne of the law is held by law beyond the will of the parties concerned" (Subekti, 2001). Many foreign companies that come to Indonesia bring in various types of agreements, one of which is the standard agreement. In this regard, the positive law in Indonesia states emphatically that the application of the standard clause in a treaty is a

limited act, namely the act regulated in detail in the prevailing laws and regulations - the Consumer Protection Act. According to Achmad Busro, the reason is "based on the goals to be achieved by the parties, as well as the need for the existence of rules that can accommodate the interests and provide legal protection for economic actors (the parties), then in the development of the law of agreement, the development of the treaty law requires effective, simple, practical, and does not require long process and time is possible in the principle of freedom of contract". One of the reasons for the enforcement of this regulation is to protect the interests of

consumers whose positions do not often benefit from the existence of the standard class.

The standard clause is a breakthrough of the parties to accommodate the need for rapid and appropriate legal protection. However, the use of standard clauses in an agreement is detrimental to the customer, because the position between the parties to the agreement is unequal to the other party, therefore the Consumer Protection Act have formulated articles that prohibit the application of standard clauses. One of the characteristics of the standard clause is that the clause must “first be made by the business actor”, therefore to deceive the law, the business actors make agreements with the standard clause using notary deeds where the character of the agreement is “made and settled before me, the Notary”, because the character of the notarial deed and the agreement itself cannot be categorised as a standard agreement.

2 MATERIAL AND METHODS

2.1 Page Setup

The approach used in this journal is the statute approach (approach using related legislation) and the conceptual approach (approach using related legal concepts)². The statute approach is undertaken by reviewing all of the laws and regulations relating to the issue of the law being handled. Other than that, this study also applies the conceptual approach, which is an approach from the views and doctrines that develop in the science of law. This approach is important because an understanding of the evolving views / doctrines in law science can be a foothold for building legal arguments while resolving the legal issues faced. The view / doctrine will clarify any ideas by providing legal concepts relevant to the problem.

2.2 Type of Research and Legal Material

In writing this journal, the researcher used the normative juridical research type. This means that this research was conducted based on a literature study to get the legal materials. To complement this research, we used legal materials in the form of:

- Primary Legal Material; in this case, Law Number 8 Year on Consumer Protection Act and *Burgerlijk Wetboek*.
- Secondary law materials are legal materials that provide an explanation of the primary

data; in this case, the authors obtained the data from legal books, the scientific work of scholars, newspapers, and internet sites.

- Tertiary Law Material is legal material that supports both the primary law material and secondary law material, including dictionarie,

3 RESULTS AND DISCUSSION

The terms of the agreement are a translation of the Dutch language word *overeenkomst*. The word *overeenkomst* comes from the word *overeenkomen*, which means ‘agree’. So, the term agreement contains an agreement in accordance with the principle of consensualism. According to Subekti, an “agreement is an event in which a person promises to another or where the parties promise to do something”³, (Subekti, 2001) Wirjono Prodjodikoro, in more detail, gave the meaning of an agreement as being “a legal relationship relating to property between two parties, in which one party promises or is considered promised to do something or to do nothing, while the other party has the right to demand the execution of the agreement” (Prodjodikoro, 1986). In an agreement, there are clauses governing the legal relationship including the rights and obligations of the parties. One of the most common types of clause is the standard clause. The meaning of the standard clause can be seen in the Consumer Protection Act. Standard clause are any rules, terms and conditions that have been prepared and determined first unilaterally by the business actors as outlined in a document that are agreement binding that must be fulfilled by the consumer.

In the Indonesian Big Dictionary, the word standard means a certain measure that is used as a benchmark, while the standard word means a benchmark that is applicable to the quantity or quality specified⁵. Abdulkadir Muhamad states that “standard or standard word means the benchmark used as a benchmark or guideline for every consumer who has a legal relationship with the entrepreneur, which is standardised in the standard agreement covering the model, formulation, and size” (Abdulkadir, 2006). The standard clause is the content or part of an agreement whereas the agreement using the standard clause is called the standard agreement. The standard agreement is an agreement in which there are certain conditions made by the creditor, generally referred to as the adhesive agreement or the standard agreement. The other party, the customer, is generally called the

"Adherent". He does not participate in contracting, and he has no choice. In that case, the seller has a monopoly position. If seen in the development of the use of standard clauses, this is due to business activities that require everything to be done quickly and efficiently.

The standard clause is one of the outcomes of article 1338 on the freedom of contract, which gives freedom for the parties to determine its contents, including if the content is a standard clause. But the use of the standard clause has been banned in the consumer protection law. To avoid the restrictions set forth in consumer protection laws, the business actors make agreements with the standard clause using a notary deed where the character of the agreement is "made and settled before me, the Notary".

According to law number 2 of 2014 on the amendment to Law number 30 of 2004 concerning the position of a notary public, article 1 point 1 regulates who is a notary. A notary is a public official authorised to make the deed authentic and who has the authority as referred to in the Act. One of the duties of a notary is to create an authentic deed where the notary pours the will of the parties into a deed made by the parties before the notary. The notary in this case acts only as a recorder and not as a party to the agreement.

By using a notarial deed wherein the agreement is made and settled before the notary by the parties, it does not meet the definition of a standard clause which requires that the agreement be made by one of the parties. This legal loophole makes the provision of a prohibition in consumer protection law difficult to implement, therefore it is better to exclude the definition of "standard clauses"/"non-standard clauses" and to promote a generalisation of the definition between both standard clauses and non-standard clauses. It is very difficult, and even impossible, to prove that a clause has been "made first" or made on the spot.

4 CONCLUSIONS

There is a legal loophole in the application of a ban as part of the standard clause to protect consumers in the Indonesian legal system. Thus, business actors can still violate any provisions of the standard clause by bringing it to the notary and creating an authentic deed. The legal loophole means that the restrictions on the contents of the standard clauses stipulated in the Consumer Protection Act are not applicable because they do

not meet the "made first" element but are "made together before the notary".

Suggestions to be given in order to tackle this legal loophole are to revise the Consumer Protection Act, and to remove the definition of the standard clause and prohibition using a standard clause for any agreement made with either party, in addition to the consumer.

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