

# DIFFERENCES BETWEEN COMMERCIAL CONTRACTS AND CONSUMER CONTRACTS

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**Submission date:** 30-May-2022 12:32PM (UTC+0800)

**Submission ID:** 1846920814

**File name:** 2.\_A.\_Differences.pdf (635.71K)

**Word count:** 3796

**Character count:** 21258

## PalArch's Journal of Archaeology of Egypt / Egyptology

### DIFFERENCES BETWEEN COMMERCIAL CONTRACTS AND CONSUMER CONTRACTS

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Marsella Tridarani, Faizal Kuniawan. Differences Between Commercial Contracts And Consumer Contracts-- Palarch's Journal Of Archaeology Of Egypt/Egyptology 17(3), 1819-1827. ISSN 1567-214x

**Keywords: Differences, Contracts, Commercial, Consumer, Consumer Protection**

#### ABSTRACT

In the business law theory, business contracts can be categorized into several types; two of them that are often used daily are commercial contracts and consumer contracts. Both contracts have fundamental differences, in which the consumer party in consumer contracts is legally protected by the Law Number 8 of 1999 on Consumer Protection. This study aims to further differentiate commercial contracts and consumer contracts by writing down the characteristics and principle developments of both agreements. Moreover, the liabilities of both commercial and consumer contracts are also to be identified. This study is a qualitative study that is carried out by employing the statute approach and conceptual approach. The results disclose that the legal development of commercial and consumer contracts are distinct in the aspects of principles, regulations, and scopes; commercial contracts comprise business matters, while consumer contracts are for consumers or end-users. The liabilities of both commercial and consumer contracts can be carried out through litigation and non-litigation. However, the filing for a lawsuit and the non-litigation settlement facilities through the Consumer Dispute Settlement Agency (BPSK) are different.

#### INTRODUCTION

Contracts are events that occur when two or more people agree to give, do, or not do something, which is usually more often procured in writing. The parties agree on the matters that have been determined and are obliged to implement them so that the contract results in an agreement (*verbinten*). Therefore, legally formed

contracts can justify <sup>18</sup> rights and obligations for the parties involved, as well as being a formal legal source for the parties (Saliman, 2005).

In the business law theory, business contracts can be divided into some categorizations; among them are two that are frequently used in daily basis, <sup>13</sup> namely commercial contracts and consumer contracts (Hernoko, 2009). Likewise, the UNIDROIT Principles of International Commercial Contracts (hereafter, <sup>13</sup> UICC) also mentions the differences in transactions involving consumers (consumer contracts) and commercial contracts itself. Commercial contracts are defined as a written agreement which substances, including business matters or commercial matters are agreed by the parties involved. Given commercial contracts are based on the conventions of both parties the clauses must be examined thoroughly and carefully so that it will be proportional and impartial.

Moreover, commercial contracts emphasize more on building partnerships that are based on agreement and respect for the sustainability of a business as well as the rules of the applicable contract law, and not imposing the wills of others. Consumer contracts, otherwise, are contracts made by both parties with inequality bargaining powers – one party with strong bargaining power, namely the business person (due to the control of capital/funds, technology, skills, or sellers) and the weaker bargaining power party, which is the consumer. Thus, as the party with weak bargaining power, consumers can only take the clauses in the contract for granted because if they bother to bargain with other alternatives, they most likely will lose what they need in the agreement. In other words, there are only two options for the weaker party: take the contract or leave it (Hernoko, 2009).

The inequality of consumer contracts can be seen in the standard clause <sup>11</sup> which tend to be biased. Therefore, the consumer as the weaker party is legally protected by Law Number 8 of <sup>8</sup> 1999 on Consumer Protection. Article 1 number 10 of the law stipulated that: "Standard Clause is any regulations or provisions and conditions unilaterally prepared and predetermined by the entrepreneurs in the form of a document and/or an agreement which is binding and must be met by the consumers (Sutan, 1993). Standard contracts, however, are controversial; many experts of business law are against the agreement. However, some others support the deal due to the efficiency of the transaction. Even though the pros and contras of the agreement cannot be settled down, standard contracts can still frequently be found daily. Besides of its practicality, standard contracts are believed preventing any forms of losses (Johan, 2006).

Based on the phenomena, objective understanding in examining a contract, particularly regarding the unequal clauses, is fundamental. There are often misunderstandings about the existence of contracts that can ultimately lead to misleading objective assessments. Many parties easily judge a deal for being unequal only because of the status or power differences of both parties. The misunderstanding, for instance, is solely based on the backgrounds of the parties involved (bank-customers, business-consumers) then explicitly states that the

contract is biased by assuming that there is different bargaining power. However, this understanding is not entirely wrong; in some cases, both parties must acknowledge that there is inequality of bargaining powers, especially in consumer contracts. Even so, it will be fairer and more objective if an agreement is assessed based on its substances and the category of the contract itself – whether it is a commercial or consumer contract.

## METHODS

This study is normative qualitative research by applying <sup>14</sup> statute approach and conceptual approach. The primary and secondary legal materials used in this study were books, articles, newspapers, and credible online sources related to the analyzed legal issue collected by doing library research. Then, the gathered materials were grouped based on the suitability with the current issue, which are the barriers between commercial contracts and consumer contracts in Indonesia.

## RESULTS AND DISCUSSION

### *Regulations of commercial contracts*

All the involving parties in a commercial contract have an equal power to make clauses which substances are including business. Besides, all parties have the rights to make an agreement between two or more parties that contains commercial matters following the interest of the parties involved. In commercial contracts, it is further explained that its distinguishing feature is the provision of "financial or economic motive (benefit motive)," which according to Robert W. Clark, underlying the relationship of all the involving parties (Clark, 1987).

Besides the regulations as mention<sup>12</sup> above, commercial or international trade contracts are also regulated by The United Nations Convention on Contracts for the International Sale of Goods (hereafter, CISG) as the *Lex Mercatoria* of the International Trade Contracts (Soenadar, 2001). Furthermore, the preamble of CISG argued the purpose of it as follows:

<sup>3</sup> "Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade."

Article 2 of the CISG has stipulated the clauses of trade or commercial contracts, for instance, a commercial contract does not include sales to consumers or end-users and that not all goods are under the convention (Widjaja, 2008). Moreover, to determine the CISG provisions, several essential aspects must be considered (Siregar, 2008), for instance, regarding the parties involved in the contract. The first requirement is that the parties must live in different countries that have employed the CISG. Second, the CISG can be applied if both parties are from

different countries with only one country acknowledging the CISG, but both parties have agreed to use the CISG regulations as the legal basis of the contract.

### *Scopes of commercial contracts*

Regarding the definition of commercial contracts itself, in the international context, the UNIDROIT has released the Principles for International Commercial Contracts (hereafter, UPICC)-UNIDROIT Principles. However, the UPICC does not provide the formulations for commercial contracts, but, instead, comparing it with transactions involving consumers (consumer contracts).

The scopes of international trade contracts can also be seen in Article 2 of the CISG. The CISG excludes transactions that belong to particular ranges, for instance: "Sales of something other than, among other things, ships, aircraft and hovercraft, goods bought for family and personal use, or goods bought at auction." In other words, "goods bought for family and personal use" refers to consumers or end-users, which should be the scope of consumer contracts.

### *Regulations of consumer contracts in Indonesia*

Consumer contracts are regulated by the Law Number 8 of 1999 on Consumer Protection by following the general provisions stipulated in the BW. The Consumer Protection Law is also used as the legal protection in several fields related to consumer contracts, including the banking and housing sectors, which have special arrangements in their areas that comprise consumers' criteria. Those arrangements are the role of law in helping economic growth, financial regulation, and other legal changes that can stabilize the business cycle (Listokin, 2019).

### *Scopes of consumer contracts in Indonesia*

As explained, a consumer contract involves two parties: one from the consumer and the other one from the entrepreneur. There are two types of consumers, that is, final consumers and intermediate consumers. The former refers to the final or end-users of a product, while the latter refers to those who use a product as production from another product. However, the term 'consumer' mentioned in the Consumer Protection Law only applies to the final consumers or end-users. This type of consumer, furthermore, can get goods by the following ways (Sidabalok, 2006):

- a. Buying; the purchase or buying of a product is based on the privity of a contract of trades, credit agreements, leases, and so on with the entrepreneur. In consequences of the contractual relationship, both parties receive legal protection.
- b. Other ways than buying; such as presents, grants, and inheritances. However, in these ways, consumers do not have privity of contract with entrepreneurs; thus, consumers cannot be legally protected by the law. For that



reason, the country is in charge to protect the consumer<sup>10</sup> through laws and regulations. In Indonesia, the protection is in the form of the provision of Consumer Protection Law.

In brief, trade agreements under the protection<sup>10</sup> of the Consumer Protection Law are only the agreements between entrepreneurs and final consumers. Even so, the transaction must refer to the BW, as in the obligation to hand over ownership rights, the seller's responsibility to bear hidden defects, and others as stipulated in the BW.

### *Liabilities in commercial contracts and consumer contracts*

#### *Form of liabilities to the disadvantaged party in commercial contracts*

The dispute of a contract is generally caused by the imbalance elements between parties, such as the misunderstanding of the ongoing business process, the disability to recognize partners or business partners, or the absence of a legal cover underlying the business process (Yudha, 2009). There are some reasons to file for a lawsuit regarding the issue. The first reason is the default, which can be used as a basis in a lawsuit to the District Court. In essence, someone or a party is considered committed defaults if he/she does not carry out what was agreed to do or do something that, according to the agreement should not be done. The juridical consequence for the defaulting party is a lawsuit from the disadvantaged party for the fulfilment of the contract, termination of the deal, imposition, or compensation to the defaulting party. The settlement, furthermore, may comprise the real costs, losses, and interests or penalties as stated in the contract clause. The lawsuit, additionally, must be based on the privity of contract. Regarding the defaults, Article 1243 of the BW stipulated that:

<sup>1</sup> "Reimbursement of costs, losses and interest due to not fulfilling an agreement, then begins to be compulsory, if the debtor, after being declared negligent in fulfilling the agreement, is still neglected or if something must be given or made, can only be given or made in grace the time he has spent."

<sup>24</sup> The second reason is the fundamental breach of contract – not all breach of contract can be categorized as a fundamental breach. If the fundamental breach is found, one of the parties can file for a lawsuit to terminate the contract as stipulated in Article 26 of the CISG: "... that the party in breach cannot unilaterally terminate the agreement without the consent of the other party," or when consumers refuse to fix the defaults.<sup>21</sup> In the international commercial contract as <sup>4</sup> stipulated in Article 9 paragraph (1) of the CISG, it is mentioned that "the buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or (b) if the seller does not deliver the goods within the additional period of time fixed by the buyer."

Third, the compensation according to the CISG, lets the consumer to ask for specific performance, price's reduction, or terminate parts of the contract. However, the consumer must fulfil the CISGs requirements in filing for remedy. Meanwhile, according to the BW in regards to <sup>7</sup>the defendant party, it has been stipulated in Article 1238 of the BW that, “the debtor shall be declared to have defaulted, either by an order or other such similar deed, or pursuant to the contract itself, which stipulates that the debtor should be in default, upon failure to deliver within the stipulated time period” (Harahap, 2012).

### *Form of liabilities to the disadvantaged party in consumer contracts*

The negligence by the entrepreneur party during the process of making and carrying out a consumer contract often result in losses to the consumer party. The losses are mainly caused by the weaker bargaining power of the consumer so that the entrepreneur party misuses his higher power. The consumer disputes that often occur can be due to two things (Sidabalok, 2006), namely:

1. The entrepreneur is negligence in carrying out his obligations that it is not by the law. Besides, the entrepreneur might ignore the prohibitions or rules made for him in carrying out the business. Such disputes are referred to as legal disputes.
2. The entrepreneur or the consumer does not follow the contract's clauses, whether it is the obligations or rights agreed during the making of the contract. Such disputes are referred to as contract disputes.

In the case of consumer protection, if a defective entrepreneur produces a product, it is enough for the consumer to prove that the product <sup>16</sup>consumes is broken and results in a loss. Otherwise, the process of verifying, whether there is negligence or error in the production process of goods and services becomes the responsibility of the entrepreneur (reserve proof) (Handono, 2011).

### *Rejection of goods*

A consumer contract in the form of standard contract is <sup>19</sup>efficient in terms of the efficiency of use, yet, in terms of accommodating a balanced position for the parties, the agreement is still found disadvantageous (Handono, 2011). In a standard contract, it is fundamental to include exemption clauses. Exemption clauses are clauses that contain conditions that limit or eliminate the responsibility that should be borne by the producer or entrepreneur (Shidarta, 2006). The exemption from personal liability referred to is the legal consequences due to the lack of implementation of the obligations required by Article 18 paragraph (1) and (2) of the Consumer Protection Law, such as regarding compensation in the case of violating the agreement. Compensation, furthermore, is not carried out if the exemption requirements are listed as such (Kristiyanti, 2009).

### *Cancellation and termination of contracts*

The cancellation of consumer contracts can occur if there are prohibited clauses that can cause the contract cancelled and void during the formulation of the contract (Kristiyanti, 2009). Termination of contracts, furthermore, is the legal consequence of the events that occurred during the fulfilment of the contractual obligations. In a consumer contract, if a default occurs in which the entrepreneur does not fulfil his duties, the consumer is rightful to compensate. However, the entrepreneur can also be exempted from the responsibility of providing compensation if he can prove that the non-performance of obligations is the consumer's mistake, as stipulated in Article 19 paragraph (5) of the Consumer Protection Law. In this case, the consumer is rightful to withdraw and other solutions (Hyde, 2019).

#### **10** *Functions of the consumer dispute settlement agency*

**5** "Settlement of dispute outside the court shall be conducted in order to reach an agreement regarding the type and amount of compensation and/or regarding certain measures that must be taken to ensure that no such damages should occur again to the consumers" (Article 47 of the Consumer Protection Law). The occurrence of personal cases between the entrepreneur and the consumer always ends in the realm of litigation (Yudhantaka, 2019). The system of settlement of a dispute in courts is used to deal with court processes that take a long time and are costly. Article 45 paragraph (4) of the Consumer Protection Law stipulated that: "If efforts to settle the consumers disputes outside the court has been made, charges can only be filed in the court if the said efforts are declared unsuccessful by one of the parties or by both of the parties in dispute."

The dispute settlement through the non-litigation way, on the other hand, can be done through the Consumer Dispute Settlement Agency, Non-Governmental Organizations, and the entrepreneur himself. Consumer Dispute Settlement Agency is an organization formed by the government that handles and settles consumer disputes by mediation, arbitration, or conciliation. Consumer dispute settlement through the agency is relatively less costly, fast, simple, and straightforward. Moreover, the agency only accepts cases with a small loss value. During the process, the examination is carried out by a single Judge and the full presence of a third party as the representative of the disputing party that is not permitted.

One example of consumer disputes that can be filed to the Consumer Dispute Settlement Agency for disadvantaging the consumer party is the standard contract of the TKD Express, an expedition service, which includes exoneration clauses in its Terms of Delivery and Service (Express, 2017). In brief, there are some clauses of the terms that violate Article 18 of the Consumer Protection Law, as written in point 4a: "TKD is not responsible for the following: Technical risks that occur during the shipment, which causes the goods to not function or change its function either concerning machinery or the like or electronic items, such as TV, computers, diskettes, compact discs, AC, refrigerator, video, washing machine,



and others of the same type." Moreover, point 7 discloses that "TKD does not serve and is not responsible for claims in any form for not receiving the good after 1 (one) month from the date of the shipment." Additionally, in point 11, TKD states that "The sender hereby promise to declare TKD free from all legal claims, including from the claims of the third party as well as any damages from anywhere resulting from the shipment."

Returning the shipping cost is prohibited in the standard clauses as stipulated in Article 18 paragraph (1) letter c of the Consumer Protection Law. However, TKD seems to violate the provision by stating the terms as written in point 10: "shipping costs are non-refundable and returns and other costs related to the shipping failures are the responsibility of the Sender." Other than that, according to Article 18 paragraph (1) letter g of the Consumer Protection Law, entrepreneurs are prohibited for making new clauses and treating the consumers as the subject to the new regulation. TKD in point 5 of their Terms of Delivery and Services, however, states that "TKD without prior notification has the right to use the sea, river, and land transportations to carry out the shipments if all goods to the destination."

## CONCLUSION

The forms of liability in commercial and consumer contracts can be done through both the litigation and non-litigation procedures. Nonetheless, the treatment for the dispute settlement in the forms of filing a lawsuit and the settlement facilities are different, for the non-litigation procedures are carried out by the Consumer Dispute Settlement Agency.

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