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The Role of Public Notary in Providing Legal Protection on Standard Contracts for Indonesian Consumers

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Abstract: Public Notary is needed in conducting businesses of varying sectors. For example, people who want to own a house through a bank with House Ownership Loan (*Kredit Pemilikan Rumah - KPR*). Quite similar to a purchase of common loan contracts, the purchase of KPR contract is formulated into a standard contract. Its contents and clauses have been previously prepared by the bank. Then, bank customers as debtors only have the option to accept the entire contents and clauses of the *KPR* contract, otherwise they will not be granted KPR loan. As the consequence, the position of banks as lenders and customers as debtors are never equal. Debtors are powerless and have to comply with the content of the contract. This research discusses the protection given by notary in the drafting process of standard contract based on Law No 8 of 1999 on Consumer Protection (*Undang-Undang Perlindungan Konsumen - UUPK*) and Law No. 2 of 2014 on the Rules of Notary Profession (*Undang-Undang Jabatan Notaris - UUNJ*). The result of the study showed that a public notary has a strong foundation to protect consumers' rights according to the *UUPK*. An application of this, among others, the notary's refusal has to include the entire content of the *KPR* agreement into a deed before s/he could examine whether the two parties of the agreement occupy an equal position and have proportionate power. For instance, in the transfer of responsibility clause from a bank as a business owner – a notary is entitled to advise the bank that its activity has violated the *UUPK*. If the bank insists that the clause is instructed by its central bank, the notary can help explain that the revision of the clause will help the Bank avoid the violation of *UUPK*.

Keywords: public notary; standard contract; consumer protection.

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INTRODUCTION

In globalization era, the need for public notaries and deeds increases. Today's society has better legal awareness in con-

ducting their businesses such as common transaction, banking transaction, or other social interactions. Those activities need the role of public notary to make an authentic deed to legally bind the parties of interest.

Public Notary is granted an authority by the state to make authentic deeds. Notary, as a legal expert, can grant his assistance either giving legal advice or making of deeds. Article 1 of the Rules of Notary

Profession regulates the definition and duty of a notary as follows:

“Notary is a public official with the only authority to make deeds of contracts, deals, or decisions, which are required by the law to be formulated in an authenticated document. Notary is also responsible to set the date of the deed, to save it, to give the legitimate *grosse* or copies or partial citation of the deeds; as long as the making of the deeds are not tasked to other public officials and are only exclusive duty of the notary.”

It is stated that a public notary is needed in conducting businesses of varying sectors. A simple example is helping people who want to own a house through a bank with House Ownership Loan (*Kredit Pemilikan Rumah - KPR*). Similar to a purchase of common loan contracts, the purchase of *KPR* contract is also formulated into a standard contract. Its contents and clauses have been previously prepared by the bank. Then, customers as debtors only have the option to accept the entire contents and clauses of the *KPR* contract, otherwise they will not be granted a *KPR* loan.

As a result, the positions of banks as lenders and customers as debtors are never equal. Debtors are powerless and have to comply with the content of the contract imposed by the bank.¹ It creates a problem to customer protection, especially

when a consumer wishes to apply for a bank's *KPR* loan. They feel cheated by their unfair position against the bank as their lenders who have more understanding on economic and financial matters and practical things.

Another disadvantage of bank's *KPR* loan is that the *KPR* loan clause of the Indonesian Government Bank (*komen: IGB maksudnya Bank Pemerintah seperti BRI, BNI dlsb. berarti Indonesian Public Banks, ataukah Bank Indonesia Indonesian Bank?*) states that debtors have to agree immediately if the interest rate increases. Thus, consumers have to bear with the interest rate set by the bank. Normally, this interest rate for *KPR* loan is around 5.5% per year effective fixed rate for its first year, and 8.5% per year effective fixed rate for the second year. If there is a change in interest rate, it immediately affects the loan contract. If the debtors do not accept the change, they are burdened with the immediate acquitting of all the debts, interests—practically everything assigned to the customers to pay. (*Komen: Mungkinkah maksud kalimat terakhir ini: mereka dibebaskan dari semua hutang, bunga ...sehingga bhs inggrisnya → they are acquitted on all debts, etc.? Karena are burdened → dibebani*)

Some banks prepare *KPR* contracts through private agreement followed by a letter of debt acknowledgement in front of a notary. Other banks prepare *KPR* contract with authentic deeds. This is according to the need of written and legally binding document which can be provided in the form of a deed by a notary to protect the legal rights of the consumers and

¹ Sutan Remy Sjahdeini, *Kebebasan Berkontrak dan Perlindungan yang Seimbang Bagi Para Pihak dalam Perjanjian Kredit Bank di Indonesia*, Institut Bankir Indonesia, Jakarta, 1993, p. 2

other interested parties in the deed. However, notaries have not been playing this role yet. Most of them tend to follow the instructions of the bank in the formulation of the deed without considering the debtors as consumers. In such case, notaries actually have more capacity in ensuring that the content of the deed or contract protects not only the interest of the bank, but also the consumers.

The questions of this research are:

1. What is the form of protection given by a notary from the making of standard contract based on Law Number 8 of 1999 on consumer protection?

2. How does the Regulation of Notary Profession (*Undang-undang Jabatan Notaris – UUNJ*) regulate the role of a notary in protecting a consumer from such standard contract?

ANALYSIS AND DISCUSSION

Economic development in manufacturing and international trade has yielded a variety of consumables. Globalization and free trade allow more rooms for transactions of goods and services across national borders. Articles 33 and 34 of the 1945 Indonesia Constitution are a juridical foundation of our modern economic development having the goal of hastening the economic recovery based on a democratic economy. A concrete way to achieve it is by defending the consumers—the people.²

Based on such proposition, a law that can protect consumers' interest needs to be effectively implemented. The law

on consumer protection is formulated by a national development philosophy which dictates that a national development includes a legal development that can provide consumers with a legal protection for the purpose of realizing a state based on the Indonesian national philosophy of *Pancasila* and the Constitutions.³ The consumer law protection (*Undang-undang Perlindungan Konsumen – UUPK*) aims to improve the position of consumers by raising consumers' awareness, knowledge, and independence, most importantly in selecting, considering, and demanding their proper legal rights as consumers. In addition, the *UUPK* aims to realize a consumer legal protection with a legal certainty and a better access to information for consumers, as well as improving the awareness of business owners as producers of their responsibility for the customers in order to realize an honest, open, and responsible business environment.

The recent trade environment demands everything to serve fast. In other words, it needs to have readily available methods of contract making. Today, standard contract is customary. The standardizing of contract intends to realize such economic demand of an efficient, practical, fast, and readily available contract making. However, this option has little benefit for the consumers. An example of a standard contract is, among others, purchase agreement, insurance written contract, and insured loan. The standard contract is documented into order receipt,

² Yusuf Shofie, *Perlindungan Konsumen dan Instrumen-instrumen Hukumnya*, Citra Aditya Bakti, Bandung, 2003.p. 2

³ General Explanation on the Law Number 8 of 1999 on Consumer Protection ("UUPK")

purchase receipt, or tickets.⁴ Usually, the conditions for standard contracts are set only by business owners, i.e. banks. The conditions are usually in the form of clauses stated in numerical order within the contract, again, with the sole purpose of protecting the interest of the business owners. Sometimes the conditions are structured as a dense document of small font-sized characters, making it really difficult for consumers, as a party with limited legal knowledge, to understand them in a short amount of time.

These standard clauses have the potential to inflict loss to the consumers due to the fact that the consumers have no choice but to accept. However, it is hard to deny the efficiency achieved by this standard contract. It is difficult to imagine having to always negotiate the conditions to an agreement. Take a concert or show hosting for instance, it is impossible for the consumers and business owners to previously negotiate their respective rights and duties along with the legal consequence if the show is cancelled. Therefore, certain kinds of standard clauses are strictly banned in the *UUPK*. If business owners insist on including such clauses, its legitimacy will be denied.

Recent development in global trade demands the development of better forms of contract. The freedom to contract making principle is evident in the Indonesian Civil Law Code, Article 1338 paragraph (1), which states: “every authentic and legitimate contract binds and acts its party

of interest as a law.” This means that everyone with legal capacity can formulate any contract with any parties on any particular subject.

In the later development, a freedom of contract principle is only valid if both parties involved in the contract have equal bargaining position since of one of the parties occupies a weaker position while the other will have the chance to force its interest. Therefore, conditions in such kind of contract may violate fair and proper legal rules. Unfortunately, this situation happens most of the time that makes it the responsibility of the state to provide protection to the weaker parties.⁵

Concerning the problem of consumer protection, a consumer legal protection can be embodied by recognizing consumers’ rights, enforcing business owners’ duties and responsibilities, forbidding the inclusion of certain clauses in contracts, and making efforts in resolving consumer dispute cases.

Consumers’ low awareness of their own rights with their low education level makes consumer protection very important. Consumer protection has a quite clear definition which is realized in words and acts that can provide consumers with legal insurance. This definition is parallel with the definition of consumer: “every person who consumes goods and/or services available in the society for their

⁴ Pemberdayaan Hak-Hak Konsumen di Indonesia, Direktorat Perlindungan Konsumen Ditjen Perdagangan Dalam Negeri, Departemen Perindustrian Dan Perdagangan, 2001, P 191.

⁵ Sutan Remy Sjahdeini, *Kebebasan Berkontrak dan Perlindungan Yang Seimbang Bagi Para Pihak Dalam Perjanjian Kredit Bank di Indonesia*, Jakarta Penerbit IBI, 1993. p 8.

own, or their family, or others' interest, without selling it".⁶

Article 1 paragraph 1 of the *UUPK* states that "Consumer protection is any effort that provides consumers with legal insurance in order to protect them"

According to Hans W. Micklitz,⁷ there are two main action models to take in consumer protection.

- a. Complementary action, which stipulates the business owners to give adequate information of their products to consumers (fulfilling their right to information);
- b. Compensatory action, which stipulates protection on the economic interest of consumers (fulfilling their right to security and safety).

UUPK also includes five regulatory principles regarding consumer protection based on the principle of national development. These are the principles of beneficence, justice, equality, safety and security, and the principle of legal certainty.⁸

The late president of the U.S, John F. Kennedy, once put forward the 4 basic rights of consumers as follows:

1. The rights to safe products;
2. The rights to be informed about products;
3. The rights to definite choices in selecting products;
4. The right to be heard regarding consumer interests.

The Guidelines for Consumer Protection formed in the United Nations Resolution 39/248 of 1985 also formulate the interests of consumers that require protection:

- (a) The protection of consumers from hazards to their health and safety;
- (b) The promotion and protection of the economic interests of consumers;
- (c) Access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs;
- (d) Consumer education;
- (e) Availability of effective consumer redress;
- (f) Freedom to form consumer and other relevant groups or organizations and

the opportunity of such organizations to present their views in

decision-making processes affecting them.

The formulation of the *UUPK* does not have the intention to shut down businesses. Instead, consumer protection may create a business environment that encourages healthy competition among manufacturers, consequently leading to the production of quality goods and/or services.⁹

Consumers' Rights

Consumer protection as a form of recognition of consumers' rights as found in Article 4 of *UUPK*,

"Consumers' rights are:

- a. The right to security and safety in consuming goods and/or services;

⁶Shidarta, *Hukum Perlindungan Konsumen*, Gramedia, Jakarta, 2004, p.5

⁷Hans W. Micklitz, in Sidharta, *Op. Cit.*, p. 49.

⁸See also Article 2 of *UUPK*.

⁹*Ibid*, p.17

- b. The right to select and attain goods and/or services with appropriate trading value and in a warranted and insured condition as promised by the manufacturers;
- c. The right to clear and honest information regarding the condition and warrant of goods and/or services;
- d. The right for the complaint and opinion regarding the goods and/or services to be heard;
- e. The right to legal protection, as well as efforts to proper resolve of consumer protection dispute.
- f. The right to consumers' education.
- g. The right to proper and indiscriminative service.
- h. The right to be compensated or to be given retribution if the goods and/or services are not in good condition as promised.
- i. The rights regulated in other regulations.

The above stipulated consumers' rights has wider scope than the basic consumers' rights as first established by Kennedy which can be narrowed down into:¹⁰

- a. The Right to safety;
This right is to ensure the security and safety of consumers in the consumption of goods and/or services.
- b. The right to select;
This right gives consumers the freedom to select which goods and/or services to consume. More details of this particular right can be

found in Article 19 and Article 25 paragraph (1) of the Law Number 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Competition, since the monopoly in business practice affects consumers' rights badly.

- c. The right to information;
This right is to ensure that consumers have adequate information and clear image of goods and/or services.
- d. The right to be heard;
This right covers either individual or collective, and can be realized directly or through a certain consumer organization or other bodies, such as YLKI.

These four rights are integral parts of the Universal Declaration of Human Rights formulated by the UN on 10th December 1948. Articles 3, 8, 19, 21, and 26 by the International Organization of Consumers Union (IOCU) each adds one basic consumers' rights as follows:¹¹

- a. The right to the provision of life basic needs;
This is a very basic right, since it concerns a person's right to life.
- b. The right to compensation;
This right is to recover a damaged or unbalanced condition yielded by the consumption goods and/or services which fail to fulfill the expectation of consumers.
- c. The right to education;

¹⁰Hondius, *Konsumentenrecht*, Praeadvies in Nederlandse Verneming voor Rechtsverlijking, Kluwer Deventer, 1972, p. 14 quoted from Mariam Darus Badruzaman, *op. cit* 7, p. 61

¹¹C. Tantri D and Sulastri, *Gerakan Organisasi Konsumen*, Seri Panduan Konsumen Yayasan Lembaga Konsumen Indonesia-The Asian Foundation, Jakarta, 1995, p. 22-24

This purpose of this right is to educate consumers in order to avoid damage due to wrong way of consuming goods and/or services.

- d. The right to healthy and clean environment;

This right is regulated further in Article 5 of the Law Number 23 of 1997 concerning the environment.

Europe Ekonomische Gemeenschap (EEG) agrees on five basic consumers' rights as follows:¹²

- a. The right to health and security (*recht op bescherming van zingezendheid en veiligheid*);
- b. The right to protection of economic interest (*recht op bescherming van zijneconomischebelangen*);
- c. The right to retribution or compensation (*recht op schadervergoeding*);
- d. The right to information (*recht op voorlichting en vorming*);
- e. The right to be heard (*rechtomte-wordengehord*);

The freedom of contract is a freedom by the parties involved in an agreement in formulating and agreeing the clauses of the agreement without the interference of other parties. This interference comes from the state in form of law and regulations of what is allowed and forbidden. This interference comes also from the court in form of a verdict to cancel a clause or the entire content of the agreement.¹³

Standard clause in *UUPK* Article 1 paragraph (10) is defined as every rule, or

condition that is set unilaterally by business owners which is formulated in a document or deed that binds consumers.¹⁴

Meanwhile, standard contract is an agreement in which exonerated clauses are included and formulated into a document where the weaker party, usually consumers, has no bargain capacity to negotiate the conditions. Exonerated clauses are clauses with conditions that avoid, or entirely eliminate the burden of responsibility and liability from the business owners as producers.

There are eight types of standard clauses forbidden in the *UUPK*. This means that, apart from these types, other clauses are valid before the law. Standard clauses are forbidden to include elements or statements of:

1. The shift of liability and responsibility from producers to consumers.
2. The right of producers to refuse returning the items purchased by consumers.
3. The right of producers to give away the money paid as a purchase on a good or service by the consumers.
4. The freedom of consumers to do anything regarding the goods bought by loan.
5. Regulating the proving of the loss of use of a good or service purchased by consumers.
6. The right of business owners to reduce the effectiveness of a service or to take from the wealth of target consumers.

¹²Mariam Darus Badruzaman, *op.cit* 7, p.61

¹³Sutan Remi Sjahdeini, *Op. Cit.* p. 11.

¹⁴*Ibid.*, Article 1 paragraph (10)

7. The obedience of consumers to the new or additional rules made by the producers while consumers are consuming their service.
8. The freedom of producers to pawn the collateral items put beforehand by the consumers.

In addition, business owners are forbidden to include standard clauses in an unseen position, unreadable, or the clauses are impossible to understand. If business owners insist, these types of clauses will be regarded null and void.

ANALYSIS

The Role of Notary in Providing Consumers with Protection in the Formulation of Standard Contract Based on the UUPK

For the sake of efficiency, there are many business owners leaning towards standard contract when making contract. Standard contract here intends to make uniform the size of business owners in conducting their businesses. This standard contract has definitely been prepared beforehand by business owners along with their content. However, business owners would still ask for approval from the parties they wish to transact with. Thus, it is easy to see how standard contract can be unbene-
ficial to consumers for not having any other choices but to agree. However, it is undeniable how efficient and quick the standard agreement is. It is difficult to imagine having to negotiate every single condition in many contracts and agreements we make every day.

Certain legal experts have different opinion concerning standard contract. Sluijter expresses that standard contract is

not a contract at all, since business owners occupy the position of independent lawmaker when facing consumers in standard contract context. Pitlo also considers standard contract a form of forced-contract.

In Indonesian legal system, there is no clear regulation about the banning of standard contract. However, the Indonesian law explicitly forbids the inclusion of certain standard clauses as regulated by the *UUPK*. This means that there are still standard clauses that qualify to be included in a contract. Lawmakers actually distinguish between standard contract and standard clauses, while not giving adequate definition of standard clauses. Even the Explanation of Article 18 which forbids certain types of standard clauses is absent in giving it a proper definition. Thus, we may use the definition used in business environment. Standard clause is a condition or requirement set unilaterally by business owners, formulated into a binding document to be fulfilled by the consumers.

Every standard clause is integral to a standard contract, since the clause content of a standard contracts are standardized. Standard contract is the container, while standard clauses are its content. Therefore, the discussion of clauses can never be taken apart from the contract within which they are contained.

In Indonesian Civil Law, obligation is formed by two sources: agreements and the ones that emerge from law. An obligation is a legal relationship between two parties, in which one party demands the fulfilment of duty from the other party. Meanwhile, contract law in the Indo-

nesian Civil Code adopts principle of informed consent. An informed consent is a mutual consent between parties codified in a written document or rooted as a custom of a particular environment.

A lender has a legal protection to demand the fulfillment of the loan, or compensation from a debtor in cases where the debtor is unable to return the loan. Generally, the agreement is bilateral—if a party receives rights in the agreement, s/he also receives duties related with the rights he received. Concurrently, a party that has duties to fulfill is also granted rights which are related with the duties which he is assigned.

The phenomenon of the increase in *KPR* interest rate puts consumers in a vulnerable position. Civil law instruments do very little in helping consumers, even making their situations worse than ever. In *KPR* agreement or debt declaration deed, consumers often face a binding clause stating that they approve any change in the interest rate, even without their consent. By issuing a written document, the bank has the right to unilaterally increase or decrease the interest rate of *KPR*. Concerning interest rate, this gets worse by the fact that, the Indonesian National Bank delegates its control entirely into the related bank offering the *KPR* loan. This does not even take into account any penalty for late payment which comes as a result of the increase of money consumers have to pay which is far beyond their average income.¹⁵

¹⁵Yusuf Shofie, *PerlindunganKonsumendanInstrumen-InstrumenHukumnya*, Bandung, PT Citra Aditya Bakti, 2009, p 57.

While consumers are in an unfavourable situation, the bank on the other hand is protected by a standard banking agreement (in this case, the *KPR* agreement) with a unilateral clause from the bank which states that consumers have to obey all the directions and regulations set before.

While the problem of consumer protection concerning standard agreement is only related with a bank as a lender and business owner, there is also another party playing a proportionate role to protect *KPR* consumers, that is the notary. This is because the agreement between a bank and a consumer is formulated into an authentic deed before a notary. In the case of *KPR* agreement, it also includes additional agreements in the form of *SKMHT* or *APHT* which involves a *KPR* notary in his or her capacity as the *PPAT*. The role a notary can play in helping *KPR* debtors as consumers is inferred by the Article 17 paragraph (1) point 1 of UUJN which trusts a notary to be honest, detailed, independent, and impartial in performing his/her job in order to protect the legal interests of all parties. This is in accordance with the Notary Code of Ethics. Article 1 paragraph (1) of the Code stipulates that in performing his/her job a notary should:

- a. Put the law above all, and act according to the oath.
- b. Prioritize a service to the interest of the state and society.

Based on the above articles, a notary obtains a strong foundation in protecting consumers' rights according to the UUPK. An application of this is, among others, notary's refusal to include entirely

the content of the KPR agreement into a deed before s/he could examine whether the two parties of the agreement occupy equal position and have proportionate power. A good example of the application is the transfer of responsibility clause from a bank as the business owner. Then, a notary is entitled to advise the bank that its activity has violated the *UUPK*. If a bank insists that the clause is instructed by their head office, a notary can help explain that the revision of the clause will help the Bank avoid violation of *UUPK*. Thus, a notary actually helps the Bank, in addition to protecting the interests and rights of the consumers. This is in accordance with Article 18 paragraph (4) of the *UUPK* which states that “Business owners should make necessary adjustments to standard clauses that violate the law.”

Furthermore, if a notary finds a clause that is irrelevant with the rights and duties of the interested parties of the *KPR* agreement, the notary can cancel the clause with the mutual consent of the parties. For instance, the clause that obliges debtors to hand over the original certificate of debtor’s land acquirement and mortgage to the bank. The clause is irrelevant seeing that the obligation to provide such certificates belongs to the notary or other *PPAT* authorities since the latter already concludes a statement letter or cover note to the bank beforehand.

The Role of *UUJN* in Regulating Notary to Provide Consumers of Standard Contract with Legal Protection

A notary has the capacity to make regulations on every conduct or contract that is stipulated by the law to be documented into an authentic deed. A notary has the

right to make an authentic deed, only if it is demanded by interested parties and not by the demand of the notary himself/herself. A notary is also granted an authority to ensure conducts that are not in accordance with the law. These conducts are divided into two types. The first type includes a condition where a notary ensures actual conducts in the making of regular deed; for example the declaration and signing of a deed, the statement of formality regulated in a deed. The second type is where a notary ensures certain conducts separately; an example of this is reports or investigation reports on a stakeholder meeting of a company.

The role of a notary as an official has to be based on the oath of notary profession, the *UUJN*, and the Code. Article 1 paragraph (1) of the Code states that in carrying out of his/her duty, a notary has to prioritize social service for the nation and the people; while Article 16 of the *UUJN* paragraph (1) point (a) demands a notary to be honest, detailed, impartial, and independent in carrying out his/her duty, in order to protect the legal interests of all parties. Thus, there are two sides in performing the notary profession. First, a notary should be passive by only formulating what is wished by the parties of an agreement into a deed; second, a notary has to be educative and active to ensure a legal protection to every interested parties in the deed.

At one point, its passive attitude will not help consumers beyond the making of an authentic deed, since a notary cannot be held liable if there is anything not meeting the expectation. Hence, the notary role in the context of *UUJN* may not

meet the expectation of a *KPR* agreement. Therefore, in the making of *KPR* deed, a notary is demanded to be able to provide a legal protection to consumers, while in the *UUJN* context, a notary only acts passively while not paying attention to whether or not the deed is proportionate and equal to the two parties. However, by concluding a proper authentic deed in accordance with its formal requirements, a notary is considered to have provided the consumers with a legal protection, even if it takes the form of an authentic deed, since authenticity is what the consumers need to be the evidence and the deed itself is a perfect evidence regulated by law.

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