

**Assumption Of Risk And Release Of Liability Agreement  
Between Tour Operator And Tourist In Following  
The Whitewater Raftng Adventure Tour Package  
Based On Indonesian Law**

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**ABSTRACT**

It is important to understand that the legal agreements must be recognized by law. The agreements that do not meet the statutory requirements, it is not recognized by law, even though the agreement is agreed upon by the parties concerned. The purpose of this study is to find out the agreement on risk liability between tourist and tour operator in participating of rafting adventure tour package. This research was conducted through a normative juridical approach that was descriptive in nature. The data source of this research was obtained from library research. Then it is analyzed using qualitative analysis which describes and analyzes important data. The conclusion of this study is that in carrying out assumption of risk and release of liability agreement between the tour operator and tourist in following the whitewater rafting adventure tour package. The tour operators still use standard agreements (exoneration clauses) in their transactions.

Keywords: Agreement, Liability, Tourist

**A. INTRODUCTION**

In living the daily life, people often use the term agreement (*overeenkomst*), even though the agreement is done verbally. However, in the field of business, agreement is a very significant matter, because this is related to the business world. Therefore, in the legal aspect of the agreement it is a form of manifestation of legal certainty. Thus, ideally each agreement is carried out in writing to obtain a legal strength and

certainty, so that the legal objectives can be achieved. The relation with the agreement stipulated in the provisions of Article 1313 of the Indonesian Civil Code (ICC) defines as follows, "An agreement is an act by which one person or more ties himself to one or more other people".<sup>1</sup>

Referring to Setiawan's opinion, the definition above is incomplete, it only refers to unilateral agreement, and also has a very

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<sup>1</sup> Indonesian Civil Code (ICC) Article 1313

broad understanding, because it utilizes the word 'act' (*perbuatan*) also includes voluntary representation and illegal acts. Setiawan then formulated the definition of act as an action aimed at causing legal consequences, and adding the words "or mutually binding themselves" in Article 1313 of ICC.<sup>2</sup> So that the formulation of an agreement is a legal act, in which one or more people tie themselves to one or more people.

According to Rutten, the formulation of the agreement according to Article 1313 of ICC is too broad and contains several weaknesses. Similar opinions were also expressed by Indonesian civil law scholars, in general assuming the definition of agreement according to Article 1313 of ICC was incomplete and too broad.<sup>3</sup> R. Subekti states that an agreement is an event in which someone promises to another person or where two people promise each other to do something, from this event an engagement relationship arises.<sup>4</sup>

The agreement is part of the obligation (*verbinten*is), so the agreement is

the source of the obligation and the agreement has a broader scope than the agreement. Regarding the agreement itself, it is regulated in book III of ICC, as it is known that an obligation originates from an agreement and law. Therefore, the agreement is the same as the contract.

R. Wirjono Prodjodikoro interpretes the agreement as a legal relationship regarding property between the two parties, in which one party has the right to demand the implementation of the promise.<sup>5</sup>

While according to Abdul Kadir Muhammad redefines the definition of Article 1313 of ICC as follows, that which is called an agreement is an approval or consent with which two people or more mutually tie themselves to implement something in the field of wealth.<sup>6</sup>

From several formulations of the agreement as mentioned above. I conclude seven elements which consists of:

1. There are parties;
2. At least two parties;

This is called the subject of the agreement can be human or legal entity

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<sup>2</sup> Setiawan, *Pokok-pokok Hukum Perikatan*, Bandung: Bina Cipta, 1994, hal.49

<sup>3</sup> Purwahid Patrik, *Dasar-dasar Hukum Perikatan (Perikatan yang lahir dari perjanjian dan dari Undang-Undang)*, Bandung : Mandar Maju, 1994, hal.46.

<sup>4</sup> R. Subekti, *Hukum Perjanjian*, Jakarta: Intermasa, 1987), hal.1

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<sup>5</sup> R. Wiryono Projodikoro, *Asas-asas Hukum Perjanjian*, (Bandung : Sumur, 1993), hal. 9.

<sup>6</sup> Abdul Kadir Muhammad, *Hukum Perikatan*, Bandung: Citra Aditya Bakti, 1992, hal.78.

and has the authority to carry out legal actions as stipulated by law.

3. There is agreement between the parties;

Agreement between these parties is still not a negotiation. In negotiations, it is generally discussed about the terms and object of the agreement, then an agreement arises.

4. There are goals to be achieved.

Regarding the objectives of the parties should not conflict with public order, decency and not be prohibited by law.

5. There are achievements.

Achievement is an obligation that must be fulfilled by the party in accordance with the terms of the agreement, for example the purchase is obliged to buy the price of the goods and the seller is obliged to deliver the goods.

6. There are certain forms of oral or written.

The need for certain forms because there are provisions of the law which states that with certain forms an agreement has binding strength and strong evidence.

7. There are certain conditions as the contents of the agreement.

From certain conditions can be known the rights and obligations of the parties. These conditions comprise the

basic conditions that give rise to basic rights and obligations.

## B. RESEARCH METHOD

### 1. Research Type

The type of this study is normative juridical approach. It is a study which concentrates on assessing the application of norms or positive legal norms.<sup>7</sup> Referring to Ronald Dworkin's term, this type of study is also mentioned as the term of doctrinal study which analyzes the written law, as well as the law decided by judge through the judicial process.<sup>8</sup> The Nature of study in this research is an analytical descriptive.

### 2. Data source.

The sources of data required in this research are secondary data as the main source gained from literature study. To have the data as a comparison in accordance with the need for the required analysis namely:

- a. The Primary legal substance is a binding legal material and is the main

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<sup>7</sup> Johny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*, Surabaya: Bayumedia, 2008, hal. 295

<sup>8</sup> Bismar Nasution, *Metode Penelitian Hukum Normatif dan Perbandingan Hukum* (dialog interaktif tentang penelitian hukum, USU tgl 18 Februari 2003), hal. 2

groundwork to be utilized in the framework of study. Regulations relating to Law Number 10 of 2009 on Tourism and, Law No. 8 of 1999 on Consumer Protection, Indonesian Civil Code on agreement, government regulations relating to the object of research.

- b. Secondary legal substances are materials that provide explanations about primary legal materials such as research results, scientific work of the law and other relevant research as supporting the process of data analysis.
- c. Tertiary legal substance such as supporting legal materials in the form of scientific journals, magazines, newspapers and other data to support the research process.

### **3. Legal Material Collection Technique**

Data collection method applied in this study is Library Research. This literature research is designed to have the secondary data by examining the literature, legislation, theories, the opinions of scholars and other matters related to the subject matter.

### **4. Legal Material Analysis**

The analysis will be implemented qualitatively by applying a deductive

method. This analysis begins with research activities and review of regulations on tourism, ICC on agreement, and assumption of risk and release of liability agreement between tour operator and tourist in following the whitewater rafting adventure tour package, include the analyzing cases based on existing literature materials. This activity is intended to facilitate the researcher in examining the problems proposed, interpret them and then draw conclusion.

## **C. RESEARCH RESULTS AND DISCUSSION**

### **Assumption of Risk and Release of Liability Agreement Between Tour Operator and Tourist in Following The Whitewater Rafting Adventure Tour Package**

The principle of freedom of contract means that a person is free to enter into an agreement, free to determine what will be agreed upon and is free to determine the form of the contract. This principle is intended so that an agreement can be made freely. Because the engagement adheres to an open system, then in making the agreement known as the principle of freedom of contract, this can be found in Article 1338 of ICC. This principle frees people to make or not

make agreements, with certain forms or not and are free to choose the laws that will be used for the agreement.

Consensualism principle, an agreement is deemed to have occurred if there is a consensus or agreement between the parties.

Pacta Principle Sun Servanda, the agreement is a law for the parties who make it. Agreements made legally by the parties bind those who made them, and the agreement applies like a law.

The principle of good faith, each agreement must be made and carried out in good faith. The principle of good faith can complement and determine the contents of the agreement.<sup>9</sup>

### **1. Legitimate Terms of an Agreement**

In order for the agreement to be legal and have legal force, it must first fulfill the legal requirements of the agreement, namely the law-determined agreement. It should be noted that agreements that comply with the law are recognized by law, whereas agreements that do not meet the requirements are not recognized by law even though they are recognized by the parties concerned. For this reason, if the parties acknowledge and comply with

the agreement they made even if they do not meet the terms of the agreement, they will apply. If at any time there are parties who do not recognize it again, then the judge will cancel or the agreement is canceled.

Under Article 1320 of the ICC, for the validity of an agreement the parties must fulfill the following conditions:<sup>10</sup>

- a. Agree that they commit themselves.
- b. The skill of the parties in making an agreement.
- c. A certain thing.
- d. A reason that is lawful.

The two subjects who entered into the agreement must agree on the main matters of the agreement held. What is desired by one party, also desired by the other party. They want something in common reciprocally. Both parties in an agreement must have the free will to bind themselves and the will must be stated.

Statements can be done sternly or secretly. Free will as the first condition for a legal agreement is deemed non-existent if the agreement has become due to:

- a) Duress (*dwang*);
- b) Errors (*dwaling*);
- c) Fraud (*bedrog*).

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<sup>9</sup> Anggraeni, *Hukum Perikatan (Perikatan yang Lahir dari Perjanjian)*, Semarang: Badan Penerbit Undip, 2003, hal . 85.

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<sup>10</sup> Indonesian Civil Code, article 1320

The person who made the agreement must be competent according to the law. This means that those who make the agreement and will be bound by the agreement, must have enough ability to realize that the responsibility will be carried out for their actions. Whereas from the point of law order, because a person who makes an agreement means risking his wealth, then that person must be someone who truly has the right to do with his wealth. An agreement must be about a certain matter, meaning that what is agreed upon is about a certain object that has been agreed upon. An agreement is valid if that reason is not prohibited by law, decency or public order.

## **2. Standard Agreement of Tour Operator**

The standard Agreement is translated from a term known in Dutch, namely the standard contract or *standard voorwaarden*. Outside the country there is no uniformity regarding the terms used for standard agreements. German literature uses the term *standard vertrag*, and British Law refers to a standard contract, or a standardized contract. Mariam Darus Badruzaman translates it with the terms standard agreement,

standard means benchmark, size, reference.

Therefore if the legal language is standardized, it means that the law is determined by its size, the standard, so that it has a fixed meaning that can be a general grip. While Handius formulated the standard agreement as follows: "*Standaardvoorwaarden zijnschriftelijke concept bedingen welke zijn opgesteld zonder orderhandelingen omtrent hun inhoud obgenomen te Indonesian worl een gewoonlijk onbepaald a nog te sluiten overeenkomsten van bepaald aard*" means: "A standard agreement is a written agreement concept that is discussed without discussing the contents and usually in a number of agreements not limited to certain nature. "

In line with the mass and collective nature of the standard agreement Vera Bolger named it take it or leave it contract. The point is that if the debtor approves one of the conditions, the debtor may only accept or not accept it at all, the possibility of making changes is completely absent. Article 1 number (10) Law No. 8 of 1999 concerning Consumer Protection (UUPK) provides an understanding of standard clauses

namely; "Every rule or provision of the conditions that have been prepared and determined unilaterally by the business actor as outlined in a document and / or agreement that is binding and must be fulfilled by consumers".

The standard agreement according to Sudaryatmo has the following characteristics:<sup>11</sup>

1. Unilateral agreement by producers whose position is stronger than consumers;
2. Consumers are not involved in determining the contents of the agreement;
3. Made in written and mass forms;
4. Consumers are forced to accept the contents of the agreement because it is driven by needs;

Standard agreements that are widely available in the community can usually be divided into three types, namely:<sup>12</sup>

1. A unilateral standard agreement, is an agreement whose contents are determined by the party who has a strong position in the agreement. Strong parties here are creditors who have a strong economic position. Both parties are usually bound in

organizations, for example in collective labor agreements.

2. The standard agreement stipulated by the government is a standard agreement whose contents are determined by the government against certain legal actions, for example agreements that have objects of land rights.
3. The standard agreement specified in the notary or advocate environment. It is an agreement that the concept was originally provided. To fulfill the request of community members who ask for help from the notaries or advocates concerned. In the Dutch library, this type is mentioned as *a contract model*.

Based on Article 18 paragraph (1) Law No. 8 of 1999, business actors in offering goods and / services intended for trading are prohibited from making or including standard clauses in each document and / or agreement if;<sup>13</sup>

1. Declare the transfer of responsibility of business actors;
2. Stating that the perpetrator has the right to refuse the return of goods purchased by consumers;
3. Stating that business actors have the right to refuse the return of money paid for goods and / services purchased by consumers;
4. Declare the granting of power and consumers to business actors both directly and indirectly to carry out all unilateral actions relating to goods purchased by consumers in installments;

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<sup>11</sup> Sudaryatmo, *Masalah Perlindungan Konsumen di Indonesia*, Citra A Bakti Bandung, 1996, hal. 93

<sup>12</sup> Farij Wajdi ; *Memahami Perjanjian Baku*, 2008

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<sup>13</sup> Law No. 8 of 1999, article 18 paragraph (1) on consumer protection

5. Regulate proof of loss of use of goods and / or utilization of services purchased by consumers;
6. Giving rights to business partners to reduce service benefits or reduce consumer assets that are the object of buying and selling services;
7. Declare consumer submission to regulations in the form of new rules, additions, continuations and / or further changes that are unilaterally taken by business actors in the period consumers use the services they buy;
8. Stating that the consumer gives power to the business actor for the release of mortgages, pledges, or guarantees, for goods purchased by consumers in installments.

In conclusion, Article 18 paragraph (1) of the Consumer Protection Act basically does not prohibit businesses from making agreements that contain standard clauses, as long as the clause does not include prohibited matters. But the reality is, even though there have been some restrictions in the Consumer Protection Act, still the standard agreement clause formulated by the Tour Operator Company (producer) places consumers in an unfavorable position. Because the needs of consumers are forced to accept conditions to be the subject of business activities to reap unfair profits by business actors.

On the other hand consumer also does not have sufficient knowledge about the forms of

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especially in Following The Whitewater Rafting Adventure Tour Package. The ability of consumer to fulfill the conditions set by default and unilaterally by business actor (producer) sometimes cannot be fulfilled when the agreement is temporarily running. In this case the consumer must accept all the consequences arising from the agreement even without his/her mistake.

The current standard agreement is still the norm in rafting adventure tour package transactions. For reasons of practicality, consumers are only offered a standard agreement and only have to sign it. The inclusion of an exoneration clause in a standard agreement is usually placed in a vague or "hidden" meaning that the agreement is conditioned to be read only at a glance. So that when the agreement takes place the consumer only understands a small part of the agreement, without being understood in depth of the legal consequences. These conditions make consumer as the service



user of the Tour Operator Company, is often unable to digest the contract or the agreement letter well, so that the potential for loss.

Following is the conditions for participating in the whitewater rafting adventure tour package, as stated in the Assumption of Risk and Release of Liability Agreement.<sup>14</sup>

**ASSUMPTION OF RISK AND  
RELEASE OF LIABILITY  
AGREEMENT**

I hereby agree to release and discharge A.R.R., on behalf of myself, my children, my parents, my heirs, assigns, personal representative and estate as follows:

1. I acknowledge that rafting on rivers entails, which could result in physical or emotional injured, paralysis, death, or damage to myself, to property, or to third parties. I understand that such risks simply cannot be eliminated without jeopardizing the essential qualities of the activity. The risks include, among other things: whitewater rapids will be encountered.

I can be jolted, jarred, bounce, thrown

to and fro and shaken about during rides through some of these rapids. It is possible that I could be injured if I come in contact with food boxes, other storage containers, or other fixed equipment necessary to the operation of the expedition and the outfitting of the raft. Rafts could turn over or I could be 'washed' overboard. I can slip or fall during a hike, resulting in damage to equipment or personal injury. Accidents can occur getting on and off the raft. Rafts are slippery when wet. Exposure to the natural elements can be uncomfortable and/or harmful. I am aware that this exposure could cause sunburn, dehydration, heat exhaustion, heat stroke, and heat cramps. Also prolonged exposure to cold water can result in hypothermia and in extreme cases death and accidental drowning is also a possibility. Furthermore, A.R.R. guides have difficult jobs to perform. They seek safety, but they are not infallible. They might be ignorant of a participant's fitness or abilities. They might misjudge the weather, the elements, or the terrain. They may give inadequate warnings or

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<sup>14</sup> Perjanjian Tanggungjawab resiko/*Assumption Of Risk And Release Of Liability Agreement* (A.R.R) peserta arung jeram.

- instructions, and the equipment being used might malfunction.
2. I expressly agree and promise to accept and assume all of the risks existing in the activity. My participation in this activity is purely voluntary, and I elect to participate in spite of the risks.
  3. I hereby voluntarily release, forever discharge, and agree to indemnify and hold harmless A.R.R. from any and all claims, demands, or causes of action, which are in any way connected with my participation in this activity or my use of A.R.R. equipment or facilities, including any such Claims which allege negligent acts or omissions of A.R.R.
  4. Should A.R.R. or anyone acting on their behalf, be required to incur attorney's fees and costs to enforce this agreement, I agree to indemnify and hold them harmless for all such fees and costs.
  5. I certify that I have adequate insurance to cover any injury or damage I may cause or suffer while participating, or else I agree to bear the costs of such injury or damage myself. I further certify that I have no medical or physical conditions, which could interfere with my safety in this activity, or else I am willing to assume-and bear the costs of-all risks that may be created, directly or indirectly, by any such condition.
  6. In the event that I file a lawsuit against A.R.R., I agree to do so solely in,Indonesia and I further agree that the substantive law of the state shall apply in that action without regard to the conflict of law rules of that state.
  7. I hereby grant permission to A.R.R. and any person or entity action on its behalf to take photographs or movies of this trip for any purpose, including commercial or advertising purposes.
  8. I understand A.R.R. is not responsible for actions or injuries caused by participants upon other participants.
  9. I understand and agreed (explained by phone or mailed) to the terms and conditions of the cancellation policy set forth by A.R.R. Also, No refunds for 'No Shows'. I authorize A.R.R. to charge my credit card for any incidental fees related to my rafting trip (extra night camp fees, meals, rental tents, etc.) These optional items are an additional cost to the client and are not included in the rafting package.

By signing this document, I acknowledge that if anyone is hurt or property is damaged during my participation in the activity, I may be found by a court of law to have waived my right to maintain a lawsuit against A.R.R. on the basis of any claim from which I have released him or her herein. I have had sufficient opportunity to read this entire document. I have read and understood it, and I agree to be bound by its terms.

Name (please print) Participant's  
Signature

Home Street Address (print) Apt #  
City (print)

State Zip Code Raft Trip Date Email  
Address (print)

Parent or Guardian Indemnification  
(Complete for minor participating  
under the age of 18)

In consideration of  
\_\_\_\_\_ (print  
Minor's name) being permitted by  
A.R.R. to participate in its activities and  
to use its equipment and facilities, I  
further agree to indemnify and hold  
harmless A.R.R. from any and all Claims  
which are brought by, or on behalf of  
Minor, and which are in any way

connected with such use or participation  
by Minor.

Parent/Guardian

Signature \_\_\_\_\_

\_\_\_\_\_

Print Name

\_\_\_\_\_

\_\_\_\_\_

Date \_\_\_\_\_

#### D. CONCLUSION

Based on the above discussion it can be concluded that in carrying out assumption of risk and release of liability agreement between the tour operator and tourist in following the whitewater rafting adventure tour package. The tour operators still use standard agreements (exoneration clauses) in their transactions.

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