CHAPTER I

INTRODUCTION

A. Context of Study

In a business activity, there are many transactions which are created in the form of standardized contract. The special feature of standardized contract is there is no need to do a long process of negotiation among the contracting parties. Business contract typically includes a negotiation process and sometimes it may take days, weeks, months, or even years. The application of standardized contract will gives business actors efficiency in expenditure of money, energy, and time.[1]

Standardized contract is accepted by many business actors and it becomes one form of contract that is not only popular in developed countries but also in developing countries as basic of implementation of economic principle, namely with an effort as little as possible, with the time as brief as possible, with cost as cheap as possible, with method as easy as possible, and the most important is to gain profit.[2]

The major characteristic of this type of contract is that the will of one of the party exclusively dominates the whole transactions, not only with regard to one individual but for the entire unidentified group of people who will participate in such transactions.[3]

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[1] Mariam Darus Badrulzaman, *Aneka Hukum Bisnis*, PT Alumni, Bandung, 2005, p. 46.

[2] Abdulkadir Muhammad, *Perjanjian Baku Dalam Praktek Perusahaan Perdagangan*, PT Citra Aditya Bakti, Bandung, 1992, p. 3.

[3] Sinai Deutch, *Unfair Contract: The Doctrine of Unconscionability*, D.C. Health and Company, Canada, 1977, p. 2.

There are several examples of application of standardized contract in many transactions such as bills of lading, charter parties, policies of insurance, contract of sale in the commodity markets.[4]

Since the party that has stronger position usually creates the form and content of standardized contract, it could be ensured that the contract contains of clauses that gives benefits to the stronger party in order to erase his certain burdens or liabilities that should be imposed on him.[5] Such clause is known as exemption clause.

Exemption clause (or in another terms known as "exclusion clause" or "exception clause") is term in a contract which exclude or limit, or purport to exclude or limit, a liability which would otherwise arise.[6]

In general definition, exemption clause is a term in a contract or notice which either seeks to exclude liability or remedies for breach of contract and/ or negligence, or which seeks to limit that liability to a specified sum.[7] If the exemption is only partial, then the clause may be called a "limitation of liability clause".[8]

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[4] Antonio Boggiano, *International Standard Contracts: The Price of Fairness*, Graham and Trotman/ Martinus Nijhoff, Netherlands, 1991, p. 1.

[5] Ahmadi Miru, *Hukum Kontrak dan Perancangan Kontrak*, PT Raja Grafindo Persada, Jakarta, 2007, p. 40.

[6] Smith J.C, *Fundamental Principles of Law: The Law of Contract*, Sweet and Maxwell, London, 1989, p. 141.

[7] Jill Poole, Casebook *on Contract (Fourth Edition)*, Blackstone Press Limited, London, 1992, p. 309.

[8] Cracknell D.G, *Obligations: Contract Law (Fourth Edition)*, Old Bailey Press, London, 2003, p. 131.

Exemption clause which is a part of the standardized contract creates imbalance position among the parties. Consumers who become an object of business need goods and services have a weak position in comparison to business actors who can provide their needs. Regarding to such condition, the government is sued Act No. 8 of 1999 concerning Consumer Protection. This act regulates about rights and obligations of consumer and business actor and also about certain kind of prohibitions for business actors toward consumers. After the enactment of this Act, government hopes that it can minimize problem that may rise in the future, especially in the event of consumer's loss due to deceitful business practices of business actors.

In Act No. 8 of 1999, there is a prohibition related to exemption clause. Business actors are prohibited to use exemption clause for their business transaction such as ease their liability to the consumer. However, in reality, business actors still use exemption clause for their own interest.

Besides, the application of standardized contract and exemption clause is still debatable, particularly regarding to freedom of contract principle and requirements of validity of the contract.[9]

One of the requirements of validity of the contract is "there must be consent of the individuals who are bound thereby".[10] Without consent which is freely given, there can be no contract. A contract is formed if an offer from one party is

[9] *Ibid*, p. 43.
[10] Indonesian Civil Code.

accepted by the other party.[11] When there is consent from both parties, then the parties are bound to the contract based on consent principle.

Moreover, the application of standardized contract and exemption clause actually restrict the freedom of contract principle. Article 1338 of Indonesian Civil Code (ICC) stated that "all legally executed agreements shall bind the individuals who have concluded them by law".[12] It means that agreement that has been made is legally binding the parties. Based on this article, it should also be noted that everyone can make any kind of contract as long as it does not violate law, public order, and morality.

Practically, there are many business actors ignore those principles and still use standardized contract and exemption clause that often harm the consumers, for example parking ticket issue. There is exemption clause that is found on parking ticket, it is stated *"goods or vehicle that lost is not liability of secure parking management"* or *"secure parking management will not liable if goods or vehicle is lost"*.[13] Consumers do have no choice at the time they receive that parking ticket except accept it as evidence that they park their vehicle in that parking area.

In reality, many consumers still lost their vehicle even in a secured parking area. As the result, secure parking management usually refers to exemption clause

[11] Chris Field, Western Australian Ombudsman, *The Law Handbook: Elements of a Contract*, http://www.lawhandbook.org.au/handbook/ch12s01s02.php#, October 2, 2012, 10.00 a.m.

[12] Indonesian Civil Code.

[13] See in many parking tickets.

on the parking ticket. Therefore, secure parking management is not liable for the damages or losses of vehicle that is parked in its area.[14]

In the case of Anny R. Gultom, she had her Toyota Kijang car stolen while parked "securely" in Mangga Dua Mall in 2000.[15] Through her lawyer, David M. L. Tobing, she filed a lawsuit. David claimed that secure parking management was not careful so that Anny lost her car. However, at that time, secure parking management referred to exemption clause as stated in its parking ticket.

Another case happened in 2008. Vovo Budiman parked his car at the Bumi Serpong Damai shop-houses in Tangerang on Sept. 8, 2008, at 4:16 p.m. and he received a parking ticket.[16] When he returned for his car the next morning, the car was gone. With his keys, vehicle registration and parking ticket still in his hands, Vovo immediately reported the incident to the parking management and the closest police station.[17] Vovo said he decided to sue the parking operator because of exemption clause on parking ticket as its foot-dragging on providing compensation and its attempts to evade responsibility.[18]

Both cases of Anny and Vovo are related to the limitation or restrictive liability of secure parking management when there is stolen car incident. Secure parking management should take a liability as long as the vehicle still in its area.

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[14] Nasima, *Masalah Perjanjian Parkir (1)*, http://nasima.wordpress.com/2012/08/09/masalah-perjanjian-parkir-1/, October 3, 2012, 6.30 a.m.

[15] Alterity, *Secure Parking Not*, http://al-terity.blogspot.com/2010/07/secure-parking-not.html, October 3, 2012, 11.00 a.m.

[16] The Jakarta Globe, *Car Owner Still Fighting for Compensation After 4 Years, 2 Courts Rulings*, http://www.thejakartaglobe.com/jakarta/car-owner-still-fighting-for-compensation-after-4-years-2-court-rulings/536037, October 3, 2012 11.15 a.m.

[17] *Ibid.*

[18] *Ibid.*

Moreover, regarding to limitation of application standardized contract which contains exemption clause, it has been limited by Act concerning the protection of consumer. Practically, most business actors still use it and in the reality, consumers have not protected yet by Act.

Those cases were brought to the District Court and the court stated that the secure parking management has to be liable for the losses. The settlement of cases became longer because the secure parking management did not agree to the District Court decision. Those cases were brought so far into Supreme Court. In the Supreme Court decision No. 1264/K/PDT/2005, Supreme Court declared whereas parking ticket which contains of exemption clause is defective.

It seems like secure parking management not aware with the consumers because such practice is still happening. They still put the exemption clause in the parking tickets. The only think of their own benefit when they operate their business. Consumers always become the victims of deceitful practice of secure parking management.

Based on such previous examples, the legality exemption clause in secured parking ticket is questionable because there is a prohibition using exemption clause in Consumer Protection Act No. 8 of 1999. Besides, there was a Supreme Court Decision concerning exemption clause.

B. Statement of Problems

The problem statements of this thesis are:

1. How is the legality of exemption clause in secured parking ticket?

2. What is the legal consequence of exemption clause in secured parking ticket?

C. Objectives of Study

The research objectives of this thesis are:

1. To get further understanding on the legality of exemption clause on secured parking ticket.
2. To get better understanding about the legal consequence of exemption clause in secured parking ticket.

D. Theoretical Framework

An agreement is an act pursuant to which one or more individuals commit themselves to one another.[19] Actually, this definition of agreement which is given by ICC is improper. An agreement is a legal act that has its legal consequence. It means that the contracting parties have to bind one to another in order to bear equal obligations and rights.

In business transaction, there must be a legal relation between business actors and consumers. It means both parties should know what their rights and obligations are. Practically, it is because the position of business actors is stronger than the consumers. Therefore, they may abuse this condition. They try to limit or even avoid their liabilities to the consumers like what happened on the practice of standardized contract and exemption clause that is written on a parking ticket.

In Indonesia practice of business actors that use a standardized contract and exemption clause has been restricted by Act No. 8 of 1999 concerning Consumer

[19] Indonesian Civil Code.

Protection. Even though this Act does not explain the definition of standardized contract, the article 1 (10) stated[20]:

> *An exemption clause shall be every regulation or provision and requirements already prepared and stipulated earlier unilaterally by a business agent and set forth in a document and/ or an agreement which shall be binding to a consumer and which he shall be obligated to fulfill.*
>
> The limitation of exemption clause as stated in article 18 (1), is:

In offering goods and/ or services intended to be traded, a business actor shall be prohibited to set forth an exemption clause on each document and/ or agreement if[21]:

a. this shall be concerned with the transfer of responsibility of the business actor;
b. it is stated that a business actor shall reserve the right to reject the return of the gods already purchased by consumers;
c. it is stated that a business actor shall reserve the right to reject the return of the money already paid by consumers for the goods and or services they have purchased;
d. it states the granting of proxy from a consumer to a business actor, either directly or indirectly, to conduct all unilateral acts related to the goods already purchased by consumers by installments;
e. it regulates matters related to proving the loss of use of the goods or utilization of the services purchased by consumers;

[20] Consumer Protection Act No. 8 of 1999.
[21] Consumer Protection Act No. 8 of 1999.

f. it bestows the right to a business actor to reduce the benefit of the services or reduce the assets of consumers which are the objects of the transaction of services;

g. it states consumers compliance with new regulations, supplementary regulations, further regulations and/ or further amendment made unilaterally by a business actor during the period in which consumers make use of the services they purchase;

h. it states that consumers bestow proxy to a business agent for the purpose of conveying mortgage, the right of pawning or the collateral right on the goods purchased by a consumer which uses installments.

Furthermore, article 18 (2) stated, "a business actor shall be prohibited to set forth an exemption clause whose position and form is difficult to see or which cannot he clearly read or whose expression is difficult to understand".[22]

The limitation or prohibition to use certain exemption clauses in the contract has purpose in order to avoid undue influence *(Misbruik van Omstandigheden*[23]*)* by the party that has a stronger power which may cause losses to the consumer.

Standardized contract or exemption clause is one form of business actor's freedom in stating his willingness to operate his business.[24] In composing

[22] Consumer Protection Act No. 8 of 1999.

[23] *Misbruik van Omstandigheden* is a new reason to void a contract. It becomes a factor that can cause disability of will that makes the contract voidable.

[24] Abdulkadir Muhammad, *op.cit*, p. 2.

contract, business actor is always in the stronger position than the consumer. Consumer only confronted by two options as follows[25]:

a. If consumers need productions or services that are offered to them, they must accept the contract which contains exemption clauses as written by business actors. It called “take it” or;
b. If consumers disagree with offered exemption clause, they could not compose a contract with business actors. It called “leave it”.

There are many kinds of standardized contract as follows[26]:

a. One sided of standardized contract

   A contract in which the contain is determined by strong party. This party is a creditor that usually has stronger position rather than debtor. Both parties are usually bound by organization, for example contract of work.

b. Standardized contract that has been determined by government

   Standardized contract is contract that has rights object of land. In the scope of agrarian for example, we can see many forms of contract as governed in decision letter of domestic minister dated August 6, 1977 No. 104/Dja/1977, such as deed of sale and purchase model 1156727, mortgage deed model 1045055, and etc.

c. Standardized contract that has been determined by public notary or lawyer

[25] *Ibid.*

[26] Muliadi Nur, *Asas Kebebasan Berkontrak dalam Kaitannya Dengan Perjanjian Baku (Standard Contract)*, file:///D:/Asas%20kebebasan%20berkontrak/Standard%20Contract%20%AB%20Muliadi%20Nur.htm, October 28, 2012, 8.00 p.m.

> There are some contracts that, from very beginning, have been provided to fulfill request from the society who ask a help from public notary or lawyer. In Netherland, such contract is usually named as "contract model".

Contract law, in Indonesia, follows freedom of contract principle based on article 1338. It means the contracting parties have freedom to make contract that is not contradict with public order, morality, and the subject is not prohibited by law.[27] Based on this principle, people hope that it can create balance position among parties, but sometimes it practically creates injustice. Consequently, the party who has stronger bargaining position controls the party who has weaker bargaining position.[28]

A contract or agreement has to fulfill the requirements that have been regulated in article 1320. Therefore, the contract becomes a valid contract. Those requirements are[29]:

1. There must be consent of the individuals who are bound thereby;
2. There must be legal capacity to conclude an agreement;
3. There must be a specific subject;
4. There must be a permissible cause.

According to Subekti, those four requirements are classified into two categories, namely subjective requirement and objective requirement. If subjective

[27] Muhammad Taufiq, *Teori Perjanjian dan Dasar Hukum (Bagian 1)*, http://belajarhukum.net/teori-perjanjian-dan-dasar-hukum-bagian-1/, October 7, 2012, 11.30 a.m.

[28] Ridwan Khairandy, *Itikad Baik Dalam Kebebasan Berkontrak*, Fakultas Hukum Universitas Indonesia, Jakarta, 2003, p. 2.

[29] Indonesian Civil Code.

requirements are not fulfilled, it makes the contract voidable. Meanwhile, objectives requirements are not fulfilled, it makes contract null and void or, in the other words the contract is presumed never happened. As the result, there is no reason for the parties to sue before the judge.[30]

According to basic of freedom of contract principle and article 1320, it implies that people can create any kind of contract, determine the party whom they want to make a contract as long as not violating the provisions that have been determined by law and existing principles.

E. Definition of Technical Terms

The terms which are used in this study were clearly explained in order to make the analysis understandable.

The development of large scale enterprise with its mass production and mass distribution creates a new type of contract which is inevitable-standardized one.[31]A standard form contract drafted by one party (usually a business with stronger bargaining power) and signed by the weaker party (usually a consumer in need of goods or services), who must adhere to the contract and therefore does not have the power to negotiate or modify the terms of the contract.[32]

[30] Elly Erawati and Herlien Budiono, *Penjelasan Hukum Tentang Kebatalan Perjanjian*, PT Gramedia, Jakarta, 2010, p. 1.

[31] Friedrich Kessler, "Contract of Adhesion: Some Thoughts about Freedom of Contract", *Faculty Scholarship Series*, 43 Colum. L. Rev. 629 Paper 2731, 1943.

[32] Cornell University Law School, *Adhesion Contract (Contract of Adhesion)*, http://www.law.cornell.edu/wex/adhesion_contract_contract_of_adhesion, November 11, 2012, 9.50 p.m.

According to Munir Fuadi, standardized contract is[33]

> *a written contract that is composed only by ne party, or even it has been printed in a form. When such contract is signed, generally the parties only fill the certain informative data with little or without changes in its clauses whereas, another party of contract has no chance or only has a little chance to negotiate or change the clauses which has been made by one party. Therefore, usually standardized contract is one sided.*

Before the enactment of Consumer Protection Act, many literatures commonly used term of standardized contract. However, nowadays Consumer Protection Act uses exemption clause term. All those terms are right, but the term of standardized contract is broader which does not only refer to the exemption clause that has been prepared unilaterally by business actor in the agreement but it also refers to its form.[34]

Consumer protection Act gives definition[35]:

> *An exemption clause shall be every regulation or provision and requirements already prepared and stipulated earlier unilaterally by a business agent and set forth in a document and/ or an agreement which shall be binding to a consumer and which he shall be obliged to fulfill.* (Article 1 (10))

Rijken stated that exemption clause is clause that is stated in a contract in which one party can avoid to fulfill his liability for paying a full or partial compensation such liability happens because of tort.[36]

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[33] Salim H.S, *Perkembangan Hukum Kontrak Di Luar KUHPerdata*, PT Raja Grafindo Persada, Jakarta, 2007, p. 18.

[34] Ahmadi Miru and Sutarman Yodo, *Hukum Perlindungan Konsumen*, PT Raja Grafindo Persada, Jakarta, 2004, p. 47.

[35] Consumer Protection Act No. 8 of 1999.

[36] Mariam Darus Badrulzaman, *op.cit*, p. 47.

Generally, exemption clause can be divided into exclusion clause and limitation clause. Exclusion clause excludes liability completely for specified outcomes.[37] Limitation clause limits the maximum amount of damages which a party may have to pay if there is a mistake in the content of contract.[38]

According to Kumar, exclusion clause is a clause of a contract which purports to protect the preference absolutely or in a limited manner against liability, from breach of contract, or damages, and to exclude his liability if the action is brought after the stipulated time.[39]

Therefore, according to Yates, exclusion clause is any term in a contract restricting excluding or modifying a remedy or a liability arising out of breach of contractual obligation.[40]

Those kinds of exemption clause have purpose to limit the liability of the party. There are various methods of limiting liability in a contract. These include[41]:

a. Listing certain types of loss that a party will not be liable for;

b. Stating that the contract contains the whole of the party's agreement;

c. Setting a limit on the amount of damages a party will be liable for;

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[37] http://definitions.uslegal.com/e/exemption-clause/, October 5, 2012, 11.00 a.m.

[38] *Ibid.*

[39] Sutan Remy Sjahdeini, *Kebebasan Berkontrak dan Perlindungan Yang Seimbang Bagi Para Pihak Dalam Perjanjian Kredit Bank Di Indonesia*, PT Pustaka Utama Grafiti, Jakarta, 2009, p. 83.

[40] *Ibid.*

[41] Pinsent Masons, *Exclusion and Limitation Clauses*, http://www.out-law.com/en/topics/projects--construction/construction-claims/exclusion-and-limitation-clauses/, October 8, 2012, 1.00 p.m.

d. Excluding certain remedies that would otherwise be available to the party that is not in breach.

Exemption clause on a contract cannot be separated from its creator and its subject, known as business actors and consumer. Consumer Protection Act gives definition about business actor as follows[42]:

> *Business actor shall be any individual or business company, either in the form of a statutory body or otherwise, set up, and domiciled or undertaking activities in the jurisdiction of the state of Republic Indonesia, both individually and jointly through agreements on the running of business activities in various economic area.* (Article 1 (3))

Furthermore, Consumer Protection Act also gives definition of consumer, it is stated "consumer shall be anybody using goods and/ or services which are available in the community, both for his own purpose, for the purpose of his family, and other people as well as other living creatures and which are not to be traded".[43]

Both business actor and consumer should know about their own rights and obligations in order to prevent losses especially related to the restrictive liability on the exemption clause which is determined by business actor to the consumer.

F. Research Procedure

1. Object of Study

The objects of this research are:

a. Legality of exemption clause in secured parking ticket.

[42] Consumer Protection Act No. 8 of 1999.
[43] Consumer Protection Act No. 8 of 1999, (See article 1 (2)).

b. Legal consequence of exemption clause in secured parking ticket post the enactment of Act No. 8 of 1999 and Supreme Court Decision.

2. Classification of Data

This research used secondary data which were taken from the documents or archives that related to the discussed problems in this research. The purpose of the classification of data was to identify the data systematically in order to answer the problems.

Secondary data were divided into:

a. Primary Legal Materials
    1) Indonesian Civil Code (ICC)
    2) Act No. 8 of 1999 concerning Consumer Protection
    3) Supreme Court Decision No. 1264/K/PDT/2005
    4) Judicial Review No. 124 PK/Pdt/2007 jo Supreme Court Decision No. 1264 K/Pdt/2005
b. Secondary Legal Materials
    1) Literatures
    2) Text books
    3) Law journals
    4) Internet sources

3. Data Collections

Secondary data were collected from library research and document study and also they were taken from collecting, learning, and understanding the

Act, documents, text books, and articles from internet sources which were related to the study of research.

4. Approach of The Study

This research employed juridical normative research that identified legal norms and opinion from scholars. The objective was to understand and answer the object of study by using juridical normative approach method.

5. Data Analysis

The data collection was organized by selecting the data that related to the discussed problem in this research. It was structured descriptively in order to answer the problem in a descriptive analysis. The data were collected and managed to answer the problems. The method of analyzing the data was qualitative method. It means that the obtained data were not in the form of numbers and statistics. Collected data were analyzed qualitatively and descriptively in order to be elaborated descriptively and qualitatively. Moreover, it also portrayed facts and the enforcement deal with the applicable legal aspects. The steps were defined as follows:

a. Classify the data collection based on the problems of the research
b. Systematize data collection
c. Systematize data was analyzed in order to achieve conclusion