

**LIMITATIONS BETWEEN COMMERCIAL CONTRACTS
AND CONSUMER CONTRACTS****Marsella Tridarani¹, Yarni Nikita Ahmady²**

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Abstract

Commercial Contracts and Consumer Contracts have a fundamental difference however in practice people still can not distinguish between the two. These differences include the principles, scope, the parties who are involved and the settlement of its dispute. Moreover, the terms of the contract can not be separated from BW, although the consumer contract is specifically regulated in Law No. 8 of 1999 on Consumer Protection. These contractual arrangements are also governed by the Convention on International Sales of Goods (CISG), Unidroit Principles of International Commercial Contracts (UPICC), the settlement of disputes between the two contracts are different in which the non litigation process of consumer contracts dispute can be settled through BPSK.

Keywords: *BPSK; Commercial; Consumer Protection; Contracts*

INTRODUCTION

Contracts are derived from formulation of agreement between parties out of the differences in interests and desires between them, therefore negotiation is a key part to a contract. Through negotiations the parties make every effort such as bargaining process to create forms of agreement that can meet both parties needs. Thus it can be concluded, in general, business contracts actually start from differences in interests that are brought together through contracts. Through con-

tracts that have united the differences are framed by legal instrument, thus it can bind both parties. In the contract the question of certainty and fairness will only be reached if the differences between the parties are accommodated through a proportional contractual relationship mechanism¹.

In the development of business law, business contract relations recognize the existence of several terms classification of

¹ Agus Yudha Hernoko, *Hukum Perjanjian: Asas Proporsionalitas dalam Kontrak Komersial*, Jakarta : Kencana Prenada Group, 2009, p.1.

contracts, two of which are often encountered in everyday life which are commercial contracts and consumer contract². Moreover according to UNIDROIT *Principles for International Commercial Contract* (UPICC) also differentiate the transactions involving consumers (consumer contracts) and commercial contracts themselves.

Commercial contract is a written agreement which substance is approved by parties with business intent or contain commercial content. Because commercial contracts are based on an agreement / consensus between the two parties, they must be carefully reviewed to avoid any immediate claimed regarding the contract clause being unbalanced or biased. By simply reading the text of a contract without a full understanding of the business processes of the related fields, many can falsely assume the contract is biased or unbalanced. Thus, raises problems regarding freedom of contract and equity between parties.

Whereas consumer contracts are contracts made by both parties where there are two unequal position, between those who have a strong bargaining power (either due to the mastery of capital / funds, technology or skills or the seller)

and the less bargaining power (consumers). From that, the one with less bargaining power is being taken from granted because he had no other choice than to accept all the contents of the contract, because if he tries to bargain with other alternatives it is likely to accept the consequences of losing what is needed. So, there are only two alternative choices for those who have weak bargaining positions, which take it or leave it³. Imbalance in contracting consumer contracts can be seen in clauses that have standards (*standar baku*) which contain clauses whose contents tend to be biased to one party. Parties in consumer contracts that do not have this equal position are protected by Law No. 8 of 1999 concerning Consumer Protection (hereinafter referred to as UUPK).

According to UUPK article 10 which stated: "*Klausula Baku adalah setiap aturan atau ketentuan dan syarat-syarat yang telah dipersiapkan dan ditetapkan terlebih dahulu secara sepihak oleh pelaku usaha yang dituangkan dalam suatu dokumen dan/atau perjanjian yang mengikat dan wajib dipenuhi oleh konsumen*"

In a business transaction that uses standard clauses, there is no equal nego-

² *Ibid*, p.5

³ *Ibid* p.2.

tiation process between the parties, but the agreement occurs in a unilateral manner in which one party has prepared the standard terms on an agreement form that has been printed and then given to the other party to be agreed with giving almost no freedom at all to the other party to negotiate the terms given⁴.

The standard contract has an endless controversy, many experts oppose its presence in business law, but many support it for reasons of transaction efficiency. However, if we pay attention to daily conditions, despite the controversy, we often see the standard contract often in daily life. One reason is practical, but is actually more based on efforts to minimize losses on the party who draft it⁵.

Based on the phenomena that occur, it is necessary to have an objective understanding in assessing the contents of a contract, especially related to contract clauses that are considered biased. There are often misunderstandings about the existence of a contract which in turn can mislead an objective assessment. Many parties are easily trapped to declare a contract to be biased or unbalanced, only because it is based on differences in the sta-

tus of each contracting party. This misconception, for example by just taking into account the different backgrounds of the contracting parties (bank-customers, business-consumer), then expressly states that the contract is biased with the assumption that there are different bargaining positions. The view is not entirely wrong, even in some things must be recognized that in a contract there is an imbalance and injustice where there is a different bargaining position, especially if related to consumer contracts. However, it will be more fair and objective to assess the existence of a contract, especially by examining the substance, as well as the relevant contract category, whether the contract is a consumer contract or a commercial contract. These fundamental differences can be seen from the development of the principles, scope and resolution of each contract's agreement.

DISCUSSION

Development of Principles and Characteristics of Commercial Contracts and Consumer Contracts

Basically, every contract made must be in accordance with the provisions of Article 1320 BW regarding the legal terms of the agreement. These conditions include the agreement of those who bind

⁴ Sutan Remy Sjahdeini, *Kebebasan Berkontrak dan Perlindungan yang Seimbang Bagi Para Pihak dalam Perjanjian Kredit Bank Indonesia*, Jakarta: Institut Bankir Indonesia, 1993, p.61.

⁵ Johan P, *Penggunaan Kontrak Baku dalam Praktek Bisnis di Indonesia*, Jakarta: Majalah BPHN, 2006, p.51.

themselves, the ability to make an agreement, a certain matter, and the permissible cause. The first and second conditions are subjective conditions which if in conflict with these conditions the agreement can be canceled, while the third and fourth conditions are objective conditions which if contrary to the terms the agreement is considered null and void⁶. The principle of freedom of contract in Article 1338 BW also applies, so in making contracts / agreements, the parties are free to determine the contents of the contract as long as the contents of the agreement do not conflict with the law, decency, or with public order as limited by Article 1337 BW. Commercial contracts made by equal parties has no special protection, therefore the parties must follow the basic principles.

While in consumer contracts there is a development of the applicable principle, the first is that the Caveat Emptor principle is basically a dependency placed on the buyer on his own judgment. This is based on the basic premise owned by the buyer in relation to the suitability of the product for its use, which in the future does not have the right to refuse or return

the goods that have been purchased⁷. The Caveat Emptor principle has evolved since a decision was made in 1817 by Chief Justice John Marshall, who is believed by scientists to be the first case in the Supreme Court to establish the rules of caveat emptor in America. Where in this case the seller is aware of changes in commodity prices that will occur because of news of peace between the United States and Britain, but the seller remains silent when the buyer asks about price changes. Finally, buyers are confused because of this transaction. However, the Court stated that the seller was not bound to communicate because the information could be accessed by both parties. And at that time people could not think of any regulations that would put pressure on the seller⁸.

This principle however contains weaknesses, in the development, consumers do not get adequate information to make choices about the goods and / or services they consume. This can be caused by limited consumer knowledge or openness of business actors to the products offered. Thus, if the consumer suffers a loss, the business actor can argue that the loss

⁶ Fani Martiawan Kumara Putra, "Paksaan Ekonomi dan Penyalahgunaan Keadaan Sebagai Bentuk Cacat Kehendak dalam Perkembangan Hukum Kontrak", *Yuridika*, Vol. 30 No. 2, Mei-Agustus 2015, p. 196.

⁷ Sowmya Christina dan Prakash Munishamappa, "Caveat Emptor To Caveat Vendor In The Process", *International Research Journal of Management Sociology & Humanity (IRJMSH)*, Vol 5 Issue 5, 2014, p.430.

is a result of the consumer's own negligence. But in the development of consumer protection law now, it has begun to minimize the use of these doctrines or principles, even though the consumer still has to be careful of the goods he will buy from business actors. There is also an increase in liability that must be carried out by businesses for goods sold, so that the doctrine of the caveat venditor or let the seller be ware is more used⁹.

In Caveat venditor the business actor is obliged to be careful of the goods marketed, if the seller has been cautious, the seller cannot be blamed. This theory explains the company's obligations to consumers based on the idea that buyers and consumers are not aligned with each other and that the interests of consumers are very vulnerable to corporate goals in this case having knowledge and expertise that consumers do not have. Because producers are in a more advantageous position, they are obliged to guarantee that the interests of consumers are not harmed by the products they offer. This due care view also states that consumers must depend on the manufacturer's provisions, so

that producers are not only obliged to provide products that match the claims they make, but also must be careful to prevent others from getting hurt by these products even if the company explicitly rejects responsibility or provide compensation if they fail to provide products in accordance with the claim and do not hurt consumers. The weaknesses derived from this theory are the absence of clear methods to determine when a person or producer has given adequate attention. Then, the assumption that producers are able to find risks that arise in the use of a product before consumers buy and use it. In fact, in an environment with high technological innovation, new products whose damage cannot be detected before being used for several years and will continue to be distributed to the market. Third, this theory looks paternalistic, which illustrates that the producer is the party that makes important decisions for consumers, including the risks to consumers¹⁰.

Under Indonesian law, the Consumer Protection Law refers more to the Caveat Vendor principle, where producers must be careful in producing and marketing their goods. This principle astonishes factories and producers as sellers to be careful, so that their products do not cause

⁹ English Legal History and its Materials, "The Historical Context of Chandelor v. Lopus", <http://emoglen.law.columbia.edu/twiki/bin/view/EngLegalHist/LopusChandler?rev=6> , diakses pada 9 Agustus 2019.

¹⁰ Manuel G. Velasquez, *Business Ethic An Cases*, Yogyakarta : Andi, 2005, p. 303

loss for health and safety of consumers, because consumers have the right to obtain goods that do not contain defects¹¹. The obligations of the business actor are regulated in Article 7 of the UUPK¹². The Caveat Venditor principle adheres to a strict liability system where all forms of responsibility are borne by business actors such as explaining products, guaranteeing product quality to the burden of proof in general courts (District Courts) in the event of a dispute. Meanwhile, the UUPK adheres to the strict liability system as regulated in article 19 paragraph 5 which if a business actor can prove that the loss suffered by consumers does not occur due to the negligence of the business actor, it is free from responsibility¹³.

In addition to these two principles, which are often debated, in practice, the principle of freedom of contract can be used as a basis for the preparation of consumer contracts that govern the relationship between consumers and business actors. For reasons of cost and time efficiency, consumer contracts in the form of standard contracts are used in almost all

business activities, such as insurance, banking, leasing, buying and selling houses / apartments of companies (real estate), leasing leasing office buildings, making credit cards, shipping of goods (land, sea and air, etc.)¹⁴. When referring to Article 1320 BW, there are several requirements that apply to the principle of freedom of contract, namely as long as it is in accordance with the legal terms of the agreement, the agreement between parties, capability, the existence of certain objects and permissible causes. Referring to the provisions of Article 1320 BW, there is a deviation in the application of the principle of freedom of contract in consumer contracts, because the agreement does not occur because of a balanced negotiation process, but the agreement occurs by the way the business actor has prepared standard conditions (standard clause) on a agreement forms that have been printed, then submitted to consumers for approval with almost no freedom at all for consumers to negotiate these terms. Consumers with weaker positions can only read the conditions put forth by business actors whose positions are strong, and if he agrees to these requirements, consumers are welcome to sign them, but vice versa

¹¹ John Pieris dan Wiwik Sri Widiary, *Negara Hukum dan Perlindungan Konsumen terhadap Produk Pangan Kadluarsa*, Jakarta; Pelnagi Cendekia, 2007, h.86. seperti yang dikutip dalam Celina Tri Siwi Kristiyanti, *Hukum Perlindungan Konsumen*, Jakarta: Sinar Grafika Offset, 2009, p.101.

¹² Undang-Undang No 8 Tahun 1999 tentang Perlindungan Konsumen (Lembaran Negeara Republik Indonesia tahun 1999 no 42), pasal 7

¹³ Celina Tri, *Op Cit*, p.106.

¹⁴ Munir Fuady, *Hukum Kontrak Dari Sudut Pandang Hukum Bisnis*, Buku Kedua, Bandung : Citra Aditya Bakti, 2003, p. 77.

if consumers do not approve the requirements put forth by business actors, then the transaction cannot proceed (leave it). That is why the standard agreement in this consumer contract is known as the "take it or leave it contract"¹⁵. However, the existence of this element of choice, some states that this consumer contract does not violate the principle of freedom of contract (Article 1320 Jo. Article 1338 BW) with the right still given to the consumer to approve or reject the proposed agreement¹⁶.

In practice, the principle of freedom of contract can be used as a basis for the preparation of consumer contracts that govern the relationship between consumers and business actors. For reasons of cost and time efficiency, consumer contracts in the form of standard contracts are used in almost every business activities, such as insurance, banking, leasing, buying and selling houses / apartments of companies (real estate), leasing office buildings, making credit cards , shipping of goods (land, sea and air, etc.)¹⁷. When referring to Article 1320 BW, there are several requirements that apply to the principle of freedom of contract, as long as it is in accordance with the legal terms

of the agreement, the agreement between parties, skills, the existence of certain objects and permissible causes. Referring to the provisions of Article 1320 BW, there is a deviation in the application of the principle of freedom of contract in consumer contracts, because the agreement does not occur out of equal negotiation process, instead the agreement occurs by the way the business actor has prepared standard conditions (standard clause) on a agreement forms that have been printed, then submitted to consumers for approval with almost no freedom at all for consumers to negotiate these terms. Consumers with weaker positions can only read the conditions put forth by business actors whose positions are more prominent, and if he agrees to these requirements, consumers are welcome to sign them, but vice versa if consumers do not approve the requirements put forth by business actors, then the transaction cannot be proceed (leave it). That is why the standard agreement in this consumer contract is then known as the "take it or leave it contract"¹⁸. However, in the consumer contract there's one thing that must be taken seriously which is the existence of exemption clause (Exoneration Clause) in the contract. Exoneration clauses are clauses

¹⁵ Shidarta, *Op.Cit.*, p.120.

¹⁶ *Ibid.*

¹⁷ Munir Fuady, *Hukum Kontrak Dari Sudut Pandang Hukum Bisnis*, Buku Kedua, Bandung : Citra Aditya Bakti, 2003, p. 77.

¹⁸ Shidarta, *Op.Cit.*, p.120.

that contain conditions that limit or even completely eliminate the responsibility that should be borne by the producer / business actor¹⁹. Exemption of liability is a legal consequences that occur due to lack of implementation of the obligations required by legislation. Concerning the issue of compensation in the case of breach of contract, which then the implementation is put aside in a standard contract by the business actor. Compensation is not carried out if there is an exoneration clause in the contract²⁰.

In Article 1329 BW, agreement is divided into 2 (two) types, namely the nominate agreement and the in nominate agreement. Nominate agreement is an agreement contained in BW while in nominate agreement is an agreement that arises, grows, lives and develops in society²¹. This commercial contract is a business contract which is included in the nominate contract as the arrangements for making and implementing this contract are regulated in BW. In this paper the author will explain about commercial contracts in the case of sale and purchase regulated in Article 1457. The parties in this commercial contract have the same position where

they can make clauses whose substance is agreed upon and the contents are business loaded, or agreements with two or more parties with commercial content make a contract in accordance with the agreement or the interests of both parties. This understanding is also reinforced by the characteristics of commercial contracts that distinguish it from consumer contracts, that in commercial contracts there is a "financial or economic motive (benefit motive)" that underlies the relationship of the parties according to Robert W. Clark²².

Moreover, commercial contracts or international sale and purchase are regulated in the United Nations Convention on Contracts for International Sales of Goods, hereinafter referred to as CISG which is the Lex Mercatoria International Purchase Contract. International sale and purchase contracts can be included in the type of business contract, where the parties involved in the sale and purchase contract come from two different legal systems. The parties that carry out international trade need a standard to bridge the different legal systems and it is this CISG that acts as one of the standard international buying and selling contracts. As stipulated in Article 2 of the CISG also

²⁰ Celina Tri, op. cit., p. 142.

²¹ Salim HS, *Hukum Kontrak Teori dan Teknik Penyusunan Kontrak*, cet.6, Jakarta: Sinar Grafika, 2009, p.5.

²² Robert W. Clark, *Inequality of Bargaining Power*, Toronto-Calgary-Vancouver: The Carswell Company Ltd., 1987, p. 101.

explains that the sale and purchase contract stipulated in this regulation is an object that is used not for the purposes of personal interest / end users. The sale and purchase agreement referred to in a commercial contract based on BW at the same time when looking at the characteristics described in the UIPCC, is carried out by parties having equal position, where in the business transaction process both parties have their own profit motive or seeking profit and is not a end consumer or end user.

Consumer contracts are regulated under Law No.8 of 1999 concerning Consumer Protection, but must be based on and in accordance with the general provisions of the contract that has been described in BW. The establishment of the Consumer Protection Act in Indonesia is in accordance with the United Nations Guidelines on Consumer Protection (UNGCP). The UNGCP is a policy framework that also urges governments to promote consumer protection, initially, in eight areas: basic needs, security, information, choices, representation, recovery, consumer education, and a healthy environment²³. This guideline is specifically

designed for the governments of developing countries and newly independent countries to be used in developing and strengthening consumer protection policies and laws in their country²⁴. That guideline is based on the saying of "*recognizing that consumers often face imbalances in economic terms, education levels and bargaining power*"²⁵. That is the reason why UNGCP is a reference that officially recognizes that consumer protection is a tool for social justice and economic development²⁶.

In UNGCP, it becomes important for member countries to create the right organisms or agencies to implement basic consumer protection standards that are completed at UNGCP in areas such as: (a) physical security, (b) promotion and economic protection consumers (c) standards for the safety and quality of consumer goods and services, (d) distribution facilities for important goods and services, (e) actions that enable consumers to recover, (f) education and information programs, (g) actions related to certain areas (food, water, medicines, including pesticides and

²³ Ana Candida Muniz Cipriano dan Hector Valverde Santana, *The UN Guidelines for Consumer Protection: Review and Next Steps*, dalam Claudia Lima Marques dan Dan Wei, *Consumer Law and Socioeconomic Development: National and International Dimensions*,

Switzerland: Springer International Publishing, 2017, p. 26.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

chemicals) and international cooperation²⁷.

Forms of Liability in Commercial Contracts and Consumer Contracts

Business actors in their relations always endeavor to make the contracts they have been agreed upon to run in accordingly. However, during the implementation of the contract did not rule out some that may arise along the way. Contract disputes generally arise as a result of an imbalance or unequal position between parties, caused by various factors such as an inadequate understanding of the business processes carried out, inability to recognize partners or business partners, or the absence of a legal cover underlying the business processes²⁸. However, Dispute that mostly occurs is when either parties does not performed accordingly to the contract agreed upon. Because of these possibilities, generally in the commercial contracts the parties include the dispute resolution clauses and the liability in their contract²⁹. One basis among other things that can be used to file a lawsuit to District Court is the act of breach of contract.

²⁷ *Ibid.*, p. 27.

²⁸ Agus Yudha, *Op.Cit.*, p. 305.

²⁹ Basuki Rekso Wibowo, *Menyelesaikan Sengketa Bisnis di Luar Pengadilan (Pidato)*, Disampaikan pada pengukuhan Jabatan Guru Besar dalam Bidang Ilmu Hukum, Fakultas Hukum Universitas Airlangga, 17 Desember 2005, sebagaimana dikutip oleh Agus Yudha, *Op.Cit.*, p. 307.

Basically a party is considered breach of contract if they do not carry out what was promised or according to the agreement. Juridical consequences for the party doing the breach of contract is the existence of a claim from the party at lost for the fulfillment of the agreement, cancellation of the agreement or the imposition of fines / asking for compensation to the party doing the default. Compensation can include costs that have actually been incurred, losses incurred as a result of the default, as well as interest or penalties as stated in the contract clause. The basis for this claim must be based on a contractual relationship (privity of contract). Meanwhile according to the CISG there is also a breach of contract which explains that, in international commercial contracts as stipulated in CISG article 49 paragraph 1.³⁰ According to article 49, the seller may, even after the date of shipment, make legal remedies at his own expense for any negligence to carry out his obligations, if he can do so without undue delay and without causing undue discomfort to the buyer or uncertainty of replacement provided by the seller for expenses that are paid in advance by the buyer. Nevertheless, the buyer has the right to claim

³⁰ Convention of International Sales of Good, article 19.

compensation as provided for in this convention.

The form of compensation that can be done on the basis of a claim by Breach of Contract according to BW is for damaged parts, CISG allows the buyer to request specific performance, price reduction, or cancel part of the contract. However, the buyer must meet the CISG provisions in demanding the remedy. To cancel the contract, the buyer can only do so if the partial submission reaches the fundamental breach of contract. While according to BW regarding the payment of compensation due to the achievement of the compensation agreement between the plaintiff and the defendant in accordance with article 1238 BW, "The debtor is declared defaulted on a warrant, or with similar deed, or based on the strength of the engagement itself, that is, if the engagement this results in the debtor being deemed to have been negligent with the allotted time", 1243 BW:" Reimbursement of costs, losses and interest due to non-fulfillment of an engagement has begun to be compulsory, if the debtor, even though it has been declared breach of contract, is still negligent to fulfill the engagement, or if something which must be given or done can only be given or done in a time that exceeds the allotted time. "and 1244 BW:"

The debtor must be punished to compensate for costs, losses and interest. If he cannot prove that the agreement was not carried out or the timing is not precise in carrying out the engagement it was caused after something unexpected, which can not be insured to him. although there is no bad intention to him "³¹.

Consumer contracts in the form of standard contracts provide many advantages in terms of efficiency, but out of those advantages there are weaknesses in terms of accommodating a equal position for the parties. The weaknesses of this standard contract stem from the characteristics of a standard contract which form by one party who standardized contract that leaves little or no space for the other party to negotiate the contents of the contract. The issue for legal experts about the entry into force of the standard contract in addition to its validity is the existence of unfair clauses³².

There is a difference between the definition of contract annulment (*Pembatalan kontrak*) and termination of the contract. In the annulment of the contract is always associated with not fulfilling the conditions of its formation (the phase of contract formation). While the termination

³¹ M. Yahya Harahap, *Hukum Acara Perdata Tentang Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan*, Jakarta: Sinar Grafika, 2012,p.501.

³² *Ibid*, p. 178.

of the contract recognizes the validity of the contract and binds the obligations of the parties, but because there are problems in its implementation therefore the contract is terminated (the contract implementation phase)³³. Annulment of a contract in a consumer contract can occur if in the formulation of the contract there are prohibited clauses which will eventually cause the contract to be null and void and is considered never to have happened at all³⁴.

Termination of contract is a legal consequence of further events that occur in the implementation contractual obligations. In a consumer contract if there is a breach of contract where the business actor does not fulfill the obligations that should be carried out according to the contract, the consumer has the right to compensate. However, the business actor can also be exempted from the responsibility of providing compensation if the business actor can prove that the non-performance of obligations in the contract is a mistake to the consumer according to Article 19 paragraph 5 of the UUPK³⁵.

CONCLUSION

The principles of freedom of contract, consensualism, *pacta sur servanda* and the principle of good faith as an essence of a contract is also being used as the basis of commercial contract. More specifically in the consumer contract known the existence of *caveat emptor* principle which makes all responsibility over the goods lies on the consumer, which has now developed into the *caveat venditor* principle that imposes prudential responsibilities over business actors. Therefore, business actors must be responsible for the products they sell. Thus, business actors must have the good faith to provide protection and education to consumers, one of which is through honest product information. The parties in commercial contracts are regulated in BW. Whereas, in this commercial contract the parties have a *provite motive* and equal position and can form clauses in the contracts as agreed upon. International commercial contracts are further explained in in the CISG. While in the consumer contract the parties involved according to the Under Consumer Protection Law are business actors and end consumers, where due to unequal bargaining position, business actors can make standard contracts that are designed by them-

³³ Agus Yudha, *Ibid.* p.296

³⁴ Celina Tri, *Op Cit.*, p.98

³⁵ Celina Tri, *Op.Cit.*, p. 142.

selves. Hence, this consumer gets special protection in Law No. 8 of 1999 concerning Consumer Protection.

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