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FULFILLMENT OF GOOD FAITH PRINCIPLE IN PREPARATION OF STANDARD CLAUSES

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Abstract

Standard clauses are made by business actors with the aim of efficiency and effectiveness. However, various problems arise from standard clauses made by business actors both producing goods and providing services. Standard clause is not prohibited if it pays attention to the balanced position of the parties, but conversely if it contains exoneration clause then this is categorized as null and void. Provisions on the prohibited standard clause are regulated in Law No. 8 of 1999 concerning Consumer Protection of Article 18. This study aims to determine the fulfillment of good faith principles in the preparation of standard clauses and identify the consequences of the agreement containing standard clauses that are not in accordance with the principles of good faith. The research method used is normative research using primary legal material from the Civil Code, Law No. 8 of 1999 concerning Consumer Protection and secondary legal materials in the form of reference books and articles in legal journals. The results obtained, the principle of good faith is regulated in Book III of KUHPdt article 1338 thus it must be concretized in the form of an agreement with a standard clause that provides a balanced position for the parties. If there is an exoneration clause, the standard agreement is categorized as null and void.

Keywords: Exoneration Clauses, Principles of Good Faith, Standard Clauses

1. INTRODUCTION

The agreement creates a bond for the parties to the agreement. The agreement takes place based on the principle of freedom of contract between two parties who have a balanced position. This principle in its development became a new paradigm in contract law that led to freedom without limits (unrestricted freedom of contract). The agreement must meet the legality requirements of the agreement as stipulated in Article 1320 of the Civil Code, there must be agreement, skills, certain matters and legal causes. The agreement is done by fulfilling the freedom of contracting which guarantees no coercion, fraud or oversight. However, the principle of freedom for the present conditions makes people/parties who are

strong can impose their will on the weak parties, so that the ideals of freedom of contract which initially provide a balance of legal, interests and also a balance in a bargaining position, become a means of coercion for weak party.

The agreements can be made either orally or in writing. Written forms that are currently often used are standard contracts or standard agreements. Standard contracts contain standard clauses which in today's business world are very important for efficiency and effectiveness. However, in the development of standard contracts containing standard clauses, it raises legal issues, that is an imbalance in the position of the parties between business actors and consumers. Standard contracts are made by business actors for banking, insurance,

financial institutions, and so on. Standard contracts that are not allowed are those standard clauses that contain elements of diversion of risk or responsibility to the consumer.

Standard agreements or contracts containing standard clauses occur by the way one party has prepared the standard requirement on an agreement form that has been printed and then offered to the other party for approval by giving almost no freedom at all to the other party to negotiate on the conditions offered. Such the contracts are called standard contracts or adhesion contracts (Sjahdeni, 1993). The interests of the business actors are more dominant in the standard contract rather than the interests of consumers. This is due to the unbalanced position between consumers and business actors. The standardization of the requirements of the agreement that binds the parties is more dominated by the economic interests of the business actors to obtain greater profits. Consumers who are given a standard contract have the option to sign which means to approve or not sign with the consequences of disagreeing and looking for other parties that can accommodate consumer needs. But this is rarely done by consumers, because most business actors do the same thing. If the consumer agrees to the standard contract, it means agreeing with the clauses as a whole without exception, even though there are elements that are detrimental to the consumer.

The development of biased business practices, especially in the standard agreement with its default clause which does not provide a balance of interests for the parties, has led to reactions that lead to the need to be given a "proper" place for the existence of the principle of good faith in the making and implementation of the agreement. Good intentions are regulated in Article 1338 paragraph (3) of the Civil Code which determines "approval of approval must be carried out in good faith". Good faith as a general principle of law is familiar from municipal law, but striking in its differences when assessed in the practice of international law. Having

examined the specific aspects of good faith and how international jurisprudence has crafted justiciable concretisations out of a vague notion, one conclusion becomes very clear (Reinhold, 2013).

In previous research, (Hadi, Nasution, Purba, & Barus, 2017) found The application of the principle of good faith in the rental agreement of outlets at Hermes Building Medan can be seen from before and after the agreement occurred. Even the application of the principle of good faith before the agreement, the PT. Hermes Realty Indonesia has carried out the principle of good faith objectively namely to have delivered the object to be promised, namely; outlet to the CV. Khansa Mandiri Asri. In the lease agreement between PT. Hermes Realty Indonesia with CV. Khansa Mandiri Asri. This process also applies to every transaction of buying and selling goods or services. as stated by (Wijaya & Dananjaya, 2018), the principle of good faith has a very important (fundamental) role in making an agreement, including in an online sale and purchase agreement in order to minimize the possibility of fraudulent practices in buying and selling online.

The good faith that underlies the establishment of the standard agreement so far has not been well implemented, this right is supported by data on the number of business actors using the exoneration clause in the standard agreement. Based on the background above, the objectives of this study are to determine the fulfillment of good faith principles in the preparation of standard clauses and identify the consequences of the agreement containing standard clauses that are not in accordance with the principles of good faith.

2. METHOD

The method used in this study is normative juridical using the statute approach of study, an approach in which legislation and regulation are used. The legal material source were primary legal material from the Civil Code, Law No. 8 of 1999 concerning Consumer Protection and secondary legal materials in the form of reference books and articles in legal journals.

3. RESULT AND DISCUSSION

Fulfillment of Good Faith Principle in Preparation of Standard Clauses

A standard agreement is made for the purpose of providing convenience (practicality) for the parties concerned. Starting from that goal, Mariam Darus Badruzaman then defined a standard agreement as an agreement which contents were standardized and set forth in the form of a form (Badruzaman, 1986).

The standard agreement means an agreement that almost all of the clauses are standardized by the user and the other party basically has no chance to negotiate or ask for changes. As for what has not been standardized are only a few things, for example those concerning the type, price, quantity, color, place, time, and some specific things of the promised object. Sjahdeni emphasized, what was standardized was not the agreement form, but the clauses (Sjahdeni, 1993).

Standard agreements like this are very profitable, when viewed from how much time, energy and costs can be saved. But on the other hand this form of agreement places parties who do not participate in making clauses in the agreement as parties who are either directly or indirectly as the harmed party, because they should have the right to obtain a balanced position in carrying out the agreement, but on the other side they must obey the contents of the agreement offered to him (Sriwati, 2000).

In fact, standard agreements not necessarily always be in the form of forms even though they are usually written. An example can be made in the form of an announcement posted at the seller's place of business. Thus, a standard agreement is an agreement that is unilaterally determined, that is by producer/distributor of the product (seller), and contains generally provision (mass), so that the other party (consumer) has only two choices, approve or reject it.

The existence of two these choices by some parties is said to be a standard agreement if it does not violate the principle of freedom of contract (Article 1320 jo. 1338 Civil Code). This means, however, that the consumer is still given the right to approve (take it) or reject the agreement submitted to him (leave it). That is why, this standard agreement came to be known as the take it or leave it contract (Shidarta, 2006).

The standard agreement, because it was created from the need for efficiency and effectiveness of work, then the form of this standard agreement also has unique characteristics that are not possessed by other agreements in general, including standard agreements made by one party only and not through a form of negotiation, content standardized agreements, the clauses in them are usually clauses that have become widely customary and apply continuously for a long time (Sriwati, 2000).

Standard agreements have many advantages, but the development of standard agreements has received a lot of critical attention from legal experts, that is the weakness to accommodate a balanced position for the parties. The weaknesses of this standard agreement sourced from the characteristics of the standard agreement which in its form is an agreement made by one party and a standardized agreement that leaves little or no space for the other party to negotiate the contents of the agreement. The attention of the legal experts from the enactment of the standard agreement apart from the aspect of its validity is the existence of clauses which are unfair and very burdensome for either party (Sriwati, 2000).

A standard agreement is an agreement in which almost all clauses have been standardized by the user, and basically they do not have the opportunity to negotiate or request changes (Sriwati, 2000). However, in the practice there are often issues in the agreement, especially related to the fulfillment of the principles of good faith. The principle of good faith

should be contained in a standard clause which is the concretization of the rights and obligations of the parties. If it related to article 1320 in particular the agreement of the parties must fulfill the principle of freedom of contract and the principle of good faith.

The meaning of good faith according to Kamus Besar Bahasa Indonesia is a trust, firm belief, intention, will (good). Subekti explained that good faith according to Article 1338 paragraph (3) of the Civil Code is one of the most important principle of contract law that gives the judge the power to oversee the implementation of a contract so as not to violate propriety and justice. This means that the judge has the authority to deviate from the contract if the implementation of the contract violates the feelings of justice (*recht gevoel*) between one of the two parties. The principle of good faith demands fairness and justice, in the sense that demands for legal certainty in the form of contract implementation must not violate the norms of propriety and the values of justice (Syaifuddin, 2012).

According to the new theory of agreement, there are three stages in making an agreement / contract (Syaifuddin, 2012):

Pre-contractual stage, namely the existence of offers and acceptance;

Contractual stage, namely the correspondence of the statement of will between the parties; and

Post-contractual stage, namely the implementation of the agreement

In the pre-contractual stage, negotiations between the two parties occur, there is a bargain, until a consensus is reached. Negotiation is the process of reaching agreement on a cooperation in which the parties give concessions to each other. After that a Memorandum of Understanding, Feasibility Study and Negotiation will be made (continued). The next stage is the agreement stage. In this stage the agreement starts until the agreement is completed. In this stage, the fulfillment of contract legal requirements is

fulfilled, the performance is carried out until the contract expires. In the agreement phase, it is usually done by Initial Writing, Improvement of Manuscript, Final Manuscript Writing and signing. The phase after the agreement is complete, i.e. the maintenance period, hidden defect guarantee, or warranty phase. The post contractual stages are Implementation, Interpretation, and Settlement of Disputes. In the pre-contact stage, issues often arise when before the agreement is signed, one party has committed a legal act, for example spending a lot of money and costs, such as to rent a building, buy land, or complete the documents to complete the requirements of the agreement. This can happen because there has been an agreement at the initial negotiation stage.

In addition, it can also occur at the pre contractual stage, one party has given promises to the other party, so because of these promises the other party intends to make an agreement with the other party. Related to the validity of the good faith principle at the pre contract stage. If the implementation creates an imbalance or violates the feeling of justice, the judge can make adjustments to the rights and obligations stated in the contract. In contract law practice the judge does use his authority to interfere with the contents of the contract, so it seems that good faith must exist not only at the stage of making (signing) and the post-making (implementation) stage of the contract but also the pre-making (draft) stage of the contract (Syaifuddin, 2012).

Good faith testing must be done in every contract, both the pre-making (design), making (signing) and post-making (implementing) stages of the contract but also the pre-making (design) stage of the contract. If there is anything to worry about with the presence of a standard agreement, none other than the inclusion of an Exoneration clause or exemption clause in the agreement. Exoneration clause is a clause that contains conditions that limit or even

completely eliminate the responsibility that should be borne by the manufacturer / distributor of the product (seller) (Shidarta, 2006).

The exoneration clause as a clause that contains a limitation of the liability of the creditor, of the risks and negligence that must be borne (Badruzaman, 1986). According to Engels in (Rohaya, 2018), there are three juridical forms of agreement with the terms of exoneration. The three forms of juridical consist of;

Liability for legal consequences, because it is not good in carrying out the obligations of the agreement;

Obligations of their own that are usually borne by the party for which the terms are made, limited or written off (for example, an emergency agreement).

Obligations are created (conditions for exemption by one party are borne by assuming the other party's responsibilities which may exist for losses suffered by third parties.

An exoneration agreement that frees a person's liability for the legal consequences that occur due to the lack of carrying out the obligations required by legislation, among others concerning the issue of compensation in the event of a breach of contract. Compensation is not carried out if the exoneration requirements are stated.

From the various definitions available, it can be concluded that the exemption clause is a clause that gives a limitation or exemption of legal responsibility of one party for all forms of non-fulfillment of obligations under the agreement. An example of that clause are (Sriwati, 2000):

Exemption from the responsibility of the developer in the home purchase agreement, in the event that the developer cannot fulfill his agreement to carry out the completion of the construction of the purchased house, on time;

Limitation of liability compensation for transport companies related to loss of luggage of passengers;

There are restrictions on liability for physical accidents suffered by passengers.

Here we see that there is no balance of bargaining position between producers / distributors of products (sellers), commonly called creditors and consumers (debtors) on the other hand. Indonesian legal expert, Mariam Darus Badruzaman believes that the standard agreement is contrary to the principle of responsible freedom of contract, even more so in terms of national legal principles, in which ultimately the interests of society take precedence. In a standard agreement, the position of business actors and consumers is not balanced. The position which is dominated by the business actor, opens up wide opportunities for him to abuse his position. Business actors only regulate their rights and not their obligations. According to him, this standard agreement must not be allowed to grow wildly and therefore needs to be regulated (Sriwati, 2000).

Sutan Remy Sjahdeni believes that in reality the Civil Code itself provides restrictions on the principle of freedom of contract. For example, there is a provision that says an agreement cannot be withdrawn other than by agreement of both parties or for other reasons stated by law. The Civil Code also mentions three reasons that can lead to an agreement, namely coercion (dwang), oversight (dwaling), and fraud (bedrog). These three reasons are intended by law as a limitation to the application of the principle of freedom of contract (Shidarta, 2006).

The principle of good faith relates to the fulfillment of the principle of freedom of contract if it is to be upheld, and the interests of the world of commerce are not harmed, the only way is to limit the business actors in making exoneration clauses. Of course this is not easy to do. Even though, as Mariam Darus Badruzaman suggests, there must be government interference, so not all standard agreements can be treated as such. The material of the agreement that occurs in society is so broad and

heterogeneous (Shidarta, 2006).

Good faith can be divided into two:

Good faith in objective terms that an agreement made must be implemented by heeding the norms of propriety and decency which means that the agreement must be implemented in such a way that it does not harm either party.

Good faith in objective terms, namely the understanding of good faith that lies in one's inner attitude. In the law of objects, this good intention can be interpreted with honesty (Subekti, 1993).

In reality, interventions embody the fulfillment of the principles of good faith suggested that can be done by the government. For example, in the labor and agrarian fields, standardization of agreements is very much done. However, for civil agreements made by a notary, of course they do not have to be standardized. The latter agreements grow through the habits and demands of the people themselves. Government intervention is expected in large-scale agreements, although not fully public in the fields of labor and agrarian. The large-scale agreement in question is related to mass interests, and therefore if it is fully submitted unilaterally to business actors, it is feared that there will be many exoneration clauses that are detrimental to the public at large.

Good faith in Roman law refers to three forms of contracting parties. First, the parties must uphold their promises or words. Second, the parties must not take advantage with misleading actions towards either party. Third, the parties obey their obligations and behave as respectable and honest people even though the obligations are not explicitly promised. Related to the validity of the principle of good faith in the pre-contract stages, if the implementation creates an imbalance or violates feelings of justice, the judge can make adjustments to the rights and obligations contained in the contract. In contract law practice the judge does use his authority to interfere with the contents of the contract, so it

seems that good faith must exist not only at the stage of making (signing) and the post-making (implementation) stage of the contract but also the pre-making (draft) stage of the contract.

Understanding of the principle of good faith is also an inseparable part of the implementation of the principle of justice and the principle of proportionality in commercial contracts. The principle of justice can be realized if something given to someone is comparable to what should have been received means that the creditor gives his credit to the debtor and the debtor should carry out the contents of the agreement by fulfilling the achievements in accordance with what was promised.

Consequences of the agreement that contains a standard clause that is not in accordance with the principles of good faith

The standard clause is regulated in Law Number 8 of 1999 concerning Consumer Protection. Article 1 number (10) defines the standard clause as any rules or conditions and conditions which are prepared and stipulated in advance unilaterally by a business actor as outlined in a document and / or agreement that is binding and must be fulfilled by consumers. So the emphasis is on the manufacturing procedures that are unilateral, not about their contents. However, if it is related to the exoneration clause, which means that the "exoneration clause" does not merely question the manufacturing procedure, but also its contents which are the transfer of obligations or responsibilities of the business actor (Subekti, 1993).

Article 18 Paragraph (1) letter (a) of Law Number 8 of 1999 concerning Consumer Protection states that businesses in offering goods and/or services intended for trading are prohibited from making or including standard clauses on each document and/or agreement if they state the transfer of responsibility answered business actors.

The provisions of the letter (b) and so on actually provide examples of forms of transfer of responsibility, such as business actors can refuse the return of goods purchased by consumers, or refuse to give back money paid, and so on (Subekti, 1993).

If there is a difference between the standard clause and the exoneration clause, the provisions of Article 18 Paragraph (1) of the UUPK, the standard clause is a clause made unilaterally by a business actor, but the contents may not lead to an exoneration clause. Article 18 paragraph (2) reinforces this understanding, by saying that the standard clause must be placed in a place that is easily visible and can be clearly read and easily understood. If the matters mentioned in paragraphs (1) and (2) are not fulfilled, then the standard clause becomes null and void (Subekti, 1993).

The provisions regarding this standard clause also regulate violations committed in connection with the non-fulfillment of the provisions in Article 18 also given the threat of criminal sanctions as stipulated in Article 62 UUPK paragraph (1):

Business actors who violate the provisions referred to in Article 8, Article 9, Article 10, Article 13 paragraph (2), Article 15, Article 17 paragraph (1) letter a, letter b, letter c, letter e, and paragraph (2) , and Article 18 is sentenced to a maximum imprisonment of 5 (five) years and a maximum fine of 2.000.000.000 rupiah.

Exoneration clauses are used in various countries, for example in the United States, there are restrictions on the authority of businesses to make more exoneration clauses left to consumer initiatives. If a consumer feels aggrieved, based on the 1978 Uniform Commercial Code, he can file a lawsuit in court. These court decisions are then used as input for the improvement of existing legislation, including the extent to which the Government can intervene in the drafting of contracts (Subekti, 1993).

The standard agreement in the

Netherlands is regulated in the new Civil Code. There it is stated that business sectors which may apply standard agreements must be determined by regulations and the agreement can only be determined, amended, or revoked after obtaining the approval of the Minister of Justice. Then the stipulation, amendment or revocation will only obtain legal force after obtaining the approval of the King / Queen as outlined in the State Gazette. Other provisions state that this standard agreement can also be canceled, if the producer / distributor of the product (seller) or the creditor knows or should know that the consumer will not accept the agreement if he knows the contents (Subekti, 1993).

For us in Indonesia, the provisions that limit the authority to make this exoneration clause have not been explicitly regulated in law. The umbrella provisions are in Law Number 8 of 1999 concerning Consumer Protection, although there is used the term "standard clause" which turns out to be different from the "exoneration clause". In general, a number of articles can be appointed in the Civil Code. One of them is Article 1337, which states that an agreement must not be made contrary to the law, decency, or public order. Even so, to be able to test the extent to which the agreement was contradictory, it needed to be processed through a lawsuit in court. In fact, the power of jurisprudence in the Indonesian legal system is not as applicable in Anglo Saxon / Anglo American countries. Thus, the steps taken by the Dutch, namely by making specific provisions regarding the procedure for making standard agreements, would be considered for imitation. In addition to including it in the Civil Code, it can also be contained in special laws governing consumer protection (Subekti, 1993).

With the existence of regulation on Consumer Protection, especially on regulations related to standard clauses, it is more or less conscious to the public that they as parties to the agreement have

rights that (should be) equal to other parties in the standard agreement. So that there needs to be a means for increasing protection against the use of standard agreements and all its attributes, which of course harm one of the parties to the agreement. Where this arrangement is an initial milestone for the balance in the placement of parties to an agreement. However, the use of standard agreements that have an imbalance in the bargaining power of the parties is a matter that is very difficult to be monitored or controlled, because this is related to the existence of an element of protection from the interests of the parties having greater bargaining power to protect their interests, as well as the needs of the empowered parties lower bargaining to accept the contents of the agreement (Subekti, 1993). Simply put, the position of the strong party is that the winner is still valid. For this reason, it is necessary to anticipate more complete arrangements for the use of standard agreements with exoneration clauses, and prevent exploitation or situations that are detrimental to the weak party due to the use of coercion or abuse of the situation by stronger parties.

4. CONCLUSION

The dynamics of trade or business activities today cannot be separated from the demands to work fast, effectively and efficiently. This is the basis for business actors to make standard or standard agreements. However, the agreement triggers a problem because it shows an unbalanced position, business actors have a dominant position that harms the interests of consumers. Standard clauses that are made do not pay attention to the principles of good faith that should be met when preparing. Good faith is interpreted as the belief in acting right. Business actors seem to abuse the situation as a party that has a dominant position in making standard agreements by drafting clauses that violate the rules. Business actors do not guarantee the balance of rights and obligations of the parties. Regarding the standard clause provided

for in Law Number 8 of 1999 concerning Consumer Protection, if there is a clause stating the transfer of risk or eliminating the risk of a business actor, the agreement is declared null and void.

In order to prevent consumer losses due to exoneration clauses, the role of the state is needed to guarantee a balanced position of the parties, by supervising the standard agreements made by business actors. If there is a risk transfer, limitation or elimination of responsibility, the agreement documents cannot be circulated and there are sanctions if not corrected as provided for in the law.

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