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Legal Liability in Standard Form of Contract

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Abstract

The validity of the standard form of contract is not necessary to be disputed. The standard form of contract has become a business necessity in relation to efficiency and effectiveness. The aspect of problems arising in the standard form of contract is the aspect of the imbalance position of the parties. The standard form of contract is potential to be abused by parties having stronger bargaining power. One of the forms of the imbalance is the inclusion of exemption clauses that aim to limit or release the liability of one of the parties. Currently, the rules governing the exemption clause exists only in the Law No. 8 of 1999 on Consumer Protection (LCP). Article 18 of LCP governing the standard form of the clause is limited to the extent of prohibited form and content and only aimed at final consumer contracts. In reality, the standard form of the clause is also found in commercial contracts that are not only on final consumers but also midst consumers. Based on this matter, it is necessary to elaborate on the liabilities of the parties and state in drawing up standard form of contacts.

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1. Introduction

The contract is one of the legal instruments to fulfill the needs of human life. One of the forms of contracts is the standard form of contract. The validity of the standard form of contract is no longer something to be debated because it has become a business necessity related to efficiency and effectiveness. The aspect of problems in the standard form of contract lies in the position imbalance. The standard form of contract is potential to be abused of position by the parties having higher position due to the control of one the resources (economic, technology, or science) to the weaker parties. One of the forms of position imbalance is exemption or exoneration clause.

Exemption clause is a standard form of a clause in a standard form of a contract containing reduction or abolition of liability to the emergence of legal consequences, for example, damages due to default or breach of contract, restriction, or elimination of obligations, providing obligations which arise later. Sutan Remy Sjahdeini considers

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that exemption clauses as a clause which is unreasonably very burdensome and aimed at releasing or limiting the liability of either party in the event one of the parties does not perform his obligations as agreed in the contract [1].

Sutan Remy Sjahdeini's opinion shows that there are essential elements indicating the exoneration clause, namely, the reduction or limitation of liability on the one hand, on the other hand, while creating obligations to the other party. It is solely intended to avoid losses. Another opinion, even, suggested that the exoneration clause limits or eliminates the liability that should be borne by the producers/distributors of products (sellers).[2]

Munir Fuady concluded that exoneration clause is a clause that releases or limits the liability of either party in the event of default, in which under the law, the liability shall be charged to him.[3] Based on the existing opinions, then exemption or exoneration clause can be a diversion/evasion of liability, the abolition of liability, limitation of liability, liability reduction, or other actions creating an obligation to the other party.

The existence of the exemption clause will be detrimental to the recipient of the standard form of contract as the contract is based on the importance attributed to it. The other party at the time of the standard form of contract is proposed, is faced with several possibilities. The first possibility is that the recipient of the standard form of contract does not read let alone understand the standard form of the contract offered. The second possibility is that the recipient reads the contract, but do not understand because of different levels of understanding. The third possibility is that the contract beneficiary reads and understands, but is faced with the choice "*take it or leave it*", therefore when rejecting (especially on consumers), will still be faced with the choice of standard form of contract having the same type elsewhere given the homogeneity nature of standard form of contracts.

The difference in the position of the parties when the standard form of contract is held does not provide opportunities for the recipients of the standard form of contract to do "*real bargaining*." The standard form of contract beneficiaries has no power to express their will and their freedom to express opinions in determining the content of the contract so that "*unreal bargaining*" arises.

The weaknesses of one of the parties in drawing up standard form of contract need protecting by the state. The State intervention is necessary to restore the balance of position of the parties. The State interference may be in the form of rule establishment on a standard form of contract since the existing rules at present are intended for the final consumer. In fact, the standard form of contract has been used in a wide variety of contracts not only on consumer contract but also on commercial contracts such as distribution contract, the contract franchising and agency contracts[4].

In relation to the standard form of contract arrangements, the function of the State has emphasized more the function of the State as a regulator including various ways in which the State does intervene through the use of public law and measures of legislative, administrative and judicial control. In connection with the functions of the State as a regulator, the emphasis on the values of justice is preferred. The value of justice in the standard form of contract is a principle prioritizing equality between the parties to the contract.

The values of justice will be realized if there are aspects of liability embodiment in drawing up standard form of contract. The State provides precise rules on how to fulfill liabilities in drawing up standard form of contract. The arrangements of contract contents are not solely charged to the parties, but it should be monitored, especially against the standard form of contract. The State has the duty to maintain the balance between interests of individuals and society. Freedom of contract without any limit will cause an imbalance of position because it requires rules relating to the liabilities of the parties to the standard form of contract. Based on the description on the background above, the problem on this paper to be examined is on legal liability in the commercial standard form of contract.

2. Materials and Methods

This paper is normative legal research. Normative legal research methods mean that the legal materials were analyzed according to legal norms specified in the legislation. As a normative study, this research includes a study of the principles of law and the legal synchronization in agreement and in the related legislation. This study is a prescriptive analysis, which prescript the laws that related to the legal theories as for the object of research.

[1] Sutan Remy Sjahdeini, 2009, *Kebebasan Berkonrrak dan Perlindungan Yang Seimbang Bagi Para Pihak Dalam Perjanjian Kredit Bank di Indonesia*, Pustaka Utama Grafiti, Jakarta, h.84-86.

[2] Celina Tri, 2008, *Hukum Perlindungan Konsumen*, Sinar Grafika, Jakarta, h.141.

[3] Munir Fuady, 2007, *Hukum Kontrak (Dari Sudut Pandang Hukum Bisnis) Buku Kedua*, Citra Aditya Bakti, Bandung, h.98.

[4] There are 3 (three) types of commercial contracts, namely, the contract between business doers and business doers, contracts between business doers and non-business doers (consumers), contracts between non business doers and non-business doers (Linda Mulcahy, 2008, *Contract Law in Perspective*, Fifth Edition, Routledge-Cavendish, London, p.180)

3. Results and Discussions

3.1 The principle of legal liability in the commercial standard form of contract

Legal Liability[5] in drawing up standard form of contract is very fundamental. In cases of disputes arising from the standard form of contract should be examined who should be responsible and how far such responsibility can be charged. In a standard form of contract related to the commercial contracts (contracts that are not only aimed at consumers) then the overall liabilities can be divided into two namely the liability of the parties to the standard form of contract and liabilities related to the standard form of contract.

In general, the principles of liabilities in law can be distinguished as follows: (1) fault (liability based on fault); (2) the presumption is always responsible for (presumption of liability): (3) The presumption is always not responsible for (presumption of non-liability); (4) strict liability; and (5) limitation of liability (limitation of liability).[6]

The principle of legal liability based on fault (liability based on fault) in the Law Book of Civil Law (Civil Code) is based on Article 1365, 1366 and 1367 of the Civil Code. This principle requires may be accountable legally if there is an element of error being committed, errors mean against the law. Legal understanding is not only contrary to the law but also against propriety and decency in society.

The principle of presumption to always be responsible (presumption of liability). This principle states that a defendant is always considered responsible until he can prove that he is innocent. The burden of proof is on the defendant. The word "considered" in the principle of "presumption of liability" is important, because there is a possibility that the defendant frees himself from responsibility, namely, in case he can prove that he has "taken" all necessary measures to avoid the occurrence of damages[7]. It is shift burden of proof (*ordering van bewijslast*), and if it is applied in the case of consumers, the party required to prove the fault is the party of businesses doer being sued. The Defendant must propose evidence that he is innocence.

The principle of presumption to not always be responsible (the presumption of non-liability). This principle is the opposite of the second principle, the principle of presumption to not always be responsible means that the proof is on the injured party. The party charged to prove that fault is on the consumers.

The principle of ultimate liability (strict liability) is often identified as the principle of absolute liability. Nevertheless, there are also experts distinguishing the two terms above. Some opinions argued that strict liability is a principle of responsibility determining that fault is not as decisive factors. However, there are exceptions allowing exempting from the responsibilities, for example, in force majeure condition. On the other hand, the principle of absolute liability is the principle of liability without fault and no exceptions. According to E. Suherman, strict liability is equated with absolute liability; under this principle, there is no possibility to free himself from liability, unless the damages arising due to the fault of the aggrieved party himself. The liability is absolute[8].

The principle of responsibility with restrictions (limitation of liability principle). It can be found in the inclusion of exemption clause in the standard form of contract by the party drawing up the contractor producer in general. The limitation of liability is intended for the benefit of one party.[9]

3.2. The party's liabilities in drawing up commercial standard form of contract

The description on liabilities related to the commercial standard form of contract can not be separated from the enforceability of Law No. 8 of 1999 on Consumer Protection (LCP) and the Law Book of Civil Code. A consumer contract is part of a commercial contract since both are profit oriented. LCP regulates the standard form of clauses and businesses doer liability to the final consumers. Theoretically, based on LCP, there are some liabilities being governed, namely:[10]

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[5] Kamus Besar Bahasa Indonesia defines that legal liability means conditions to bear everything (if something happens which may be sued, blamed, litigated) see Dictionary Cimpilers Team of Language Centre, 2007, *Kamus Besar Bahasa Indonesia*, Balai Pustaka, Jakarta, p.1139.

[6] Shidarta, 2006, *Hukum Perlindungan Konsumen Indonesia*, Revised Edition, Gramedia Widiasarana Indonesia, Jakarta, p. 73-79.

[7] E. Suherman, 1979, *Masalah Tanggung Jawab Pada Charter Pesawat Udara Dan Beberapa Masalah Lain Dalam Bidang Penerbangan (Kumpulan Karangan*, Alumni, Bandung, p.21.

[8] *Ibid*, p.23.

[9] Adrian Sutedi, 2008, *Tanggung Jawab Hukum Produk dalam Hukum Perlindungan Konsumen*, Ghalia Indoensia, Bogor, p.64.

[10] Gunawan Widjaya, 2000, *Hukum tentang Perlindungan Konsumen*, Gramedia Pustaka Utama, Jakarta, p.45-46.

a) Contractual liability
b) Product liability

Ad. a. Contractual liability

There is a bond arising under the contract between business doers and consumers. Contractual liability is a responsibility of business doers based on a contract drawn up and constituting civil liability under the contract, upon the losses suffered by one of the parties to the application of the contract.[11] This responsibility derives from LCP and also from the Law Book of Civil Law (Civil Code), especially the Book III on Contract. This type of liability may arise due to the occurrence of a default, the occurrence of the unlawful act, incautious action, including the provision of compensation to be paid by business doers as a result of the employers' negligence (Article 1365 to Article 1367 of Civil Code)

Seen from the outline, the liability by the party drawing up the standard form of contracts is in the scope of liability of payment for compensation. In general, the demand for compensation for damages suffered by one party can be based on several provisions mentioned above, which are generally divided into the demand of indemnities based on breach of contract and tort.

Liability claims based on breach of contract (default) is preceded by a contract caused by one of the parties does not meet performance, delay or does not fulfill the performance at all.[12] In this kind of responsibility, the obligation to pay damages is based as a result of the application of the clause in a contract made by the parties. Liability under tort is based on an unlawful act, which should not be preceded by a contract. Tort is governed under Article 1365 of Civil Code [13]. The element of tort is violating the rights of others, contrary to the legal obligations of the creator. The result of these actions is based on a causal relationship causing the damages.

The cases related to the standard form of contracts are within the scope of contract law so that the rules apply in addition to LCP shall also refer to the Civil Code. The pattern of liability demands is that one of the parties demands the fulfillment of performance while the opposite party questioned the basis of the applicability of the standard form of the contract itself. The parties demanding the fulfillment of the performance based on the provisions of Article 1 point 10 of LCP stating that "(...) binding and must be fulfilled." In addition, to rely on these provisions, it also applies Article 1320 and Article 1338 of the Civil Code as the basis. The agreement is applicable as a law for those drawing it up.

The party demanded to fulfill the performance are generally based on Article 18 of LCP where there are some clauses in which based on the contents and forms are prohibited; this article is associated with Article 1337 of Civil Code concerning with the prohibited causes to the extent they are prohibited under the law, or if contrary to good morals or public order. Article 18 LCP contains lists of prohibited clauses, either because the substances as well as their forms which cannot be clearly seen by the counterparties. Violation of this Article is threatened with nullification. It is intended to obtain that the position of consumers equals as business doers. It is evidence that the demand for the standard form of contract cancellation due to the fulfillment of Article 18 still requires prosecution in court even though the contract has become invalid

Ad. b. product liability[14]

Agnes M. Tour interpreted product liability as the responsibility of producers of products brought into distribution affecting or causing damages of inherent defects in the products. Product liability is not based on a contractual relationship (no privity of contract) between business doers and consumers. However, based on the direct civil liability (strict liability) of business doers upon the damages suffered by the consumers on consumption of goods they produce. This accountability is related to legal relationship arising between business doers and consumers. This relationship may have existed beforehand between producers and consumers, but this legal relationship may never exist before and the legal relationship tends to exist after events affecting the consumers.

[11] See Article 19 paragraph (1) LCP that "Business Doers shall be liable to provide compensation to the breakdown, contamination and/or damages of consumers as a result of consuming goods and/or services traded" and also Article 18 of LCP on the prohibition of mentioning standard form of clause.

[12] Purwahid Patrik, 1994, *Dasar-dasar Hukum Perikatan (Perikatan yang Lahir dari Perjanjian dan dari Undang-undang*, Mandar Maju, Bandung, p.11.

[13] Article 1365 of Civil Code states that "Any acts violating lawa and leading to damage to other people requiring the persons causing damages due to their fault to indemnify such damages".

[14] The term of *product liability* had just known around 60 years ago in the field of insurance in the United States, related to the commencement of food materials production massively. The producers as well as the sellers insured their products to the possibility of risks due to defect products or arising damages to consumers. Adrian Sutendi, 2010, *Hukum Rumah Susun & Apartemen*, Sinar Grafika, Jakarta, p.45.

Generally, the compensation claim against the manufacturers may be filed based on the three theories of liabilities, namely, liability based on fault under tort and breach of contract (default), and demands of strict liability (strict liability).

3.3 State liability in the commercial standard form of contract

States has an obligation in relation to the drawing up of the standard form of contracts, state's intervention is necessary for the form of making laws to protect the weaker parties, the parties having lower bargaining power, limited access and information, limited education and lack of capital.

The arrangement of the standard form of contract is associated with the functions of the state as a regulator. The function of state as proposed by W. Friedmann dividing the state into four functions: the function of the state as provider (guarantor) of people welfare, the function of state as regulator (regulator), the function of state as entrepreneur (employers) or run certain sectors through state-owned corporations and the function of state as an umpire (supervisor, referee) to formulate a fair standards regarding the performance of economic sectors, including state companies (state corporations)[15]. The state has the authority as a regulator to make legal rules related to drawing up standard form of contract to protect the weaker parties against those having the capital or higher bargaining power so that balance can be achieved.

The need for state intervention in making rules regarding the standard form of contract as the contract is one of the human means to realize prosperity. The increase of prosperity is one of the parts of the right to life as the basis of human right. The contract is a human right in the field of economics. The imbalance between the weak parties and those parties having stronger "bargaining power" has affected human rights such as the right of expressing an opinion is not fully implemented. In the standard form of contract, the beneficiary of the contract cannot express their willfully in the contents of the contract as they are faced with the need for goods or services offered.

This requires the intervention of the state to re-balance the position of the parties. The fulfillment of life needs as a form of human rights should be protected by the state as one of the duties to ensure in which there are two obligations in it, namely, the obligation to protect and the obligation to fulfill[16].

Related to the drawing up of the standard form of contract, the state has a duty in the legislative field, that is to set up rules in the field of drawing up standard form of contract. Which is not just intended for the contract of final consumers but also for commercial contracts as a whole with an emphasis on "profit-oriented", in executive field there must be official overseeing the drawing up of standard form of contract, especially the standard form of clauses, in judicial affairs, the role of judges in resolving disputes relating to contractual default is by enforcing the principles of balance, proportionality, the principle of good faith and the principle of protection.

4. Conclusion

Based on the description proposed, it can be concluded that the liability of the drawing up a standard form of contracts is not only done by those who are bound in the contract but the state shall be liable for protecting the weaker parties by making relevant rules of the standard form of contracts. The form of liabilities found in drawing up standard form of contract can be divided into two, namely the liabilities undertook by the parties and responsibility by the state. In broad, the responsibility of the parties (contracting parties) are in the scope of liabilities of payment for damages. In general, the demand for compensation upon the damages incurred by either party, divided into the claim for damages based on breach of contract and based on tort. The state responsibility related to the drawing up a standard form of contract is in the field of rulemaking, supervision and settlement of disputes relating to the standard form of contract.

The state should establish rules on the standard form of contract that is not only intended for the contract of the final consumer but also for other commercial contracts (amongst consumers); the state should supervise the standard form of the clause is circulating in the community.

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[15] W.Friedmann, 1971, *The State and The Rule of Law in A Mixed Economy*, Stevens and Sons, London, p.3.

[16] Yosep Adi Prasetyo, 2012, "Ekosob Rights and State Obligation", *Article*, presented in the framework of Strengthening Human Right Understanding for all Judges in Indonesia, Lombok dated 28-31 of May 2012, p.2, source httpl://pusham.uii.ac.id/, accessed on 1st of May 2015.

Statement of authorship
The author(s) have a responsibility for the conception and design of the study. The author(s) have approved the final article.

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