

Legal Analysis of the Position of Exoneration Clause in the Contract Legal System in Indonesia

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Abstract

The development of social life and human interaction methods results in changes in the nature of laws. The forms of agreements or contracts in the early stages of human life were characterized by strong emotional ties. Written contracts were merely created as a reminder of their previous contractual relationships, not necessarily to bind parties to an agreement. However, as society's interactions expanded to reach the external world beyond their domicile, humans began to consider how to engage in contracts without being disadvantaged, especially by parties providing facilities, such as financing or other services, who held greater bargaining power than others. This led to the creation of pre-prepared contract documents without the consent of the other party, which is known as the "exoneration clause." According to the law, the existence of standard contracts containing an exoneration clause may render the agreement void if it fails to meet the requirements of a valid agreement, unless the contents of the contract are explained beforehand and the second party accepts the presence of the contract. The inclusion of an exoneration clause in a standard contract, as seen from the conditions for a valid agreement under Article 1320 of the Civil Code, may lead to the nullification of the agreement due to a lack of mutual consent caused by one party's exploitation of the other party's situation in determining the contract's content. Meanwhile, from the perspective of Consumer Protection Law Number 8 of 1999, standard contracts containing an exoneration clause (liability waiver) are legally void.

1. Introduction

The principle of freedom of contract, as implied in Article 1338 paragraph (1) of the Civil Code, is a principle related to the form and content of an agreement. The essence of freedom of contract means that every person is free to determine with whom they will enter into a contract, free to determine the form and content of the agreement, and free to make a choice of law. This principle indicates that there should be a balance in the bargaining position among the parties involved. In another sense, the principle of freedom of contract is a principle that grants freedom to the parties to: a) enter into or not enter into a contract; b) make a contract with anyone; c) determine the content, implementation, and conditions of the contract; d) determine the form of the contract, whether written or oral. However, this freedom has its limits, as long as it remains within the boundaries of the requirements and does not violate the law or regulations, morality, and public order.¹

In Islamic law, the principle of freedom of contract, or "mabda' hurriyah at-ta'aqud," means that Islam grants freedom to the parties to enter into an agreement. The form and content of the agreement are determined by the parties involved. Once the form and content are agreed upon, the agreement binds the parties who have agreed to it, and they must fulfill all their rights and obligations. However, this principle is not absolute; as long as it does not contradict Islamic law, the agreement must be fulfilled. According to Faturrahman Djamil, Islamic law grants freedom to anyone to make a contract according to their desires, but the determination of its validity relies on the teachings of religion.²

However, as time goes by and with the development of business models in society that prioritize profit over purely humanitarian values, the target of profit and the size of risks involved in investing funds in non-cash transactions have led business actors to continuously strive to ensure that their business activities are related to contract systems or installment payment systems. In doing so, entrepreneurs engage in various contractual arrangements,³ In this contract, the entrepreneur determines its content, and the content does not need to be compromised with the prospective debtor (the person who owes). The system used is "take or leave" (take it or leave it and withdraw with respect). This is what is referred to as a standard contract or an exoneration clause (a clause made solely

¹ Anggitariani Rayi Larasati Siswanta and Maria Mu'ti Wulandari, 'Penerapan Asas Kebebasan Berkontrak Pada Perjanjian Baku Dalam Perjanjian Kerja', *Soedirman Law Review Universitas Jendral Soedirman*, 4.4 (2022), 409–20.

² Akhmad Hulaify, 'Asas-Asas Kontrak (Akad) Dalam Hukum Syari'ah', *AT – TADBIR: Jurnal Ilmiah Manajemen*, 3.1 (2019), 41–54.

³ Lola Venna Pahlevi, Ratna Sari, and Hamzah Ahmad, 'Analisis Penerapan PSAK 34 Dalam Pengakuanpendapatan Perusahaan Jasa Kontruksi Pada PT Arteri Cipta Rencana', *Invoice: Jurnal Ilmu Akuntansi*, 3.1 (2021), 102–27.

based on the wishes of one party, in this case, the entrepreneur, without considering the consent of the prospective customer or consumer).⁴

Agreements form the core of many business relationships. With the continuous development of the industrial world, where agreements serve as instruments for facility management, information technology services, human resource services, software licensing, and others, the clauses in agreements have also become more complex. The clarity and detail of agreements aim to benefit all parties involved and avoid losses.⁵ Therefore, the parties are obligated to understand: (a) the characteristics of the goods/services being agreed upon; (b) the rules of engagement in business; (c) the reciprocal nature of the relationship between both parties; and (d) to what extent each party understands the rules and behaviors of the other party. At the beginning, before the agreement is made, there is much focus on the preparation of the contract.⁶

However, this diminishes after the consumer agrees to the contract, and the agreement begins to take effect. In the preparation of a fair and balanced agreement, there are essential principles that must serve as the basis for the contract, namely the principle of freedom of contract (*partij autonomi*).⁷ The fundamental principle of this principle is that every individual, whether they want to enter into a contract or not, has the freedom to exercise their will. Therefore, the principle of freedom of contract is comprehensive in nature. To achieve a contract that fulfills the principle of balance, limitations are necessary. These limitations are determined by the parties involved, as long as they do not violate the provisions of the legislation.⁸

However, with the increasingly complex and fast-paced economic development, large companies propose agreements between parties using a more practical format known as "standard contracts." Standard contracts contain specific terms predetermined by the first party, aimed at the second party, without any balanced negotiation between the parties.⁹ Initially, the application of standard contracts aimed to enhance transactional efficiency in serving

⁴ Yong Woon Kim and Trevor L. Brown, 'The Importance of Contract Design', *Public Administration Review*, 72.5 (2012), 687–96 <<https://doi.org/10.1111/j.1540-6210.2012.02537.x>>.

⁵ Mutia Indah Wahyuni, 'Penggunaan Klausula Eksonerasi Dalam Perjanjian Standar Jasa Laundry (Suatu Penelitian Di Kabupaten Aceh Besar)', *JIM Bidang Hukum Keperdataan*, 3.3 (2019), 527–540.

⁶ Trevor L. Brown, Matthew Potoski, and David M. Van Slyke, 'Complex Contracting: Management Challenges and Solutions', *Public Administration Review*, 78.5 (2018), 739–47 <<https://doi.org/10.1111/puar.12959>>.

⁷ M. Roesli, Sarbini Sarbini, and Bastianto Nugroho, 'Kedudukan Perjanjian Baku Dalam Kaitannya Dengan Asas Kebebasan Berkontrak', *DiH: Jurnal Ilmu Hukum*, 15.1 (2019), 1–8 <<https://doi.org/10.30996/dih.v15i1.2260>>.

⁸ Aryo Dwi Prasnowo and Siti Malikhatun Badriyah, 'Implementasi Asas Keseimbangan Bagi Para Pihak Dalam Perjanjian Baku', *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, 8.1 (2019), 61–75 <<https://doi.org/10.24843/JMHU.2019.v08.i01.p05>>.

⁹ Nurhafni Nurhafni and Sanusi Bintang, 'Perlindungan Hukum Konsumen Dalam Perjanjian Baku Elektronik', *Kanun Jurnal Ilmu Hukum*, 20.3 (2018), 473–94 <<https://doi.org/10.24815/kanun.v20i3.10969>>.

consumers. However, this type of agreement has led to an imbalance and tends to benefit the contract maker more.¹⁰

In order to protect consumers or the second party, the government has actually regulated restrictions or prohibitions on using standard contracts that include exoneration clauses (statements of liability waiver). This is stipulated in Article 18 paragraph (1) letter a of Law Number 8 of 1999 concerning Consumer Protection (hereinafter referred to as the Consumer Protection Law). The legal consequence of including an exoneration clause in a standard contract is that the contract can be nullified.¹¹

An exoneration clause is only allowed to be included in an agreement if one party denies its obligation to fully or partially pay damages due to unlawful acts. Prominent American attorney, David Yates, states that there are three types of exoneration clause: 1. Full release or partial reduction of liability by the defaulting party; 2. Nominal limitation of the required damages; and 3. Limitation of the expiration period for the victim to file a claim or seek compensation, based on the provisions of the legislation.¹²

Sutan Remy Sjahdeini argues that the validity of the application of standard contracts no longer needs to be questioned because the existence of standard contracts has become a reality, as they have been widely used in the business world for over 80 years. This reality has been shaped by the fact that standard contracts were born out of the community's own needs. The business world cannot function without standard contracts. Standard contracts are necessary and accepted by society.¹³

The debate on the validity of an agreement arising from a standard contract to bind or apply as law to the contracting parties has been a long-standing issue in countries that have faced the problem of using standard contract patterns. It has been a reaction or effort of the legal community to seek a measure of justice, especially for the users of goods and services (consumers) who are more likely to be in a weak position.¹⁴

One form of applying an exoneration clause in contract activities is through a standard agreement in the opening of a bank savings account, which includes an exoneration clause stating that the account holder submits to and complies

¹⁰ Alya Yudityastri and Suraji, 'Klausula Baku Dalam Perjanjian Endorsement Dikaitkan Dengan Asas Kebebasan Berkontrak', *Jurnal Privat Law*, 8.2 (2020), 165–72 <<https://doi.org/10.20961/privat.v8i2.48402>>.

¹¹ Made Sarjana, 'Pembatasan Klausula Eksonerasi', *Jurnal Notariil*, 1.1 (2016), 109–27 <<https://doi.org/https://doi.org/10.22225/jn.1.1.175.109-127>>.

¹² Jein Stevany Manumpil, 'Klausula Eksonerasi Dalam Hukum Perlindungan Konsumen Di Indonesia', *Lex Privatum*, 4.3 (2016), 35–41.

¹³ Kelik Wardiono, *Perjanjian Baku, Klausul Eksonerasi Dan Konsumen, Beberapa Uraian Tentang Landasan Normatif, Doktrin Dan Praktiknya* (Yogyakarta: Penerbit Ombak, 2014).

¹⁴ Agus Satory, 'Perjanjian Baku Dan Perlindungan Konsumen Dalam Transaksi Bisnis Sektor Jasa Keuangan: Penerapan Dan Implementasinya Di Indonesia', *PADJADJARAN Jurnal Ilmu Hukum (Journal of Law)*, 2.2 (2015), 269–90 <<https://doi.org/10.22304/pjih.v2n2.a4>>.

with all provisions applicable at the bank, including but not limited to the general terms and other conditions. The issue arises when the exoneration clause is included in the general terms of the savings account opening form, stating that the customer is subject to the applicable savings provisions at the bank, as well as any future changes.

The application of this clause clearly contradicts the Financial Services Consumer Protection Regulation (POJK) Number 1/POJK.07/2013, specifically Article 22 paragraph (3) letter f, which states: "Financial services providers are prohibited from stating that consumers are subject to new, additional, extended, and/or unilaterally made changes by financial services providers during the consumer's use of purchased products and/or services." Standard agreements in the form of account opening application forms at banks still contain exoneration clauses prohibited by the Financial Services Consumer Protection Regulation and the Consumer Protection Law for the Financial Services Sector. Therefore, even if agreed upon by both parties, if the customer-creditor objects to the content of the account opening form containing an exoneration clause, they may request the cancellation of the account opening form containing the exoneration clause through the court.¹⁵

At least three decisions have been made at the first instance level, where the Panel of Judges considered the exoneration clause. These decisions include:

Sample of Court Decisions for 2017-2022 Discussing Exoneration Clauses in Standard Agreements

No.	Verdict Number	The Parties	Content of the Verdict
1.	Verdict Number 38/Pdt.G/2020/P N Bjm	Plaintiff: Aulia Saida Rahman Defendants: PT. Bank Tabungan Negara, Tbk, and others	The judge partially grants the plaintiff's lawsuit, where the plaintiff is found to have committed a breach of contract related to the Mortgage Certificate. Therefore, the exculpatory clause in the standard agreement is considered by the judge as a clause that disadvantages the consumer.

¹⁵ I Gusti Ayu Ratih Pradnyani, I Gusti Ayu Puspawati, and Ida Bagus Putu Utama, 'Perjanjian Baku Dalam Hukum Perlindungan Konsumen', *Kertha Semaya : Journal Ilmu Hukum*, 6.2 (2018), 1–7.

2.	Verdict Number 49/Pdt.Sus- BPSK/2021/PN Plg	Plaintiff: PT Toyota Astra Financial Services Defendant: Endang Kartikawaty	The Panel of Judges declares that the Consumer Dispute Settlement Agency is not authorized to accept and decide consumer dispute cases. However, in the BPSK's decision, it states the existence of a violation concerning an exculpatory clause that disadvantages the consumer.
3.	96/Pdt.G/2019/P N Bli	Plaintiff: I Nyoman Sareng Defendant: PT. Bank Rakyat Indonesia (Persero) Tbk. Bangli Branch Office	The Panel of Judges declares to reject the plaintiff's lawsuit, and the agreement containing the exculpatory clause remains valid.

The inclusion of this exculpatory clause occurs because the parties' positions in the agreement are unequal, with one party being stronger and determining the terms of the contract, while the other party is in a disadvantaged position and in dire need of the agreement. Such conditions are susceptible to the abuse of power by the party setting the terms of the contract against the other party. Based on the background above, the researcher is interested in analyzing the Juridical Analysis of the Position of Exculpatory Clauses in the Contract Legal System in Indonesia.

2. Research Method

This research employs a normative legal research method, which involves examining the analyzed cases using literature or secondary data. There are research approaches applied, namely the legislative approach, accompanied by presenting several cases.¹⁶ The legislative approach is used to analyze the regulations of standard agreements containing exculpatory clauses as stipulated in Law Number 8 of 1999 concerning Consumer Protection and the Civil Code. To address the research issues, the researcher utilizes: (a) primary legal materials, namely the Consumer Protection Law and the Civil Code; and (b) secondary legal materials, including books, journals, scientific research findings, newspapers, and online news articles. The collection of legal materials is done through research, gathering, and conducting literature studies based on the formulated research topics and classified according to their sources. Furthermore, after

¹⁶ I. G. K. Ariawan, 'Metode Penelitian Hukum Normatif', *Kertha Widya*, 1.1 (2013).

gathering the legal materials, they are analyzed in a qualitative descriptive manner.¹⁷ Qualitative descriptive analysis is an effort to explain general matters presented systematically to address issues and draw specific conclusions. Researchers mainly focus on philosophical, juridical, and sociological aspects to explore the rationale.¹⁸

3. Results and Discussion

The Validity of Standard Agreements in Indonesian National Law

Agreements are one of the most crucial aspects of civil law, as regulated in Book III of the Civil Code (KUHPerdata). In daily life, the general public often enters into agreements to fulfill their needs. Every individual has the capacity to perform legal actions, such as entering into an agreement, getting married, and others.¹⁹

Every person has the right and freedom to execute or establish an agreement and determine the terms and conditions of the agreement, whether in oral or written form. The Civil Code (KUHPerdata) regulates agreements and their valid requirements in Book III, Article 1320. Agreements are a way for individuals to bind themselves to others to fulfill their needs. Despite the significance of agreements, many people in society are generally unaware of their importance.

Article 1313 of the Civil Code defines an agreement as an act by which one or more persons bind themselves to one or more others, creating a legal relationship involving two or more parties in an agreement, resulting in rights and obligations for each party. These rights and obligations must always be fulfilled to be valid. An agreement can be perfect, whether it is oral or written.

In an agreement, it is essential to consider the basic requirements for the agreement to be legally valid. The valid requirements of an agreement are regulated in Article 1320 of the Civil Code. This understanding is crucial to establish a valid agreement. Article 1320 of the Civil Code mentions four requirements for an agreement to be considered valid, namely:

1. The existence of an agreement between both parties. An agreement is the concurrence of expressions of will between one or more individuals and the other party. The indicator of 'concurrence' lies in the statements made because the will cannot be seen or known by others. The expression of

¹⁷ Zuchri Abdussamad, *Metode Penelitian Kualitatif* (Makassar: Syakir Media Press, 2021).

¹⁸ Ani Purwati, *Metode Penelitian Hukum: Teori Dan Praktek* (Surabaya: CV. Jakad Media Publishing, 2020).

¹⁹ Umi Rohmah, 'Perikatan (Iltizam) Dalam Hukum Barat Dan Islam', *Jurnal Al-'Adl*, 7.2 (2014), 144–55.

agreement can be explicit or implicit. Explicit statements can be in oral, written, or through signs/symbols.

2. Legal capacity is the ability to perform legal acts. Legal acts are actions that will have legal consequences. Legal subjects are of two types: individuals and legal entities. Individuals, as legal subjects, have rights and can exercise rights guaranteed by the applicable law. Besides humans, legal entities are also included as legal subjects. Legal entities refer to entities or associations. A legal entity is an entity created by law. Therefore, as legal subjects, legal entities can perform legal acts (carry out legal actions) just like humans.
3. The presence of the object of the agreement (a specific thing). The object of the agreement is the consideration (main subject of the agreement). Consideration consists of the debtor's obligations and the creditor's rights. Consideration includes positive and negative acts. The consideration can be: 1. Giving something, 2. Doing something, 3. Not doing something (Article 1234 Civil Code). Regarding this matter (a specific thing), we can find it in Articles 1332 and 1333 of the Civil Code. Article 1332 of the Civil Code stipulates: "Only tradable goods can be the subject of an agreement." Meanwhile, Article 1333 of the Civil Code states: "An agreement must have as its subject a thing that is at least determined by its type." The indeterminacy of the quantity is not an obstacle as long as the quantity can be subsequently determined or counted.
4. Regarding this matter (a specific thing), we can find it in Articles 1332 and 1333 of the Civil Code. Article 1332 of the Civil Code stipulates: "Only tradable goods can be the subject of an agreement." Meanwhile, Article 1333 of the Civil Code states: "An agreement must have as its subject a thing that is at least determined by its type." The indeterminacy of the quantity is not an obstacle as long as the quantity can be subsequently determined or counted.²⁰

Regarding contracts that contain exculpatory clauses or standard contracts, according to Saliman, contracts in a broader sense are often referred to as agreements. Contracts or agreements are defined as events where two or more parties enter into an agreement to perform or refrain from a certain act, usually in writing.

Although Saliman states that contracts and agreements have similar definitions, the concept of contracts has a narrower essence than agreements. Contracts essentially involve written agreements between two individuals or two parties. Based on Financial Services Authority Circular Letter Number 13/SEOJK.07/2014, hereinafter referred to as SEOJK, it is stated that Standard Agreement is a written agreement unilaterally determined by the Financial

²⁰ Lukman Santoso, *Hukum Perikatan* (Malang: Setara Press, 2016).

Services Provider and contains standard clauses on content, form, and manner of creation, used to offer products and/or services to Consumers en masse.

Standard contracts are written contracts made by only one party in the contract, and often these contracts are already pre-printed (boilerplate) in certain forms by one party. When the contract is signed, the parties usually only fill in specific informative data with little or no changes to its clauses. The other party in the contract may have little or no opportunity to negotiate or modify the clauses already made by the other party. Hence, standard contracts are often considered one-sided or biased.

One form or model in economic activities related to standard contracts or exculpatory clauses focused by the author is, for example, the model of a savings account opening agreement at a Bank, which is pre-printed in the form of an account opening application form (an example of a standard contract containing exculpatory clauses commonly used in the banking industry to provide ease in illustrating standard contracts or exculpatory clauses in daily life). This form contains various provisions about the prospective customer's identity and the conditions for becoming a Bank's customer.

The account opening form is required as evidence that the customer will deposit money in the Bank. In the standard account opening agreement at the Bank, according to the author, there is an exculpatory clause, where the depositing customer declares to abide by all applicable provisions at the Bank, including but not limited to the general terms and conditions for bank account holders and other conditions.

The issue is that the exculpatory clause is present in the general terms and conditions of the savings account opening form, which states that "the customer shall comply with and be subject to the prevailing savings provisions at the Bank and any future changes." The application of this clause clearly contradicts Financial Services Authority Regulation Number: 1/POJK.07/2013 concerning Consumer Protection in the Financial Services Sector, specifically Article 22 paragraph (3) letter f, which states: "Financial services providers are prohibited from stating that consumers are subject to new, additional, continuing, and/or unilateral changes made by financial services providers during the consumer's use of the purchased products and/or services."²¹

This POJK clearly prohibits the implementation of this clause, but in practice, banks still apply it. According to Achmad Aripin, the standard account opening agreement is made for uniformity and consistency across all Bank Operational Offices and has undergone reviews from various parties to safeguard the interests of customers and the bank.

²¹ Rinrani Patrisia, 'Pelaksanaan Perjanjian Antara Bank Penerbit Kartu Kredit (ISSUER) Dengan Pemegang Kartu Kredit (Car Holder) Dalam Penggunaan Kartu Kredit (Sudi Pada PT. Bank Rakyat Indonesia, Tbk. Cabang Padang)', *ADIL: Jurnal Hukum*, 9.1 (2018), 115–26
<<https://doi.org/10.33476/ajl.v9i1.666>>.

This is intended to provide good and fast service to customers who want to deposit their money in the bank. If the agreement were to be made through negotiations between parties, it would take a long time for customers during the account opening process, while the service department aims to provide quick service, and based on the Service Level Agreement (SLA) for Customer Service, the maximum time for each customer is 5 (five) minutes.

Regarding the legal consequences of applying the standard account opening agreement at the bank, the author explains that this type of agreement, in the form of an account opening application form, constitutes a standard contract and contains an exculpatory clause. Although this has been regulated in Law No. 8 of 1999 concerning Consumer Protection and Financial Services Authority Regulation Number 1/POJK.07/2013 concerning Consumer Protection in the Financial Services Sector.

However, upon further examination, it is found that the standard account opening agreement in the form of an application form at the bank remains a valid agreement between the customer and the bank. This is in line with the fulfillment of the provisions in Article 1320 of the Civil Code, which states that the valid requirements of an agreement are: a. There must be an agreement between the parties, b. Legal capacity to make an agreement, c. A specific subject matter, d. A lawful cause.

The legal consequence of implementing the exculpatory clause in the standard account opening agreement form in the bank is related to the validity of the agreement that has been made. Under contract law in Indonesia, the validity of a standard agreement in the form of an account opening application form can be assessed based on the legal regulations, namely, the Civil Code, Consumer Protection Law, and Financial Services Authority Regulation Number 1/POJK.07/2013 concerning Consumer Protection in the Financial Services Sector. According to Article 1320 of the Civil Code, for an agreement to be valid, the parties must fulfill the following requirements: 1. Agreement between the parties, 2. Legal capacity to make an agreement, 3. Specific subject matter, and 4. A lawful cause.

The above requirements relate to the subject and object of the agreement. The first and second requirements pertain to the subject of the agreement or subjective conditions. The third and fourth requirements pertain to the object of the agreement or objective conditions. The subjective elements include the free consent of the promising parties and the legal capacity of the parties entering into the agreement, while the objective elements encompass the existence of the main issue that becomes the subject matter in the form of agreed-upon performance, which must be something not prohibited or permitted by law. Failure to fulfill any of these four elements results in a defect in the agreement, and the agreement is threatened with nullity, either in a form that can be annulled (if there is a violation in the subjective element) or null and void (in the case of failure to fulfill

the objective element), meaning that the obligations arising from the agreement cannot be enforced.

The provision of null and void exists in Article 1320 paragraph (4) of the Civil Code, which states that a contract is null and void if it is based on an unlawful cause. The explanation of the unlawful cause is detailed in Article 1337 of the Civil Code, which states that the cause of an agreement is considered unlawful if it is prohibited by law or contrary to morality or public order.

Exculpatory clauses aim to exempt an individual or business entity from legal claims and liabilities. However, the inclusion of exculpatory clauses in standard contracts still occurs in the savings account opening forms conducted by banks, especially commercial banks, which are the subject of this research. The inclusion of exculpatory clauses in a savings account opening form is an act prohibited by law and the Financial Services Authority Regulation (POJK). Nevertheless, the inclusion often happens in the practice of savings account opening forms.²²

The Validity of Standard Agreements Containing Exculpatory Clauses from the Perspective of Consumer Protection

The inclusion of clauses in standard agreements that are unilaterally determined by business operators often leads to abuse, where the content of the agreement disproportionately imposes obligations on consumers compared to the obligations of the business operators. Moreover, it grants more rights to the business operators than to the consumers. In some cases, standard agreements are accompanied by exculpatory clauses that shift certain risks to the other party.²³

The inclusion of exculpatory clauses that involve the transfer of responsibilities is possible because it grants freedom to the parties to determine whatever they agree upon, even if it deviates from supplementary provisions in the law. However, the inclusion of exculpatory clauses that burden consumers can be considered a limitation on the principle of freedom to contract, as this freedom is only controlled by one party who holds a relatively stronger position. Consequently, the clauses in standard agreements are solely determined by the business operator without involving the consumer, allowing the business operator to potentially misuse this situation. The principle of freedom to contract in Indonesian contract law includes the following scope:

1. The freedom to make or not to make an agreement;

²² Yuniva Marsaoleh Mamonto, 'Strategi Pembuatan Kontrak Bisnis Dan Akibat Hukumnya Di Masa Pandemi Covid 19', *Lex Privatum*, 9.12 (2021), 37–45.

²³ Sri Lestari Poernomo, 'Standar Kontrak Dalam Perspektif Hukum Perlindungan Konsumen', *Jurnal Penelitian Hukum De Jure*, 19.1 (2019), 109–20 <<https://doi.org/10.30641/dejure.2019.V19.109-120>>.

2. The freedom to choose the party with whom one wants to enter into an agreement;
3. The freedom to determine or choose the cause (purpose) of the agreement to be made;
4. The freedom to determine the object of the agreement;
5. The freedom to determine the form of the agreement;
6. The freedom to accept or deviate from supplementary provisions in the law (aanvullend recht).²⁴

When looking at the types of freedom present in the principle of freedom to contract as explained above, it appears that the freedom to contract in standard agreements is predominantly controlled by one party, namely the business operator who presents the standard agreement. On the other hand, the party to whom the agreement is presented, the consumer, only has freedom in terms of (1) the freedom to make or not to make an agreement, and (2) the freedom to choose with whom they want to make an agreement. These freedoms are not essential because whether they will enter into an agreement or not depends on whether they truly need the agreement or not. Meanwhile, other freedoms are solely possessed by the business operator who determines the terms in the standard agreement.

In its development, the principle of freedom to contract has indeed been subjected to limitations. Factors influencing the limitations on the principle of freedom to contract are: 1. The growing influence of the doctrine of good faith, where good faith is not only present during the execution of the contract but must also exist during the formation of the contract; 2. The development of the doctrine of abuse of circumstances (misbruik van omstandigheden).

In line with the above, Setiawan states that the limitations on freedom to contract are influenced by:

1. The development of the doctrine of good faith;
2. The development of the doctrine of abuse of circumstances;
3. The increasing number of standard contracts;
4. The development of economic law.²⁵

So, even though contract law grants freedom to the parties in an agreement to determine their own terms, it is important to note that the parties in an agreement do not always have balanced positions. Sometimes, one party holds a stronger position while the other party is in a weaker position and highly depends on the agreement. The weaker party's position is often exploited by the stronger party to maximize their profits without considering the potential losses

²⁴ Agus Yudha Hernoko, 'Asas Proporsionalitas Sebagai Landasan Pertukaran Hak Dan Kewajiban Para Pihak Dalam Kontrak Komersial', *Jurnal Hukum Dan Peradilan*, 5.3 (2016), 447–66 <<https://doi.org/10.25216/jhp.5.3.2016.447-466>>.

²⁵ Niru Anita Sinaga, 'Peranan Asas Itikad Baik Dalam Mewujudkan Keadilan Para Pihak Dalam Perjanjian', *JURNAL ILMIAH M-PROGRESS*, 8.1 (2015) <<https://doi.org/10.35968/m-pu.v8i1.186>>.

incurred by the weaker party. In light of this reality, government intervention is necessary to protect the weaker individuals in society.

In the development of civil law, according to Mariam Darus Badruzaman, government intervention is a shift towards the socialization of civil law (*vermaatschappelijking*) for the public interest. Therefore, matters concerning public interest will receive protection from the government. In fact, recently, there is a tendency to increase mandatory legal regulations (*dwingen recht*) for the public interest and to protect the weaker parties.

One form of government protection for the weaker parties is the enactment of Law Number 8 of 1999 concerning Consumer Protection (UUPK). In Article 18 of this law, various prohibitions have been stipulated regarding the creation or inclusion of standard clauses in any document and/or agreement, as outlined below:

1. Business operators are prohibited from including standard clauses in any document and/or agreement when offering goods and/or services intended for trade, if such clauses:
 - a. State a transfer of responsibility from the business operator;
 - b. State that the business operator has the right to refuse the return of purchased goods by the consumer;
 - c. State that the business operator has the right to refuse the return of money paid for goods and/or services purchased by the consumer;
 - d. State the granting of authority from the consumer to the business operator;
 - e. Attempt, directly or indirectly, to unilaterally take any action related to goods purchased by the consumer on an installment basis;
 - f. Regulate the burden of proof regarding the loss of utility of goods or the utilization of services purchased by the consumer;
 - g. Grant rights to the business operator to reduce the benefits of services or reduce the wealth of the consumer that is the subject of the sale and purchase of services;
 - h. State that the consumer is subject to rules in the form of new, additional, continued, and/or unilaterally made changes by the business operator during the consumer's use of the purchased services;
 - i. State that the consumer grants authority to the business operator to encumber collateral rights, pledges, or guarantees against goods purchased by the consumer on an installment basis.
2. Business operators are prohibited from including standard clauses that are positioned or designed in a way that is difficult to see or read clearly, or whose disclosure is hard to understand.
3. Any standard clause established by business operators in documents or agreements that violates the provisions as referred to in paragraphs (1) and (2) shall be declared null and void under the law.

4. Business operators are obligated to adjust standard clauses that contradict this law.

Considering the provisions mentioned above, the validity of a standard agreement that includes a clause transferring the business operator's responsibility (known as an exoneration clause) results in the nullification of that clause under the law. An act is declared null and void under the law due to its invalidity based on the legislation. Nullification means that the legal action is considered never to have existed.

Although Article 18 of the Consumer Protection Law states that the consequences of a standard agreement that violates such provisions result in nullification under the law, the cancellation must be sought from a judge, as stipulated in Article 1266 Part Three, which states, "In such a case, the agreement is not null and void, but the cancellation must be sought from a judge."

Thus, canceling a clause in a standard agreement that contains an exoneration clause requires awareness from the consumer who feels aggrieved to file a cancellation lawsuit. However, we are aware that consumer awareness of their rights in our country is still low. Therefore, a very dominant role of the government is needed to protect consumers. The government's role in this matter is essential in supervising the inclusion of standard clauses, as stated in Article 52 letter (c) of the Consumer Protection Law, where the government assigns the task and authority to the Consumer Dispute Resolution Agency (BPSK) to supervise the inclusion of standard clauses.

However, in this article, the term "supervising the inclusion of standard clauses" implies that the standard agreements have already been included by the business operators. Thus, the protection provided by the government here is only reactive in nature.

4. Conclusion

Based on the results and discussion of the research above, it is known that standard agreements containing exoneration clauses, such as in application forms, invoices, parking cards, or other predetermined formats used by business operators, are prohibited by the Consumer Protection Law (UUPK) and the Financial Services Consumer Protection Regulation (POJK). Therefore, even if agreed upon by both parties, such agreements are prohibited because they contain clauses that are prohibited by the law. Considering the requirements for a valid agreement, a standard agreement containing an exoneration clause (exculpatory clause) occurs due to the abuse of circumstances, resulting in a defect of will. An agreement that contains a defect of will means it does not fulfill the requirement of "agreement of the parties in making the agreement," which falls under the subjective requirement. An agreement that does not meet the subjective requirement can be canceled. The government, through the Consumer

Protection Law No. 8 of 1999, aims to provide protection to consumers regarding the inclusion of standard clauses. Article 18 of the law states that business operators are prohibited from including standard clauses that contain a transfer of responsibility (exoneration clause), and violations of this provision render the clause null and void under the law. However, even though it is null and void under the law, it still requires consumer awareness and courage to file a cancellation lawsuit.

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