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Comparison of Agreement Law in Indonesia and Malaysia: Phenomenon of Standard Agreement Practices

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Abstract

Introduction: : *Indonesia and Malaysia are countries with fairly good economic levels in the ASEAN. Economic growth in the business world also has an influence on contract law because the phenomenon that occurs is the use of standard agreement models in the business world to make business processes more effective and efficient.*

Purposes of the Research: *The aim of this research is to analyze the differences in contract law in Indonesia and Malaysia, also describe the phenomenon of standard agreement practices that occur in Indonesia and Malaysia, and analyze the validity of standard agreements that apply in Indonesia and Malaysia.*

Methods of the Research: *The research method used is normative juridical. The type of study used is through literature study. The type of data used is secondary data consisting of primary legal materials, namely the Civil Code, the Malaysian Contracts Act 1950, the 1957 Sale of Goods Deed.*

Results Main Findings of the Research: *The research results show that Indonesia and Malaysia are countries that have implemented standard agreement. These two countries also have a legal basis that allows standard agreements to come into force on the condition that there must be clauses that emphasize the rights and obligations of the parties to achieve justice.*

Keywords: Legal Comparison; Agreement; Indonesia and Malaysia.

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INTRODUCTION

Abdul Kadir Muhammad said that an agreement is an agreement by which one or more people bind themselves to each other to carry out something in the field of property.[1] The agreement is divided into several types, but based on its form it is divided into two, namely oral and written agreements. Written agreements are divided into two parts, namely private deeds and authentic deeds. This written agreement is usually used in banking credit agreements or is known as a standard agreement (standard agreement). Standard agreements in Dutch are known as "standard contracts" while in English they are known as "standardize contracts".[2] In the era of economic globalization, making standard agreements by business people is not impossible, considering that with economic developments in this

[1] I Made Aditia Warmadewa and I Made Udiana, "Akibat Hukum Wanprestasi Dalam Perjanjian Baku," *Kertha Semaya: Journal Ilmu Hukum* 5, no. 2 (April 2016).

[2] Elis Herlina and Sri Santi, "Model Perjanjian Baku Pada Kontrak Berlangganan Sambungan Telekomunikasi Telepon Selular Pasca Bayar," *Jurnal Hukum IUS QUIA IUSTUM* 23, no. 3 (July 2016): 415–38.

era of globalization, there is no time limit and place for parties to make contracts. This certainly has an impact on the high frequency of contracts made by business people. In this regard, for the sake of efficiency in both energy and time and costs, providing a contract form is the right choice that can be taken by business people. Contracts made like this are known as standard agreements or standard contracts or also known as standard contracts. Such standard agreements are made possible by the principle of freedom of contract, which is one of the principles in contract law.[3]

A standard agreement is an agreement in which there are certain conditions made by the business actor.[4] In essence, standard agreements aim to provide convenience or practicality for the parties in carrying out transactions. Therefore, the rapid development of standard agreements cannot be stopped in an era that demands practicality in carrying out transactions[5]. In the business world, there are agreements that are sometimes used by business actors and are known as standard agreements. Standard agreements basically limit the principle of freedom of contract, but in practice these agreements move freely in society, especially in certain business fields, for example, in banking and real estate. The rights and obligations of the parties are contained in a standard or standardized agreement. This means that the contents of the agreement are determined unilaterally, and the other party can only accept or reject the contents of the agreement, without being able to change its contents. This contract is made collectively or en masse, so because of its nature, Vera Bolger calls the agreement a "take it or leave it contract".[6] The characteristics of a standard agreement or standard clause are as follows: 1) The contents are determined unilaterally by the creditor whose position is relatively stronger than the debtor; 2) The debtor does not participate in determining the contents of the agreement; 3) Driven by his needs, the debtor is forced to accept the agreement; 4) Written form; 5) Prepared in advance, en masse or individually.

These characteristics reflect the economic principles and legal certainty that apply in the countries concerned. Economic principles and legal certainty in standard agreements are seen from the interests of entrepreneurs, not from the interests of consumers. By standardizing the terms of the agreement, the economic interests of entrepreneurs are more secure because consumers only agree to the terms offered by the entrepreneur.[7]

Contract law in Indonesia is regulated in the Civil Code. The agreement in Article 1313 of the Civil Code contains an element of engagement as in the words "binding oneself to one or more other people." An agreement is basically the basis for creating an agreement as is clearly stated in Article 1233 of the Civil Code, namely "Every agreement is created either by agreement or by law." Reviewing the definition of an agreement as stated in Article 1313 of the Civil Code, in the view of several legal experts regarding the definition of an agreement, starting from Subekti's view that an agreement is "an event in which one person makes a promise to another person or in which two people It's a promise to each other to

[3] Fahdelika Mahendar and Christiana Tri Budhayati, "Konsep Take It or Leave It Dalam Perjanjian Baku Sesuai Dengan Asas Kebebasan Berkontrak," *Jurnal Ilmu Hukum: ALETHEA* 2, no. 2 (February 2019): 97–114.

[4] Putu Prasintia Dewi and Anak Agung Sagung Wiratni Darmadi, "Asas Naturalia Dalam Perjanjian Baku," *Kertha Semaya : Journal Ilmu Hukum* 4, no. 2 (September 2015).

[5] I Gusti Ayu Ratih Pradnyani, I Gusti Ayu Puspawati, and Ida Bagus Putu Sutama, "Perjanjian Baku Dalam Hukum Perlindungan Konsumen," *Kertha Semaya : Journal Ilmu Hukum* 6, no. 2 (January 2018).

[6] Wurianalya Maria Novenanty, "Perjanjian Baku Dalam Dunia Bisnis Dikaitkan Dengan Hak Asasi Manusia," *MELINTAS* 33, no. 1 (July 13, 2018): 70–90, https://doi.org/10.26593/mel.v33i1.2955.70-90.

[7] Melisa Aquaria Putri S, "Klausula Baku Dalam Suatu Perjanjian Berdasarkan Undang-Undang Nomor 8 Tahun 1999 Tentang Perlindungan Konsumen," *Jurnal Gagasan Hukum* 2, no. 02 (December 30, 2020): 122–34, https://doi.org/10.31849/jgh.v2i02.8553.

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do something.[8] Regarding the legal conditions for an agreement, it is regulated in Article 1320 of the Civil Code. If the conditions as stipulated in Article 1320 of the Civil Code are met then the agreement is valid, including standard agreements because one of the principles of an agreement is also known as the principle of freedom of contract, which means that the parties are free to make any form of agreement by fulfilling the legal requirements of the agreement.

Malaysia is in first position as the country with the highest economic growth in Southeast Asia, where it is recorded to grow 8.7 percent annually in 2022.[9] Malaysia is the country with the fastest economic growth in the ASEAN region, the use of standard agreements in the business world in Malaysia is also running very rapidly to accelerate economic growth. The characteristics of a contract differ between countries that adhere to different legal systems. In countries that adhere to the "Common Law"[10] system such as England, Malaysia and India, contracts have the following characteristics: 1) There is an offer; 2) There is acceptance; 3) There is a reply; 4) Intention to create a legal and legally protected relationship; 5) The ability or feasibility to make a contract; 6) Certainty or provisions of contract terms and conditions; 7) Free will (not ordered or forced).

If these characteristics are not met, then in countries that adhere to the "Common Law" system, a valid contract is deemed not to have occurred and what is possible is only an agreement.[11] Based on this background, the aim of this research is to provide a legal comparison regarding contract law in Indonesia and Malaysia in response to the phenomenon of standard agreement practices which are currently widely used in the business world.

METHODS OF THE RESEARCH

The research method used in this research is normative juridical. The type of study used is through literature study. This normative legal research aims to describe the norms that apply in a particular legal system. Juridical-normative legal research (also known as doctrinal legal research) can be simply defined as research that asks whether the law is in a particular jurisdiction. In this case, researchers try to collect and then analyze the law, along with relevant legal norms.[12] Therefore, this study will analyze the legal norms of Indonesia and Malaysia in terms of the application of agreements in the business world. This study also uses a comparative legal method between Indonesia and Malaysia. The type of data used is from secondary data consisting of primary legal materials, namely the Civil Code, the Malaysian Contracts Act 1950, the 1957 Sale of Goods Deed and secondary legal materials consisting of previous research relating to standard agreements.

RESULTS AND DISCUSSION

A number of countries in Southeast Asia (ASEAN) released economic growth figures for the first quarter of 2024. Apart from Indonesia, countries in ASEAN that have reported the

[8] I Wayan Agus Vijayantera, "Kajian Hukum Perdata Terhadap Penggunaan Perjanjian Tidak Tertulis Dalam Kegaiatan Bisnis," *Jurnal Komunikasi Hukum (JKH)* 6, no. 1 (February 15, 2020): 115–25, https://doi.org/10.23887/jkh.v6i1.23445.

[9] Yuli Nurhanisah, "Pertumbuhan Ekonomi 6 Negara ASEAN," *Indonesiabaik.Id*, February 24, 2023.

[10] Nasaruddin Umar, "Studi Hukum Perbandingan Sistem Ketatanegaraan Malaysia Dan Indonesia," *Jurnal IAIN Ambon: Tahkim* 9, no. 2 (2013).

[11] Sunarjo Sunarjo, "Perbandingan Hukum Indonesia Dan Malaysia Terhadap Ketidakseimbangan Dalam Perjanjian Baku," *Jurnal Cakrawala Hukum* 6, no. 1 (June 2015).

[12] David Tan, "Metode Penelitian Hukum: Mengupas Dan Mengulas Metodologi Dalam Menyelenggarakan Penelitian Hukum," *Nusantara: Jurnal Ilmu Pengetahuan Sosial* 8, no. 2 (2021).

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realization of their economic growth are Singapore, Vietnam and Malaysia. Indonesia's economic growth is still below Vietnam, but above Malaysia and Singapore. The Central Statistics Agency recorded that Indonesia's economic growth in the first quarter of 2024 was 5.11 percent. This figure is higher than the first quarter of 2023, which was 5.04 percent. Acting Head of The Central Statistics Agency Amalia Widyasanti said this achievement was the highest first quarter economic growth in the last five years. Based on business fields, all experienced positive growth except agriculture which contracted 3.54 percent. The cause is a decrease in production due to El Nino. Meanwhile, business fields with the highest contribution to the economy, such as processing industry, trade, construction and mining, are growing positively. Malaysia's economy grew 3.9 percent in the first quarter of 2024 (yoy). This growth was mainly supported by the services sector. Reporting from Channel News Asia, the Head of the Malaysian Statistics Agency said all main sectors experienced positive growth in the first quarter of this year, led by an increase in the services sector, amounting to 4.4 percent (yoy). Meanwhile, the manufacturing sector recovered with growth of 1.9 percent and the agricultural sector rose 1.3 percent.[13]

The very fast economic growth in the business world has an impact on the implementation of business agreements which are usually made conventionally, changing to a more practical agreement model, namely standard agreements. The development of agreements in trade is very fast and increasing because contractual agreements are a social means in human civilization to support human life as social creatures. The existence of agreements or contracts for human life is because they can facilitate human life needs and interests that cannot be fulfilled alone without the help of other people. To involve other people, it must be clear that fulfilling needs needs to be expressed in the form of an agreement or contract that can protect the parties in terms of balanced rights and obligations.[14]

According to Setiawan, it is necessary to improve the definition of the agreement, namely: 1) Actions must be interpreted as legal actions, namely actions with a purpose to give rise to legal consequences; 2) Adding the words "or binding themselves to each other" in Article 1313 BW; 3) So the formulation becomes, "an agreement is a legal act, where one or more people binding themselves or mutually binding themselves to one or more people."[15]

The next agreement, when viewed in terms of form, is divided into two types, namely written and oral. A written agreement is an agreement made by the parties in written form, while an oral agreement is an agreement made by the parties in oral form (sufficient agreement between the parties).[16] A standard agreement is essentially an agreement whose conents have been standardized by business actors and have been printed in certain forms. One example is a banking credit agreement. Customers as consumers will be presented takeiwith an agreement by the bank, where they will be asked to read the agreement carefully and if they agree, they must sign it. If you refuse, then the agreement is deemed to not exist (take it or leave it).

[13] CNN Indonesia, "Mengintip Pertumbuhan Ekonomi Negara ASEAN, RI Bukan Nomor Satu," *CNN Indonesia*, May 7, 2024.

[14] Cindawati Cindawati, "Perkembangan Perjanjian Dalam Praktik Perdagangan (Perspektif Hukum Islam Dan Hukum Positif)," *Jurisdictie: Jurnal Hukum Dan Syariah* 7, no. 2 (February 1, 2017): 219–41, https://doi.org/10.18860/j.v7i2.3717.

[15] Agus Yudha Hernoko, *Hukum Perjanjian Asas Proporsionalitas Dalam Kontrak Komersial*, 1st ed. (Yogyakarta: Laksbang Mediatama, 2008).

[16] Salim HS, *Pengantar Hukum Perdata Tertulis (BW)*, 11th ed. (Jakarta: Sinar Grafika, 2016).

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Indonesia is one of the ASEAN member countries which also has a fairly high rate of economic growth, so the phenomenon of standard agreement practices is also occurring very rapidly in Indonesia. The legal regulation of agreements in Indonesia is contained in the Civil Code. The Civil Code (hereinafter referred to as the Civil Code) or Burgerlijk Wetboek is a set of rules from the civil law legal system created by the Dutch government and then enforced in Indonesia. The colonial law of the Dutch East Indies government applies as national law based on the principle of concordance through Article II of the Transitional Regulations which have been amended to become Article I of the Transitional Regulations of the 1945 Constitution of the Republic of Indonesia. However, these regulations are adapted to developments in situations, conditions and real needs in life. state.[17]

Discussing standard agreements in Indonesia, it is necessary to first understand the existence of law in Indonesia, especially contract law which is still considered under the influence of Roman-no-Germanic law (Civil Law) based on tradition and history. According to Ifdhal Kasim, the entry of this mainstream school of legal thought into Indonesia, apart from the impact of the Dutch East Indies government's colonization, also cannot be separated from the role of Dutch academic jurists who initiated the teaching and study of law here. As a country that continues the Civil Law tradition, legal development is largely determined by academic jurists because they have academic and professional authority in interpreting the law.[18]

Standard agreements are born from a principle in the Civil Code, namely the principle of freedom of contract. The principle of freedom of contract is the autonomy of the parties (partij autonomy or freedom of making contracts), as an elaboration of Book III of the Civil Code which adheres to an open system (optional law). This principle can be concluded from Article 1338 Paragraph (1) of the Civil Code. Freedom of contract means freedom to determine the contents of the agreement and with whom to agree. The principle of freedom of contract is universal which refers to the free will of every person to make a contract or not to make a contract, the restrictions are only for the public interest, and in the contract there must be a reasonable balance. In practice, the principle of freedom of contract is not applied in making a standard agreement but remembers that standard contracts have become a necessity for society and business actors. The principle of freedom of contract means that the parties have freedom in agreeing/contract.[19]

Standard agreements made in the business world do not conflict with the principle of freedom of contract because the parties are free to make their own agreements. This means that the party who will conclude the agreement is still given the right to agree (take it) or reject the agreement submitted to him (leave it). The standard agreement which contains an exoneration clause is one of the controversies in the application of the standard agreement. According to Shidarta, the exoneration clause means a clause that contains conditions that limit and or remove the responsibility and or obligations of the creditor (seller).[20] The standard clauses in this agreement have a position that is very advantageous to the business

[17] Deviana Yuanitasari and Hazar Kusmayanti, "Pengembangan Hukum Perjanjian Dalam Pelaksanaan Asas Itikad Baik Pada Tahap Pra Kontraktual," *Acta Diurnal: Jurnal Ilmu Hukum Kenotariatan Fakultas Unpad* 3, no. 2 (July 29, 2020): 292–304.

[18] Hardijan Rusli, *Hukum Perjanjian Indonesia Dan Common Law*, 2nd ed. (Jakarta: Pustaka Sinar Harapan, 1996).

[19] Shenti Agustini, Febri Jaya, and Agustianto Agustianto, "The Principle of Freedom of Contract in Commercial Agreements: Are Limitations Needed?," *JUNCTO: Jurnal Ilmiah Hukum* 5, no. 2 (December 2023): 209–17.

[20] Agustianto Agustianto, "An Exoneration Clause in Standard Agreements: Problems in Consumer Protection," *Pandecta Research Law Journal* 17, no. 1 (June 4, 2022): 129–36, https://doi.org/10.15294/pandecta.v17i1.35401.

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actor so that the position between the business actor and the consumer is not equal in the transactions that occur, and if the consumer does not follow or agree to the clauses that have been made by the business actor, the consumer cannot own the goods or services. required by the consumer. Consumers can be in a weak position if there is no balanced protection so that consumer protection is an inseparable part of healthy business activities. Such agreements tend to only contain and highlight the rights of the party in a stronger position while the other party accepts this situation because their position is weak.

Standard clauses in sales and purchase transactions, existing engagements and agreements increasingly show the unequal position of the parties between the risks of events or existing responsibilities. So the purpose of making this exoneration clause is to reduce or eliminate responsibility by one of the parties. In order to reduce business risks that occur to business actors in general.[21] In business experience, or in seller-buyer relationships in consumer relationships, there are exoneration clauses which are essentially contract clauses which have a special nature.[22] The exoneration clause as emphasized by I. P. M. Ranuhandoko B.A is a contract that is oriented towards "freeing a person or business entity from a claim or responsibility."[23]

Based on this understanding, an exoneration clause can be understood as a clause in a relationship that has a primary orientation towards avoiding the obligation to fulfill a loss as a form of compensation due to denial. From the Rikjen's perspective, exoneration clauses have several characteristics, including: (i) Made by one party with the aim of avoiding the fulfillment of compensation payments if there is an event that reflects an unlawful act and/or broken promise as the compensation is carried out in whole or in a limited manner; (ii) one of the two parties has prepared a format of requirements as a form of exoneration clause; (iii) The other party just needs to agree. Based on the Rikjen's view, the exoneration clause can be categorized as a standard agreement. A standard agreement is an agreement that has clauses that have been standardized or arranged in advance by one of the two parties so that it can be used by the other party; as the other party does not have the opportunity to make changes or discuss them. In fact, one of the quite 'harsh' views regarding the exoneration clause was conveyed by Sluijter, emphasizing that standard agreements do not reflect the essence of the agreement itself, considering the position of one of the parties having strong authority, such as forming a private legal product. (legio particuliere wetgever). In line with this perspective, it's just that through another reaction, Pitlo provides a paradigm where the existence of a standard agreement is an attempt to coerce the other party into complying with the agreement, in other words it can be said to be a forced agreement.[24]

Based on this, a standard agreement is something that can only be legally entered into because based on the Civil Code it adheres to the principle of freedom of contract where every person is free to make contracts in any form as long as it complies with the conditions for the validity of the agreement as stated in Article 1320 of the Civil Code. Article 1320 of

[21] Rahmat Noholo, Fence M Wantu, and Dian Ekawaty Ismail, "Kedudukan Klausula Baku Dalam Perjanjian Berdasarkan Undang-Undang Nomor 8 Tahun 1999 Tentang Perlindungan Konsumen," *The Juris* 7, no. 2 (December 10, 2023): 404–10, https://doi.org/10.56301/juris.v7i2.1043.

[22] P. N. H Simanjuntak, *Hukum Perdata Indonesia* (Jakarta: Kencana, 2015).

[23] Tia Rizky and Rismawati, "Perlindungan Konsumen Terhadap Klausul Eksonerasi Dalam Perjanjian Sewa -Menyewa Safe Deposit Box Pada Bank Mandiri Cabang Banda Aceh," *Jurnal Ilmiah Mahasiswa Bidang Hukum Keperdataan* 1, no. 2 (November 2017): 158–72.

[24] I Gede Agus Kurniawan, "Klausula Eksonerasi Dalam Bisnis Perspektif Hukum Progresif," *Istinbath: Jurnal Hukum* 19, no. 02 (December 31, 2022): 187–204, https://doi.org/10.32332/istinbath.v19i02.4784.

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the Civil Code determines the existence of 4 (four) conditions for the validity of an agreement, namely: First, the existence of an agreement for those who bind themselves; Second, the ability of the parties to create an agreement; Third, a certain thing; and Fourth, a lawful cause (causa). However, in its application, it is necessary to have an exoneration clause in the standard agreement which also pays equal attention to the rights and obligations of each party.

This is of course different from the contract law that applies in Malaysia. Malaysia is a federated country consisting of thirteen states and three federal territories in Southeast Asia with an area of 329,847 square km and in the 1980s and 1990s it has transformed Malaysia into a new industrial country because Malaysia is one of the three countries that controlling the Strait of Malacca, international trade plays an important role in its economy.[25]

In Malaysia, an agreement and a contract are two different things. Every contract is an agreement but not every agreement is worth a contract. Contracts give rise to legal implications while agreements do not give rise to legal implications. Every contract must fulfill the character of a contract, namely there is an offer, there is an acceptance, there is a reply, the intention to create a relationship that is legal and protected by law; ability to make contractual agreements; certainty of contract terms and conditions; and free will (not ordered or forced). Standard agreements regulated in the 1957 Sale of Goods Act allow for standard clauses in standard agreements which contain limitations on the liability of business actors, which is very detrimental to the party receiving the contract. If these characteristics are not met then in countries that adhere to the "Common Law" a valid contract is deemed not to have occurred and what may occur is only an agreement. An agreement is an agreement between two or more parties regarding a matter. It should be understood that the term contract is more specific while the term agreement is more general. Only agreements that have the characteristics of a contract have legal implications.

The Malaysian Contracts Act 1950 provides that all agreements are contracts if they are made by the free consent of the contracting parties. Where one or more of the contracting parties are erroneous in their belief about some relevant issues pertaining to the contract, free consent does not exist. This can arise where there is mistake, fraud or misrepresentation. Each of these is dealt with in separate provisions of the Contracts Act 1950 and different legal principles apply to each of them. While the principles governing innocent and negligent misrepresentation are the same as in English common law, the position under the Act on mistake and fraud differ to some extent from the English position. The differences are highlighted in the relevant parts of the chapter. This chapter discusses the scope of mistake, fraud and misrepresentation under the Act, their legal consequences upon contracts that are formed and the reliefs available to the innocent party.[26]

There are several differences and similarities between standard agreements in Indonesia and in Malaysia, including: 1) the use of different terms regarding "standard agreements". Indonesia calls it a standard agreement, but in Malaysia it calls it a "uniform agreement"; 2) regarding potential injustice arising from standard agreements which are also regulated differently between Indonesia and Malaysia. In Malaysia, the word "unfair" is not

[25] Anita Marianata, "Perjanjian-Perjanian Pekerjaan Dua Negara (Indonesia-Malaysia) Dilihat Dari Sejarah, Politik Dan Pemerintahan (Indonesia-Malaysia)," *Profesional: Jurnal Komunikasi Dan Administrasi Publik* 2, no. 1 (January 27, 2016), https://doi.org/10.37676/professional.v2i1.160.

[26] Tay Pek San, "Mistake, Fraud, and Misrepresentation in Malaysian Contract Law," in *Invalidity* (Oxford University PressOxford, 2022), 253–70, https://doi.org/10.1093/oso/9780192859341.003.0014.

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recognized in the 1950 Contract Deed, but the word "unfair" is regulated in the 1957 Sale of Goods Deed which is in the form of a liability exclusion clause, meaning that standard agreements are regulated in the 1957 Goods Sale Deed. Standard clauses are permitted in standard agreements which contain limiting the liability of business actors which is very detrimental to the party receiving the contract. Meanwhile, in Indonesia, regulations regarding standard agreements are agreements that are limited by taking into account the balanced rights and obligations of the parties to the agreement; 3) then regarding the settlement of cases in standard agreements in Indonesia and Malaysia, they have similarities, namely they are resolved through litigation, namely through the courts.

CONCLUSION

Economic developments in the ASEAN region have an impact on every member country in ASEAN. One impact is on the development of agreement practices in the business world. Rapid economic development forces the business world to move efficiently and quickly so that the presentation of agreements in the business world is also carried out efficiently and quickly, namely in the form of standard agreements. Indonesia and Malaysia are countries that have quite rapid economic growth rates in the ASEAN region. Indonesia and Malaysia also implement standard agreements in the business world. In fact, the way Indonesia and Malaysia apply standard agreements is the same, namely providing clauses that limit the rights and obligations of the parties in order to avoid provisions that are unfair to the parties. Therefore, the application of standard agreements in the business world is a legal innovation that helps the very rapid development of business that is currently occurring and regulations in Indonesia and Malaysia are appropriate in allowing standard agreements to be made by providing clauses that limit the rights and obligations of the parties to the agreement to realize justice in agreements.

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