

# LEGAL COMPARISON OF STANDARD CLAUSE REGULATIONS IN INDONESIAN AND NEW ZEALAND CONSUMER PROTECTION LAWS

Perbandingan Pengaturan Klausula Baku Dalam Hukum Perlindungan Konsumen  
Indonesia dan Selandia Baru

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## Abstract

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### Keywords:

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This study aims to identify and analyze the comparison of Standard Clauses regulations in Indonesian and New Zealand consumer protection laws. This research is normative legal research, in which this research obtains data from primary legal materials, including legal principles and legal norms contained in laws and regulations within the consumer protection sector in Indonesia and New Zealand, supported by secondary legal materials in the form of books, journals, articles, papers, previous research related to research problems. The results of this study indicate that there are notable differences between the regulations for the use of Standard Clauses in Indonesian and New Zealand consumer protection laws. These differences are observed in several aspects, such as the terminology used, the determination process for prohibited Standard Clauses, the legal implication of the use of Standard Clauses, and the legal accountability for business actors who include Standard Clauses prohibited by the law. Indonesia uses the term "Standard Clauses", while New Zealand uses the term "Unfair Contract Terms". In Indonesia, it is illegal for business actors to include Standard Clauses that fulfill the provisions mentioned in Article 18, Paragraph (1), and Paragraph (2) of the UUPK. If such clauses are included, they are declared null and void by law. On the other hand, in New Zealand, if a business includes an Unfair Contract Term in a consumer contract, the court can cancel it upon request by the Commerce Commission or the affected consumer.

## INTRODUCTION

Businesses often require consumers to sign pre-prepared contracts for transactions. These pre-prepared contracts typically contain predetermined clauses, which have been decided solely by the business and are commonly referred to as standard clauses. Law no. 8 of 1999 concerning Consumer Protection (hereinafter referred to as "UUPK") defines standard clauses as any rules or terms and conditions that have been prepared and determined in advance unilaterally by business actors as outlined in a document and/or agreement that is binding and must be fulfilled by consumers. Sudaryatmo highlights that Standard Clauses possess certain characteristics. They are usually created unilaterally by the party in a position of relative strength without any input from consumers. Such clauses are often produced in a written, standardized form, and consumers are compelled to accept their contents due to necessity factors (Sudaryatmo, 1999).

As the stronger party drafts the contract in advance, it usually contains terms and conditions favouring the business actors (Zulham, 2013). Consumers, who are in a weaker position, are not given the opportunity to negotiate or determine the content of the agreement. They are often compelled to accept and sign the contract, even if it includes potentially detrimental clauses. This situation arises when consumers are presented with only one option: to accept or reject the agreement. If the consumer declines to agree and sign the agreement, they will not be able to obtain the goods or services they need (Muhammad, 1992). The unequal position between the weaker party and the party with more bargaining power necessitates state intervention to restore the balance between the parties so that the contract's objective of a fair exchange of interests is achieved. The state must intervene by enforcing legal regulations and resolving contractual disputes through court rulings (Prasnowo & Badriyah, 2019). In contract law, there must be a general 'meeting of the minds' of all parties involved and everyone involved has accepted the offered contractual obligations of each party to the agreement (Westhuizen & Evans, 2019).

Therefore, in the field of consumer protection, it is crucial to regulate the use of Standard Clauses to prevent businesses from conducting unfair practices, as outlined in both standard form of consumer contracts and Standard Clauses. In Indonesia, the Indonesian Consumer Protection Law, namely the UUPK, regulates the use of Standard Clauses. The objective of regulating Standard Clauses as stated in the explanation of Article 18 paragraph (1) UUPK is to ensure that consumers have an equal footing with business actors, based on the principle of freedom of contract. Apart from Indonesia, other countries also have consumer protection laws that regulate the use of Standard Clauses, such as New Zealand. In New Zealand, the use of Standard Clauses in consumer contracts is regulated by the Fair Trading Act 1986. This is because the law recognizes that consumers often find themselves at a disadvantage when it comes to negotiating the terms of a contract with a business. By limiting the use of Standard Clauses, the law ensures that businesses cannot take advantage of consumers by inserting unfair, one-sided terms into their contracts.

With this in mind, the author is interested in exploring the topic of Standard Clause Regulations with the title "Legal Comparison of Standard Clause Regulations in Indonesian and New Zealand Consumer Protection Laws." This research aims to analyze the comparison of Standard Clause regulations in Indonesian and New Zealand consumer protection laws, and examine the legal implications of including prohibited standard clauses in consumer contracts by business actors in both countries.

## MATERIALS AND METHODS

This research is normative legal research, where this research obtains data from primary legal materials including legal principles, legal norms, contained in laws and regulations in the consumer protection sector supported by secondary legal materials in the form of books, journals, articles, papers, previous research related to research problems and tertiary legal materials in the form of websites. This research uses a statutory approach by examining statutory regulations related to the issues raised in this research, as well as a comparative approach which is carried out by comparing the laws of one country with those of other countries.

## RESULTS AND DISCUSSION

### A. Regulations of Standard Clause in the Indonesian Consumer Protection Law

Standard Clauses are defined in Article 1 point 10 of the UUPK as any rules or terms and conditions that have been prepared and determined in advance unilaterally by business actors which are stated in a document and/or agreement that is binding and must be fulfilled by consumers. Standard Clauses are specifically regulated in CHAPTER V of the UUPK with the title "Provisions for Including Standard Clauses", namely in Article 18 paragraph (1) and paragraph (2) which regulates as follows:

*"(1) Business actors in offering goods and/or services intended for trading are prohibited from making or including Standard Clauses in every document and/or agreement if it:*

- a. Declares the transfer of responsibility of business actors;*
- b. States that business actors have the right to refuse to return goods purchased by consumers;*

- c. States that business actors have the right to refuse to hand over money paid for goods and/or services purchased by consumers;
- d. Declares the granting of authority from consumers to business actors, either directly or indirectly, to carry out all unilateral actions relating to goods purchased by consumers in installments;
- e. Regulates the matter of proving the loss of use of goods or use of services purchased by consumers;
- f. Gives business actors the right to reduce the benefits of services or reduce the assets of consumers who are the object of buying and selling services;
- g. Declares that consumers are subject to regulations in the form of new, additional, continued rules and/or further changes made unilaterally by business actors during the period when consumers use the services they purchase;
- h. States that consumers authorize business actors to impose mortgage rights, liens, or security rights on goods purchased by consumers in installments."

(2) Business actors are prohibited from including Standard Clauses whose position or form is difficult to see or cannot be read clearly, or whose expression is difficult to understand."

In paragraph (3) of Article 18 of the UUPK, it is stated that any Standard Clause stipulated by a business actor in a document or agreement that meets the provisions, as intended in Article 18, paragraphs (1) and (2), is declared null and void by law. Furthermore, Article 18, paragraph (4) stipulates that business actors are obliged to adjust Standard Clauses that contradict the UUPK. Based on the provisions regarding the inclusion of Standard Clauses in agreements as regulated in Article 18 of the UUPK, it is understood that not all inclusions of Standard Clauses in agreements are prohibited by the UUPK. The UUPK prohibits the inclusion of Standard Clauses that contradict its provisions, as intended in Article 18, paragraphs (1) and (2).

Therefore, if the Standard Clauses included in an agreement do not contradict the UUPK, then they are permitted to be included in contracts between business actors and consumers. Regarding legal protection for consumers in case of violations of the Standard Clauses by business actors in Indonesia, Article 62, paragraph (1) of the UUPK states that business actors who violate the provisions of the inclusion of the Standard Clauses will be punished with imprisonment for a maximum of 5 (five) years or a maximum fine of IDR 2,000,000,000.00 (two billion rupiah).

Furthermore, in Article 63 of UUPK it is stated that for criminal sanctions as intended in Article 62, additional penalties can be imposed, in the form of:

- a. confiscation of certain items;
- b. announcement of the judge's decision;
- c. payment of compensation;
- d. order to stop certain activities that cause consumer losses;
- e. obligation to withdraw goods from circulation; or
- f. revocation of business license.

Moreover, In accordance with Article 45 of the UUPK, if a consumer is harmed, they have the right to sue a business actor through an institution tasked with resolving disputes between consumers and business actors or through a court within the general judiciary. Disputes can be resolved through the courts or out of court based on the voluntary choice of the parties involved. It is important to note that settling disputes outside of court does not absolve a business actor of criminal responsibility as stipulated by the law. The Consumer Dispute Resolution Agency (BPSK) is responsible for handling disputes between consumers and business actors. Consumers can file written or unwritten complaints regarding violations of consumer protection laws. BPSK handles disputes through mediation, arbitration, or conciliation. If there is a violation of consumer protection laws, BPSK can report it to the general investigator.

Thus, the form of accountability in the case of violations of the inclusion of Standard Clauses committed by business actors according to the Consumer Protection Law in Indonesia is that business

actors can be held criminally responsible and can be subject to criminal sanctions in the form of imprisonment for a maximum of 5 (five) years or a fine of up to IDR 2,000,000.00 (two billion rupiah). Consumers, in this case, can also make a complaint to BPSK to get the dispute handled and resolved by means of mediation, arbitration, or conciliation, considering that dispute resolution through BPSK does not eliminate the criminal liability of business actors.

## B. Regulations of Standard Clause in the New Zealand Consumer Protection Law

Under the New Zealand Consumer Protection Law, regulations of the Standard Clause in contracts between consumer and business actors are regulated through the New Zealand Fair Trading Act 1986 (hereinafter referred to as "Fair Trading Act"). However, the Fair Trading Act does not use the term "Standard Clause". Instead, it uses the term "Unfair Contract Term," which in the Fair Trading Act is defined as a term in a consumer contract or specified trade contract that a court has declared to be an unfair contract term. Thus, it is understandable that in New Zealand, it is the authority of the High Court or the District Court to determine whether a clause in the standard form of consumer or trade contract is an unfair contract term.

According to the Fair Trading Act, The High Court or the District Court may determine a clause as an Unfair Contract Term:

- a. On application by the commission, declare that a term in a standard form consumer contract or standard form trade contract is an unfair contract term; or
- b. On application by any person, declare that a term in a grocery contract that is a standard form trade contract is an unfair contract term.

Furthermore, Section 46I outlines the conditions that must be met for a court to declare a term in a contract as unfair. The court can only make the declaration if the following conditions are met:

1. The term must be present in a consumer contract or a specified trade contract.
2. The contract must be a standard form contract, which means that the terms of the contract have not been negotiated between the parties.
3. The declaration must not be prohibited by Section 46K(1), which states that a court cannot declare a term in a standard form consumer contract or trade contract as unfair if the term defines the main subject matter of the contract, sets the upfront price payable under the contract, or is a term required or expressly permitted by any enactment.
4. The term must be unfair as described in Section 46L.

Section 46L of the Fair Trading Act at this point states that a term in a consumer contract or specified trade contract will be considered unfair if the court is satisfied that the term meets the following conditions: first, the term creates a significant imbalance in the rights and obligations of the parties involved in the contract. Second, the term is not reasonably necessary for the protection of the legitimate interests of the party who would benefit from the term. And third, the term would cause detriment (financial or otherwise) to one of the parties if it were applied, enforced, or relied upon.

When determining whether a term of a consumer contract or specified trade contract is unfair, the court may consider any relevant factors, but it must take into account the transparency of the term and the contract as a whole.

If a business includes an Unfair Contract Term in a standard form of a consumer contract, then Section 46H of the Fair Trading requires that the Commerce Commission may seek a declaration from either the High Court or the District Court (depending on the Commission's preference) stating that a term in a standard form consumer contract is deemed an unfair contract term. Any individual may also request the Commerce Commission to apply to a court for a declaration, in relation to a contract in which that person is a party.

According to Section 26A, If a court has declared, under section 46I, that a term in a standard form consumer contract is an unfair contract term, a person must not:

- a. include the unfair contract term in a standard form contract (unless the term is included in a way that complies with the terms (if any) of the decision of the court); or

- b. apply, enforce, or rely on the unfair contract terms in a standard form contract.

Furthermore, as stated in Section 40 paragraph (1), if the business continues to implement the Unfair Contract Term, the business will be considered as committing an offence and is liable on a conviction to a fine not exceeding \$200,000 (in the case of an individual) or a fine not exceeding \$600,000 (in the case of a body corporate). In addition, the court may, on the application of the Commerce Commission or any other person, grant an injunction to restrain the business from including, applying, enforcing, or relying on the Unfair Contract Term. Other than that, as stipulated in Section 43, the court may order the business to refund money or pay damages to the consumer, if the court finds that the consumer has suffered or is likely to suffer loss or damage by the conduct of the business who still use or enforce the Unfair Contract Term.

### C. Comparison of Standard Clause Regulations in the Indonesian and New Zealand Consumer Protection Law

The comparison between the Standard Clause regulations in the Consumer Protection Law in Indonesia and the New Zealand Fair Trading Act is as follows:

Standard Clause Regulations in the Indonesian UUPK	Standard Clause Regulations in the New Zealand Fair Trading Act
<p><b>Definition of Standard Clause:</b>                      Any rules or provisions and requirements that have been prepared and determined in advance unilaterally by the business actor as outlined in a document and/or agreement that is binding and must be fulfilled by consumers.</p>	<p><b>Definition of Standard Clause:</b>                      The Fair Trading Act does not use the term Standard Clause, but instead uses the term "Unfair Contract Term" which is defined as every clause in a consumer contract that is declared by the court to be an Unfair Contract Term.</p>
<p><b>Determination of Standard Clauses that are Prohibited:</b>                      The criteria of Standard Clauses that are prohibited are as determined in Article 18 paragraph (1) and paragraph (2) of the Consumer Protection Law, namely Standard Clauses that:</p> <ul style="list-style-type: none"> <li>a. Declares the transfer of responsibility of business actors;</li> <li>b. States that business actors have the right to refuse to return goods purchased by consumers;</li> <li>c. States that business actors have the right to refuse to hand over money paid for goods and/or services purchased by consumers;</li> <li>d. Declares the granting of authority from consumers to business actors, either directly or indirectly, to carry out all unilateral actions related to goods purchased by consumers in installments;</li> <li>e. Regulates the matter of proving the loss of use of goods or use of services purchased by consumers;</li> </ul>	<p><b>Determination of Unfair Contract Term that are Prohibited:</b>                      A clause/term in a consumer contract will be determined and declared by court as Unfair Contract Term and is therefore prohibited from being included in a consumer contract if it meets the three criteria as regulated in Section 46L (1) as follows:</p> <ul style="list-style-type: none"> <li>a. would cause a significant imbalance in the parties' rights and obligations arising under the contract; and</li> <li>b. is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and</li> <li>c. would cause detriment (whether financial or otherwise) to a party if it were applied, enforced, or relied on.</li> </ul> <p>In addition, examples of Unfair Contract Terms are also provided under Section 46M of the Fair Trading Act. However, these examples are not intended to limit the court's discretion in determining whether a clause is an Unfair Contract Term. The examples provided in Section 46M are as follows:</p>

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| <p>f. Gives business actors the right to reduce the benefits of services or reduce the assets of consumers who are the object of buying and selling services;</p> <p>g. Declares that consumers are subject to regulations in the form of new, additional, continued rules and/or further changes made unilaterally by business actors during the period when consumers use the services they purchase;</p> <p>h. States that consumers authorize business actors to impose mortgage rights, liens, or security rights on goods purchased by consumers in installments.</p> <p>i. Location or shape is difficult to see or cannot be read clearly, or the expression is difficult to understand.</p> | <p>a. a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract:</p> <p>b. a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract:</p> <p>c. a term that penalizes, or has the effect of penalizing, one party (but not another party) for a breach or termination of the contract:</p> <p>d. a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract:</p> <p>e. a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract:</p> <p>f. a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract:</p> <p>g. a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract:</p> <p>h. a term that permits, or has the effect of permitting, one party unilaterally to determine whether a contract has been breached or to interpret its meaning:</p> <p>i. a term that limits, or has the effect of limiting, one party's vicarious liability for its agents:</p> <p>j. a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent:</p> <p>k. a term that limits, or has the effect of limiting, one party's right to sue another party:</p> <p>l. a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract:</p> <p>m. a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract.</p> |
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**Implications of Including Prohibited Standard Clauses in Consumer Contracts:**

**The inclusion of Standard Clauses by Business Actors that fulfill the provisions as intended in Article 18 Paragraph (1) and Paragraph (2) of the UUPK is declared null and void by law.**

**Implications of Including Prohibited Standard Clauses in Consumer Contracts:**

Under the Fair Trading Act, if a business includes an Unfair Contract Term, the Unfair Contract Term can be cancelled by the court upon request by the Commerce Commission or the affected consumer.

### **Legal Accountability of Business Actors Regarding Prohibited Standard Clause Inclusion:**

**Business actors who violate the provisions regarding the inclusion of standard clauses are subject to imprisonment for a maximum of 5 (five) years or a maximum fine of Rp 2.000.000.000,00 (two billion rupiah).**

### **Legal Accountability of Business Actors Regarding Prohibited Standard Clause Inclusion:**

If the court decides that a term in a business/s standard form of consumer contract is an Unfair Contract Term, the Fair Trading Act prohibits that business from including the term (unless the term can be included in a way that complies with the court's decision), or the business is prohibited from applying, enforcing, or relying on the term.

If despite being prohibited the business continues to use or enforce the Unfair Contract Term, according to Section 40, it may face:

- a. conviction and a fine of up to \$200,000 (in the case of an individual) or \$600,000 (in the case of a business); and/or
- b. an injunction restraining the business from including, applying, enforcing, or relying on the term; and/or
- c. orders directing it to refund money or pay damages, if the court finds that the consumer has suffered or is likely to suffer loss or damage by the conduct of the business who still use or enforce the Unfair Contract Term.

At this point, after comparing the regulation of Standard Clauses in Indonesian and New Zealand Consumer Protection Law, we can conclude the following points. First, there is a difference in terminology used. Indonesia uses the term "Standard Clauses" in the UUPK, while New Zealand uses the term "Unfair Contract Terms" in the Fair Trading Act. Second, the determination process of a prohibited standard clause are different in the two countries. In Indonesia, the Standard Clauses prohibited in contracts between consumers and business actors are determined by UUPK in Article 18 paragraphs (1) and (2). On the other hand, in New Zealand, although the Fair Trading Act determines the criteria of an Unfair Contract Term in New Zealand, the court has to declare it as such and prohibit its enforcement. In this case, any clause or term in a standard form of consumer contract will be considered as an Unfair Contract Term and is therefore prohibited if the court is satisfied that the term creates a significant imbalance in the rights and obligations of the parties involved in the contract, are not necessary for the protection of the legitimate interests of the party who would benefit from the term, and the term would cause harm (financial or otherwise) to one of the parties if it were enforced or relied upon. Thus, if the determination of a prohibited standard clause in New Zealand requires court declaration, on the contrary, in Indonesia the determination of a prohibited standard clause does not require court declaration as it has already been determined by the UUPK.

Third, in terms of legal implication, in Indonesia the inclusion of Standard Clauses by Business Actors that fulfil the provisions as regulated in Article 18 Paragraph (1) and Paragraph (2) of the UUPK is declared null and void by law. In New Zealand however, if a business includes an Unfair Contract Term in a consumer contract, the Unfair Contract Term can be cancelled by the court upon request by the Commerce Commission or the affected consumer. Additionally, in terms of legal accountability, business actors who violate the provisions regarding the inclusion of standard clauses in Indonesia are subject to a maximum imprisonment of 5 (five) years or a maximum fine of Rp 2,000.000.000.00 (two billion rupiah). On the other hand, In New Zealand, if a court declares a term as an Unfair Contract Term, businesses are not allowed to use that term, unless they can include it in a way that complies with the court's decision. If the business

continues to enforce this unfair term, they can face penalties such as conviction and fines up to \$200,000 (individual) or \$600,000 (business), an injunction against using the term, and/or refund or pay damages to the consumer if they suffer a loss. In Indonesia, including a prohibited standard clause in a consumer contract is considered a criminal offense. In contrast, in New Zealand, it is only considered a criminal offense if a business continues to enforce an Unfair Contract Term after the court has prohibited them from using it.

Similarly, however, In both Indonesia and New Zealand, if a business includes any prohibited standard clauses in their standard form of consumer contract, consumers have the right to file a complaint or report. This action will prompt the authorities to take legal action against the business. In Indonesia, consumers can report such cases to the BPSK, while in New Zealand, consumers can report to the Commerce Commission.

## CONCLUSION

Differences exist between Indonesian and New Zealand consumer protection laws concerning the regulation of standard clauses. Indonesia uses the term "Standard Clauses", meanwhile New Zealand uses the term "Unfair Contract Terms". In Indonesia, only certain forms of Standard Clauses are prohibited and they are determined by the UUPK. Meanwhile, in New Zealand, Unfair Contract Terms must be determined and declared by the court, in which any clause or term in a standard consumer contract will be considered an Unfair Contract Term and is therefore prohibited if the court is satisfied that the clause or term creates a significant imbalance in the rights and obligations of the parties, is not necessary for the protection of the legitimate interests of the party who would benefit from the term, and would cause harm to one of the parties if it were enforced or relied upon. Additionally, In Indonesia, it is illegal for business actors to include Standard Clauses that fulfil the provisions mentioned in Article 18 Paragraph (1) and Paragraph (2) of the UUPK. If such clauses are included, they are declared null and void by law. On the other hand, in New Zealand, if a business includes an Unfair Contract Term in a consumer contract, the court can cancel it upon request by the Commerce Commission or the affected consumer. Other than that, In Indonesia, any prohibited Standard Clause included by business actors in a consumer contract is considered a criminal offense. However, in New Zealand, it is only considered a criminal offense if a business continues to enforce an Unfair Contract Term after the court has prohibited them from including and enforcing the unfair term. Similarly, in both countries, consumers have the right to file a complaint or report against the business entity who includes any prohibited standard clauses in their standard form of consumer contract. In Indonesia, consumers can report such cases to the BPSK, whereas in New Zealand, they can report to the Commerce Commission.

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