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# BOILERPLATE CONTRACT; A PERSPECTIVE FROM INDONESIAN LAWS AND REGULATIONS

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## ABSTRACT

There were many boilerplate contracts in practice. The main issue is that it leaves no room for negotiation. Scholars used to argue that the boilerplate contract was bad for consumer protection. This research aims to elaborate that either a boilerplate contract can be legally and commercially acceptable from the perspective of Indonesian laws and regulations or not. The researcher conducted a comparative legal study from two common law countries: the United Kingdom and Singapore. This research is normative legal research, using secondary data, mainly primary legal sources. Data were obtained through literature research using google machine, with main keywords are "standard," "boilerplate," and "adhesion," combined with "contract." Collected data were reviewed using content analysis to obtain only the most relevant data. Data used for the final analysis were data from the United Kingdom, Singapore, and Indonesia. The final analysis was conducted using a qualitative approach with a comparative approach. The discussion proved that boilerplate contracts could and shall not be generally considered as legally or commercially acceptable. It must consider whether the "crucial" terms and conditions have been fairly informed or presented before the contract's conclusion. They can be performed without changing the real meaning of the transaction. The researcher finally concluded that Indonesian law on consumer protection that regulated the boilerplate contract needs to be amended.

## INTRODUCTION

Business is a legal transaction. There is always a legal risk in every business. Every business started with negotiation between the parties until they reached an agreement between them. In common daily activities, negotiation is made orally (Muljadi and Widjaja; 2003). The more complex the human life, the more complex the business transactions. The more complex the business transactions, which may involve higher risk, negotiations, and agreements, were no more made orally. Written evidence becomes a must. Written evidence will avoid any of the parties from denying the agreed terms and conditions. The denial is the earliest cause of business disputes in the future.

The scarcity of goods and services required the business to make modifications. Many transactions, which were a long time ago conducted through one by one deal, nowadays were conducted by one business entity "against" thousands (or millions) of people (known as a customer who later becomes consumer). These kinds of transactions required the same fair terms and conditions for all its customers. Since it would be impossible for the business to "know" all its customers, businesses need to make a standard form of contracts that contained pre-determined terms and conditions. These pre-determined terms and conditions will contain everything the transaction needs. Banking, insurance, parking, trading, and almost all retail business need these kinds of contacts, a boilerplate contract, a contract with less or no changes at all. In common law countries, a boilerplate contract is known as a standard contract, and in the United States of America, it was called a contract of adhesion.

Many scholars and practitioners argued that the boilerplate contract leaves no room for negotiations. It reduced the meaning of negotiations, whereby there were offers and counter-offer from both parties. In a boilerplate contract, the business solely determined the terms and conditions, and the customer can only take it or leave it. Widjaja (2003) explained that in Law No.8 Year 1999 regarding Consumer Protections ("Consumer Protection Law"), there were many prohibitions that must be obeyed by the business. One among them is the prohibitions to incorporate several terms and conditions in the (boilerplate) contract. It is regulated in article 18 paragraph (1) Consumer Protection Law.
This research aimed to discuss whether a boilerplate contract can be legally and commercially acceptable or not, especially on how article 18 paragraph (1) Consumer Protection Law must be read from the perspective of Indonesian laws and regulations. As Indonesia is considered a civil law country, the research will conduct a comparative legal study with common law countries.

## LITERATURE REVIEW

Generally, (business and) legal transaction is regulated in the Indonesian Civil Code ("ICC"). Article 1320 ICC regulates the terms and conditions for a valid contract. According to the article, there are four requirements. The first two requirements refer to the consensus and capacities of the parties. The last two requirements refer to the specific obligation(s) that need to be performed and the requirement that the obligation(s) must not violate the laws, morality, and custom (Badrulzaman, 1983; Muhamad, 1990; Soebekti, 1995; Prodjodikoro, 2000; Muljadi and Widjaja, 2003).

Based on the four terms and conditions, scholars summarized that at least five contract law principles must be followed for a contract to be called a contract. They are consensual, freedom to make a contract, personality, *pacta sunt servanda*, and good faith. The fourth condition in article 1320 ICC was known as the principle of freedom to make a contract. The main issue with this research is whether the boilerplate contract falls into the category of a contract that violates the law as to article 18 paragraph (1) Consumer Protection Law, so it is legally and commercially cannot be acceptable.

Research also found that the boilerplate contract issue has been subject to research for many years in Indonesia. From undergraduate school to post-graduate school, in doctoral dissertation research. In 1993, Sjahdeni, in his doctoral dissertation, argued on the freedom to contract and equal protection for bank's customers in the credit agreement. Twenty-six years later, in 2019, again, a doctoral dissertation, David ML. Tobing argued on the boilerplate contract, a paradox in law enforcement on consumer protection. Both of them see that the boilerplate contract is commercially not good and legally against the law as it was made against the "will." In between, we can find many pieces of research that, in principle, support the opinion.

This research is different from those previously researched. It argued that a boilerplate contract is not necessarily bad either from a commercial or legal perspective. It represents the need for the business and consumers as long as they were notified or informed in advance.

## RESEARCH METHOD

This research is normative legal research. This research collects secondary data using "google machine" with keywords "boilerplate contract," "standard contract," "standard clause," "contract of adhesion," either in Bahasa Indonesia and/ or English. Data obtained consisted of primary legal sources, secondary legal sources, and other sources related to the subject matter. Data collected were reselected by using content analysis. Through content analysis, data were subsequently triangulated to reduce them into necessary and reliable data.

The final reselected data consisted of data from two common law countries, the United Kingdom and Singapore, as comparative sources in understanding boilerplate contract; and Indonesia's data. The data were then analyzed using a qualitative method with a descriptive and analytical approach to explain and understand that a boilerplate contract is good and can be used to fulfil society's needs. Comparative analysis was conducted to obtain similarities from the Indonesian laws' perspective among several different views with the United Kingdom's and Singapore's law. For clarification in this research, the term boilerplate contract, standard contract, or contract of adhesion will be used interchangeably.

## RESULTS AND DISCUSSION

In principle, common law contract law does not have significant differences with civil law contract law, except that a common-law contract requires consideration. Contract without consideration is not a contract under common law tradition (Shatwell, 1954) (Atiyah, 1965-1991) (Valente, 2010) (Mayer et

al., 2012) (Johnson, 2015). Other terms and conditions that become requirements for a contract to become valid and enforceable co-existed in both legal traditions. One of the requirements for a contract to be enforceable is that it shall not contain matters or obligations that violating laws and regulations.

Under English law, a boilerplate contract or standard contract (the "term" used in the common law) was first regulated in the Unfair Contract Terms Act 1977 ("UCTA77"). Under article 3 UCTA77, which is applicable for England and Wales, and Northern Ireland, no contract terms may, when the party who made the standard contract was in breach, exclude or restrict any liability of his in respect of the breach. It also regulated that the party who made the standard contract may not be entitled to render a contractual performance substantially different from that which was reasonably expected of him or to render no performance at all, except in so far as the contract term satisfies the requirement of reasonableness. The same provision can be found in article 17 paragraph (1) UCTA77, which applies to Scotland. The provision stated that breach in consumer's contract or a standard form contract should not affect if it excludes or restricts any liability to the consumer or customer. The same also applies in respect of a contractual obligation, to render no performance, or to render a performance substantially different from what the consumer or customer reasonably expected from the contract. This means that no contract shall be interpreted in favour of the party who made it. The same concept can be found in article 1349 ICC.

With the enforcement of the Consumer Rights Act 2015 ("CRA2015"), there are now two governing standard contracts. UCTA77 governs business-to-business contracts (B2B) and CRA2015 governs contract related to consumer (business-to-consumer) (B2C). Based on article 62 CRA2015, a standard contract in business to customer relations shall not contain an unfair term and unfair notice to the consumer. Term or notice is unfair if it caused an imbalance that may affect detriment to the consumer. To determine the term or notice's unfairness, people shall consider the nature of the subject matter and circumstances when the term or notice was made. The other term or notice in the contract or any other contract on which the term or notice depends must be considered. Part 1 of Schedule 2 CRA2015 provides a list which was known as grey-list. This list contains an indicative and non-exhaustive list of unfair terms. It should be noted that the terms on the list are not automatically unfair. The court will use the list to assist when the court considers applying the fairness test of standard contract unfair terms to a particular case.
The un-exhausted grey-list contains twenty terms that "may" be seen as unfair terms. They are summarized as follows:

1. “excluding or limiting liability to the death or injury of the customer caused by any act or omission by the trader;
2. excluding or limiting liability the right of the consumer when the trader is in default, including the right to set off;
3. providing a right to a trader to determine terms or condition that the implementation depends on the trader's will;

4. permitting a trader to take a certain amount from a consumer when the consumer chooses to cancel the transaction; meanwhile, there is no compensation to the consumer when the trader cancels the same;
5. requiring a consumer to pay a big amount of money for the services the consumer never received whenever the consumer decided not to conclude the transaction;
6. requiring aa consumer to pay (unreasonable) big amount of money when the consumer was in default;
7. allowing a trader to dissolve the contract without any compensation to the consumer, but when the consumer dissolve the contract, the consumer shall pay a big amount of compensation for service the customer never received;
8. allowing a trader to terminate the contract without appropriate notice;
9. allowing a trader to extend the contract without consent to the consumer;
10. irrevocably binding the consumer to terms with which the consumer had had no real opportunity of becoming acquainted before the transaction was concluded;
11. allowing a trader to amend the terms of the contract without any valid reason;
12. allowing a trader to determine the characteristic of the object when the contract has been concluded;
13. allowing a trader to amend the characteristic of the object without any valid reason;
14. allowing a trader to decide the price payable by the consumer when the contract has been concluded;
15. allowing a trader to increase the price if the increased price is very high compared to the original price, and the consumer is not given the right to cancel the transaction;
16. providing the trader right to solely interpret the contract, including the conformity of the delivered object with the object determined in the contract;
17. limiting trader obligations undertaken by its agent;
18. obliging consumer to fulfil all the obligations; meanwhile, the trader does not;
19. allowing traders to transfer the contract while reducing warranty and indemnity to a consumer without the consent of the consumer;
20. excluding the right of a consumer to take legal action, particularly taking a dispute to arbitration, restricting evidence, and imposing a burden of proof to the consumer is normative legal research. This research collects secondary data."

Singapore's law on a standard contract is not very much different from the United Kingdom. The law governing standard contract terms can be found only in the Unfair Contract Terms Act ("UCTA"). UCTA is a law that protects consumers who are in a weaker bargaining position in most consumer transactions (SLA, 2019). Consumer protection does not only relate to a standard contract. The laws governing consumer protection may vary. Besides UCTA, Singapore has issued Consumer Protection (Fair Trading) Act ("CPFTA"). CPFTA was made to protect consumers against unfair practices when consumers found out that he/ she has received goods were different from a contract (SLA, 2019). On top of CPFTA, there is also Lemon Law in Singapore. Lemon law protects consumers against goods that do not conform to contract or are not of satisfactory quality or performance standards at the time

of delivery. Under the Lemon Law, businesses are obligated to repair, replace, reduce the price, or provide a refund for a defective good (CASE, 2019).

According to article 12 of UCTA, consumers are any person that did not make a contract; meanwhile, the other party makes the contract in the course of business. With this definition, UCTA covers both businesses to business (B2B) dan business to consumer (B2C) transactions. Below are, among others, some provisions that must be taken into attention and may be considered as unfair terms:

1. "a contract shall not exclude own liability which may cause death or personal injury;
2. a contract shall not exclude own liability for breaches of terms, neither shall render a different kind of service, or not at all;
3. a contract shall not make consumer indemnifies another person in respect of liability that may be incurred by the other for negligence or breach of contract;
4. a contract shall not reduce the liability of manufacturer or retailer based on a term or notice to exclude liability for product defect or negligent manufacturing or distribution."

It can be said that UCTA concerns the avoidance of civil liability through "exclusion clauses" in business contracts when there was a breach of contract, negligence, or other breaches of duty. UCTA does not examine whether a contract is unfair generally. There was no definition of "exclusion clause"; however, from Article 13 UCTA, it can be concluded that it indicates any clause attempting to:

1. restrict or exclude a liability;
2. make a liability, or the enforcement of liability, subject to restrictive or onerous conditions that are a detriment to the consumer;
3. restrict the rights and remedies of the consumer; or
4. restrict rules of evidence or procedure to the consumer.

When an exclusion clause is tested, according to Article 11 UCTA, the court shall consider the circumstances reasonably known by the parties when the contract was made. It means any further developments caused by any breaches are not relevant. Article 11 paragraph (5) UCTA puts the burden on the party seeking to uphold the exclusion clause to show that it was a reasonable clause to include at the time of the contract. This means that the party who made the contract must prove that the terms and conditions in the contract were necessary and do not mean to detriment the customer or consumer.

In Indonesia, article 18 paragraph (1) Consumer Protection Law provided eight provisions regarded as standard terms. Besides, Article 18 paragraph (2) Consumer Protection Law also prohibited business to incorporate standard clause *at the place* or *in the form*, which is *difficult to be seen* or *cannot be read clearly*, or *statement which is difficult to understand*. The existence of the standard terms and the prohibition's violation shall make the terms and the clause declared void by law operation. The eight provisions are provisions that:

1. assign the liability to the consumer;
2. refuse to receive back the goods already purchased by the consumer;
3. refuse to refund for the goods/ services purchased/ consumed by the consumer;

4. provide authority to conduct direct/ indirect unilateral actions with regards to the goods purchased;
5. regulate proof of loss of the use of the goods or the benefits of the services;
6. reduce the benefits of the services or reduce the properties of the consumers that become the object of services;
7. state that consumer shall comply with the new regulation, additional regulation, and other regulations unilaterally made;
8. provide authority to impose mortgage, pledge, or guarantee against the goods purchased on installment

The terms in Indonesian Consumer Protection Law were different from the United Kingdom and Singapore. Indonesian regulation firmly declared that such terms as regulated in article 18 paragraph (1) and paragraph (2) of the Consumer Protection Law are void by operation of law. It makes there is no room for the court to conduct an unfair test concerning the terms. In many circumstances, practices proved that the provisions could not be strictly enforced. Article 1347 ICC acknowledged that terms and conditions that have become our part of custom should be deemed concluded in the contract, even though they are not incorporated in the contract. The provision has two meanings. First, whatever the terms and conditions stipulated in the boilerplate contract, there was no room for the boilerplate contract to be disputed as long as their part of the custom. Second, whatever and, however, the terms and conditions of the boilerplate contract, the court must consider the custom that exists in the society before making any decision on the boilerplate contract. Custom showed that either in B2B transaction or in B2C transaction, there were always notices and explanations. Fair terms and fair notices before a transaction conclusion must be considered, including all circumstances that come along. As long as notices were made and given a reasonable explanation, the business may limit their liability to balance the rights and obligations. In principle, any amount of money has its price in business, as long as they are fairly presented to keep sustainability.

This means that boilerplate contracts, especially those stipulated in article 18 paragraph (1) or those violating Article 18 paragraph (2) Consumer Protection Law, shall not be directly justified as against the law and treated as void by operation of law. It should be treated as legally or commercially acceptable. To be accepted, a fair test must be conducted, taken into consideration was the environment, and reasonable notice has been fairly informed in advance before the contract's conclusion

## CONCLUSION

The researcher concluded that the boilerplate contract shall not be considered illegal or declared legally void by operation of law, as stipulated in article 18 paragraph (4) Indonesian Consumer Protection Law. Without a prior fairness test, a boilerplate contract shall be legally and/ or commercially acceptable. The researcher urged that article 18 paragraph (4) Indonesian Consumer Protection Law shall be amended

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