

Redefining the Principle of Consumer Contract to Maximize Consumer Protection: Elaboration on Product Liability Principle

Rizky Amalia, Erni Agustin, Faizal Kurniawan
Faculty of Law, Universitas Airlangga, Indonesia

Keywords: Consumer, commercial, contract, liability, protection.

Abstract: Basically, the law of contract follows the freedom of contract principle that the parties may determine the substance and the form of the contracts, on the condition of not violating the Laws, morality, and public order. However, in order to provide consumer protection, the regulation in Indonesia prohibits the businesses to include exoneration clauses in consumer contracts; specially to avoid the liability when there is defective products. In Indonesia, their claims are filed and processed in Consumer Dispute Settlement Institution (BPSK) that shall handle consumer cases only, whereas, commercial contract shall be enforced through the corridor of contract law principles. This shows that there is an overlap between the instruments of consumer law and contract law. Normatively, consumer protection in Indonesia is stipulated in The Law Number 8 Year 1999 on Consumer Protection. This paper discusses the scope of consumer contracts, the regulation and the law enforcement. It also elaborates the concept of consumer and the principle of product liability provided in Indonesian regulation compared to the Consumer Rights Directive 2011/83/EU on Consumer Protection.

1 INTRODUCTION

The science and technology development and the rapid competition in the world of trade have occurred on a national and international scale and have a significant influence with the demands of legal protection for consumers who are considered weak in trade transactions. Consumer losses are generally divided into two, namely losses caused by the behavior of business actors who are irresponsibly detrimental to consumers and consumer losses that occur as a result of unlawful acts committed by third parties, making the misled consumers ultimately harmed (Ahmad Ramli, 2002). Indonesian government through the promulgation of Law Number 8 of 1999 concerning Consumer Protection (hereinafter referred to as “**Law No. 8/1999**”) on April 20, 1999 demonstrates its commitment to provide legal protection instruments to consumers.

The main parties in consumer protection are consumers themselves. The literal translation from “consumers” comes from “consumer” or “consument”, meaning everyone who uses goods / services for a specific purpose (Az Nasution, 2000). Consumers are not only interpreted as individuals (people), but also a company that becomes the last

buyer or user (Erman Rajagukguk, 2000). The extent of “consumer” wide determination is described simply by the former President of the United States, John F. Kennedy, stating that “*consumers by definition include us all*” (Mariam Darus Badruzaman, 1990). Thus, the term consumer can be broadly defined as anyone who uses goods / services for a specific purpose. Determining from the purpose of the use of goods / services, consumers can be divided into *intermediate consumer, intermediate buyer, derived buyer, consumer of industrial market* dan *ultimate consumer, ultimate buyer, end user, final consumer, consumer of the consumer market*) (Az Nasution, 2000). Article 1 number 2 of Law No. 8/1999, defines consumers, namely every person who uses goods and / or services, which are available in the community, both for the benefit of them, their families, other people and other living things and not for trading (Sidharta, 2006). Such a definition can also be found in Article 236 of Book 6 Nieuw Burgerlijk Wetboek (NBW) which states that consumers are “*een natuurlijk person die niet handelt in de uitoefening van zijn beroep of bedrijf*” which means a natural person who acts not in his profession or business.

In the practice of countries in Europe, the regulation of consumer protection can be found in

Directive 85/374 / EEC on Liability for Defective Products which was subsequently amended through Directive 1999/34 / EC; Directive 86/653 / ECC on Self-Employed Commercial Agents; Directive 93/13 / EEC on Unfair Terms in Consumer Contracts; Directive 99/44 / EC on Sale of Consumer Goods; Directive 97/7 / EC on the Protection of Consumers in Respect of Distance Contracts; Directive 85/577 / EEC to protect consumer respect contracts are negotiated away from business premises; and Directive 2011/83 / EU on Consumer Rights. The provisions in Directive 85/374 / EEC on Liability for Defective Products which were subsequently amended through Directive 1999/34 / EC are provisions in Europe that specifically regulate product liability. This paper will discuss about the scope of consumer contracts, the regulation and the law enforcement by also elaborating the concept of consumer and the principle of product liability provided in Indonesian regulation compared to the Consumer Rights Directive 2011/83/EU on Consumer Protection. The assessment is carried out by comparing the rules of national law with the rules of other countries, so that a comprehensive analysis of these problems can be concluded.

2 MATERIAL AND METHODS

This study is a normative legal research, which is a process to find the legal regulations, principles, as well as doctrines to provide solutions to the legal issues encountered. The produced results are expected to give prescription for the issues highlighted in this study. As a normative legal study, statute and conceptual approaches were used. Legal research was conducted to seek solutions to the arising legal matters and the aimed results are to give prescription for the issues at hand. This study requires primary and secondary legal materials. The primary legal materials consist of authoritative legal materials, meaning they cover the laws and regulations, official notes or treaties in the formation of the laws and regulations and courts' decisions. Meanwhile, the secondary legal materials used in this research are scientific writings of the scholars/academicians, results from past research, encyclopedias, scientific journals and daily or periodical publications (the media) in the field of law, as well as seminar papers.

3 THE SCOPE OF CONSUMER CONTRACTS, THE REGULATION AND THE LAW ENFORCEMENT

Consumer contracts and transactional contracts are one type of contract in which the contract emphasizes the principle of justice based on the balance of the interests of the parties (UNIDROIT, 1994). The debate about whether or not there is a balance of party positions (bargaining power) is basically not relevant to be associated with commercial contracts, because the dimensions of commercial contracts emphasize more on partnership and business continuity (efficiency and profit oriented), so that they no longer well on mathematical balance, but rather emphasize the proportionality of rights and obligations among the parties, regardless of the proportion of the final results received by the parties (Ridwan Khairandy, 2013). Looking at it from a business law perspective, the existence of a consumer contract is an exception to business contracts in general, where in the consumer contract, there is a validity of public law and private law. The principle of freedom of contract is very limited to consumer contracts because the implementation of the contract is made by default through a standard contract, so it requires the application of public law in consumer contracts as a form of legal protection from the state to consumers who have a weaker position or bargaining position when compared to the producer / business actor (Peter Mahmud Marzuki, 2009).

Initially, legal protection for consumers can be categorized in two forms, namely: 1) no conflict (pre-purchase), ie if there is no conflict or no conflict, then it can be done in two ways, namely legislation and voluntary self-regulation. Legislation is carried out by designing and stipulating various laws and regulations, while voluntary self-regulation is carried out through the design and establishment of regulations by voluntary business actors; and 2) conflict (post purchase), namely in the event of a conflict or conflict between the consumer and business actor, it can be resolved through the settlement of consumer disputes, both litigation and non-litigation, to resolve the conflict (Johanes Gunawan, 2001). Settlement of consumer disputes is regulated in Article 45 to Article 48 of Law No. 18/1999 which states that, consumer disputes can be resolved through court or outside the court based on the wishes of the parties. If the consumer and business actor have chosen a particular dispute resolution forum in the agreement made by both, both through

litigation and non-litigation, then the parties must submit to the clause.

Adagium caveat emptor shifts to *caveat venditor*, where previously consumers are required to be cautious in using a product shifted into a demand for producers to be careful and require factories to be careful about their products so as not to cause harm to consumers because consumers are entitled for non-defective products. In the event that a consumer obtains a defective product, the consumer has the right to obtain compensation (Celina Tri, 2011). In anticipating products or services that harm or harm consumers, most countries participating in free trade have adopted the doctrine of product liability in their legal systems, such as Japan, the United States and the European Economic Community and other countries. Based on Black's Law Dictionary, product liability is “*A manufacturer's or seller's tort liability for any damages or injuries suffered by a buyer, user, or bystander as a result of a defective product; Product liability can be based on a theory of negligence, strict liability, or breach of warranty*” (Bryan A. Garner, 2004). *Product liability* is a legal accountability mechanism of a person / body that produces a product (producer, manufacturer), a person / body that moves in a process to produce a product (processor, assembler) or distribute (seller, distributor) the product (Husni Syawali & Neni Sri, 2000). In another view, product liability is also defined as the responsibility of the producers for the products they have brought into circulation, which causes losses due to defects inherent in the product (Agnes M. Toar, 1988).

The European community, especially the Netherlands, prescribes the criteria to postulate the existence of product liability, that is, if they fulfill the following conditions: 1) the existence of a producer, which can be qualified as a producer, is the producer of finished products, raw material producers, spare parts makers, everyone who reveal himself as a producer by stating his name or certain identification that distinguishes the original product on a particular product, the importer of a product with the intent to sell, rent, lease or other forms of distribution in trade transactions, and suppliers in terms of identity cannot be found from producers or importers; 2) the existence of consumers, where those who can qualify as consumers are end consumers (end-consumer or ultimate consumers); 3) the presence of a product, which is a moving object, even if the moving object has become a component that is attached to or becomes part of other fixed objects, such as electricity, with the exception of agricultural and hunting products; 4) loss, namely loss to humans or

loss to property, other than the product concerned; and 5) the defect in the product, where the product is qualified to contain damage because it does not meet security by considering the appearance of the product, the intended use of the product and when the product is placed on the market (Celina Tri, 2011).

4 ELABORATING THE CONCEPT OF CONSUMER AND THE PRINCIPLE OF PRODUCT LIABILITY PROVIDED IN INDONESIAN REGULATION COMPARED TO THE CONSUMER RIGHTS DIRECTIVE 2011/83/EU ON COSUMER PROTECTION

In relation to product defects, it can be found in three classifications according to the production stages, namely production damage, design damage and inadequate information provision. The regulatory objective regarding product liability is to reduce accident rates due to defective products and provide compensation for victims of defective products that cannot be avoided (Az Nasution, 2000). In Indonesia, before the enactment of Law No. 8/1999, in formal juridical terms, the principle of product liability has been regulated in the BW, including Articles 1322, 1473, 1474, 1491, and Articles 1504 to 1511 BW, although the scope of the material is not as extensive as the material in Law No. 8/1999. Bloembergen provides that liability can be filed with 2 (two) basis, namely accountability under agreement or liability based on unlawful conduct. While accountability that is based on unlawful acts refer to Article 1365 BW, where consumers must be able to prove the existence of production errors in their producers or subordinates.

In its development, product accountability, whether based on agreements or unlawful acts, is deemed no longer in accordance with the needs of legal protection for consumers. In international practice, there is a known absolute accountability doctrine (*strict product liability*). According to Black's Law Dictionary, *strict products liability* adalah “*product liability arising when the buyer proves that the goods were unreasonable dangerous and that (1) the seller was in the business of selling goods, (2) the goods were defective when they were in the seller's hands, (3) the defect caused the*

plaintiff's injury, and (4) the product was expected to and did reach the consumer without substantial change in condition" (Bryan A. Garner, 2004). The principle of absolute product liability is a principle of accountability that is not based on faults (negligence) and contractual relationships (privity of contract) between the producer and the consumer, but is based on a defect in the product (objective liability) and risk or losses suffered by consumers (risk based liability). The producer as an entrepreneur / factory / seller is accountable for the fault of his product, so that in absolute accountability, the consumer does not need to prove the production error of the producer or subordinate, but the consumer only proves: 1) that the product he bought is defective; 2) that the defect can cause loss / accident; and 3) that the defect poses a danger (Howel A. Rate, 2007).

Basically, most of the provisions in Directive 85/374 / EEC on Liability for Defective Products jo. Directive 1999/34 / EC is identical to the provisions in Law No. 8/1999, including: Article 3 Directive 85/374 / EEC on Liability for Defective Products jo. Directive 1999/34 / EC which regulates producers, namely goods makers; the maker of raw materials or components of a product, someone who lists his name as an item maker, importer (for sale, rent or leasing or other forms of distribution), and supplier, if the maker of the goods is not known, which is identical to the definition of business actor as stipulated in Article 1 number 3 of Law No. 8/1999 along with an explanation; Article 2 Directive 85/374 / EEC on Liability for Defective Products jo. Directive 1999/34 / EC which regulates the definition of products covering all movable goods, except agricultural products which after the amendment the provisions change into all movable objects, even if put into other moves or become immovable, including electricity, primary agricultural products (products from land, stock-farming and fisheries, including products that have undergone initial processing) and games. These provisions are identical to Article 1 number 4 and number 5 Law No. 8/1999 which defines products are all goods and / or services; and Article 9 Directive 85/374 / EEC on Liability for Defective Products jo. Directive 1999/34 / EC which stipulates that losses that can be held liable are losses that cause death or accident of a person and / or damage to all or part of property. This is identical to the provisions of Article 19 of Law No. 8/1999.

In relation to product liability, the principle of product liability adopted in Directive 85/374 / EEC on Liability for Defective Products jo. Directive 1999/34 / EC is liability without error (strict liability; liability without fault; principle of objective liability;

risk based liability). The principle is then applied to all member countries, by elaborating in the national law of each member country, such as the United Kingdom which applies strict liability in the Consumer Protection Act 1987 (Inosentius, 2004). This appears in the opening of the second paragraph of Directive 85/374 / EEC on Liability for Defective Products jo. Directive 1999/34 / EC which states that "*Whereas liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production*". Furthermore, it is confirmed in Article 4 of Directive 85/374 / EEC on Liability for Defective Products jo. Directive 1999/34 / EC, that the verification system adopted by Directive 85/374 / EEC on Liability for Defective Products jo. Directive 1999/34 / EC is an inverse proof system, in which the consumer is obliged to prove: 1) loss; 2) damage to goods; and 3) the relationship between property damage and loss. In addition, in Article 7 Directive 85/374 / EEC on Liability for Defective Products jo. Directive 1999/34 / EC, states that producers can free themselves from their responsibilities if they can prove: 1) do not intend to sell their goods on the market; 2) a defect arises after the goods are on the market; 3) the product has changed shape; 4) defects arise as a result of meeting government regulations or regulations; 5) defect technology cannot be detected when the goods are distributed; or 6) for component makers, the instructions for the use of the goods are made by the makers of finished goods. Both of these provisions indicate that the product liability principle is adopted in Directive 85/374 / EEC on Liability for Defective Products jo. Directive 1999/34 / EC is a strict liability because the liability is not based on the presence or absence of errors but whether there is a defective product.

In Indonesia, accountability based on agreements or unlawful acts was also followed before the Law No. 8/1999. With the promulgation of Law No. 8/1999, the accountability of business actors for consumer losses is specifically regulated in Chapter VI, Article 19 to Article 28 of Law No. 8/1999. In Law No. 8/1999 there is provisions concerning defective products, but Article 11 letter b of Law No. 8/1999 uses the term hidden disability and Article 8 paragraph (2) and (3) Law No. 8/1999 uses the term handicapped or used. However, in the event that consumers suffer losses due to defective products, Law No. 8/1999 does not adhere to the strict liability principle consistently, but adheres to the semi strict liability principle. This can be observed in Article 19

of Law No. 8/1999 which states that business actors are responsible for providing compensation for damage or loss to consumers, while in Article 28 of Law No. 8/1999 emphasized that proof of the existence of an element of error is the burden of the business actor. Furthermore, in Article 27 of Law No. 8/1999 states that there is a limitation of responsibility, whereby business actors can be released from part or all of the responsibility for losses suffered by consumers if the item is not circulated, defects arise later and are caused by the negligence of the consumers themselves.

The three provisions of article No. Law 8/1999 shows that Law No. 8/1999 adheres to product liability with semi strict liability because to be able to account for a business actor must still be proven an element of error which is the basis of the existence of such accountability even though the proof is the burden of the business actor himself. Whereas in strict liability, business actors are absolutely accountable without the need for proof of error, because the point of strict strict liability is found in the defective product itself. Thus, basically the concept of product accountability carried out in Law No. 8/1999 remains guided by the legal construction of risk liability in violating the law as regulated in Article 1367 BW. In connection with the adoption of the principle of semi strict liability in Indonesia, in the case of the trainer's liability as a fitness service provider, the trainer as a fitness service provider himself must prove that he is not guilty of the loss of his consumers because he meets the requirements Operational standards that have been set in accordance with the ability and endurance of consumers.

5 CONCLUSION

Consumer contracts are a form of business contract in which not only private law, but public law in the context of state intervention to balance the position of the parties in the contract. It includes within consumer contract category and protected by Law No. 8/1999 if one party is the final consumer, the existence of a business actor, and the existence of objects in the form of goods and / or services. If these elements are fulfilled, the dispute arising from the consumer contract concerned can be submitted in the settlement of consumer disputes through litigation in the court and non-litigation through BPSK or settlement between the parties. Thus, not every business contract in the banking sector is a consumer contract whose law enforcement can be carried out based on Law No. 8/1999, because not every bank customer is within the

last chain of consumer. Indonesian legislation governing consumer protection, especially Law No. 8/1999, does not adhere to the strict liability principle in product liability. This is different from international practices, one of which is as stipulated in Directive 85/374 / EEC on Liability for Defective Products jo. Directive 1999/34 / EC which has applied the strict liability principle in product liability. There needs to be an explicit classification of bank customers belonging to the category of end consumers protected by Law No. 8/1999 and customers as consumers between those not protected by Law No. 8/1999, as well as consumers in other fields. It is also necessary to have legal certainty in consumer protection law enforcement by BPSK with reference to Law No. 8/1999, so that disputes that are not within BPSK competencies must be declared rejected by BPSK. It is necessary to accommodate the strict liability principle in product liability in Indonesia by way of regulation in Law No. 8/1999, so businesses can be more careful in circulating their products to the free market.

REFERENCES

- Badruzaman, Mariam Darus., 1990. "Perlindungan Terhadap Konsumen Ditinjau dari Segi Standar Kontrak". Makalah pada Simposium Aspek-Aspek Hukum Perlindungan Konsumen, BPHN-Bina Cipta, Jakarta.
- Garner, Bryan A. ed. 2004. Black's Law Dictionary. United States: Thomson Wess.
- Gunawan, Johannes., 2001. "Pemberlakuan Undang-Undang Perlindungan Konsumen Terhadap PT PLN Sebagai Lembaga Pelayanan Umum". Pro Justitia, Jurnal Triwulan Universitas Katolik Parahyangan, Nomor 4.
- Hernoko, Agus Yudha., 2010. Hukum Perjanjian Asas Proporsionalitas dalam Kontrak Komersial. Jakarta, Kencana Media Prenada.
- Khairandy, Ridwan., 2013. Hukum Kontrak Indonesia dalam Prespektif Perbandingan. Yogyakarta, FH UII Press.
- Kristiyanti, Celina Tri Siwi., 2011. Hukum Perlindungan Konsumen. Jakarta, Sinar Grafika.
- Marzuki, Peter Mahmud., 2009. Pengantar Ilmu Hukum. Jakarta, Kencana Prenada Media Group.
- Nasution, Az., 1994. "Iklan dan Konsumen, Tinjauan dari Sudut Hukum dan Perlindungan Konsumen". Manajemen dan Usahawan Indonesia, Nomor 3 Tahun XXIII, LPM FE-UI, Jakarta.
- Nasution, Az., 2000. Hukum Perlindungan Konsumen: Suatu Pengantar. Jakarta, Diadit Media.
- Rajagukguk, Erman, et.al., 2000. Hukum Perlindungan Konsumen. Bandung, CV Mandar Maju.

- Ramli, Ahmad., 2002. "Perlindungan Hukum Terhadap Konsumen dalam Transaksi E-Commerce". *Jurnal Hukum Bisnis*, Volume 18 Nomor 3.
- Rate, Howel A., 1998. *Business Law and Cases*. Toronto, The Dryden Press.
- Salam, Moch. Faisal., 2007. *Penyelesaian Bisnis Secara Nasional dan Internasional*. Bandung, CV Mandar Maju.
- Samsul, Inosentius., 2004. *Perlindungan Konsumen: Kemungkinan Penerapan Tanggung Jawab Mutlak*. Depok, FHUI Pascasarjana.
- Shidarta., 2006. *Hukum Perlindungan Konsumen Indonesia*. Jakarta, Gramedia Widiasarana Indonesia.
- Syawali, Husni dan Neni Sri Imaniyati, ed., 2000. *Hukum Perlindungan Konsumen*. Bandung, CV Mandar Maju.
- Toar, Agnes M., 1988. "Penyalahgunaan Keadaan dan Tanggung Jawab Atas Produk di Indonesia". Makalah dalam Seminar Dua Hari tentang Pertanggungjawaban Produk dan Kontrak Bangunan, Yayasan Pusat Pengkajian Indonesia bekerjasama dengan Badan Pembinaan Hukum Nasional, Jakarta.
- UNIDROIT (International Institute for the Unification of Private Law), 2004. *Principles of International Commercial Contracts*. Rome.

