

# **The Analysis Of Tour Operator Liability In Running Adventure Tourism Packages Viewed From Legal Aspects In Indonesia**

Padriadi Wiharjokusumo

Tourism and Hotel Academy of Darma Agung (APP) Medan  
E-mail: [knb.ministry76@gmail.com](mailto:knb.ministry76@gmail.com)

## **ABSTRACT:**

Tourists are the consumers of the services of Tour and Travel company. With its position as a consumer, where the position between tourists and the Tour and Travel company is opposite. Tourists need to have legal protection that can provide a sense of security in the use of services provided by the Tour and Travel company. which in this case acts as a producer. It does not have to be denied, however, that the number of tourists who use the services of Tour and travel company are often neglected their rights. Whereas it is very clear that the right of tourists is regulated in Article 20 of Law Number 10 of 2009 on Tourism.

Keywords: Legal protection, tourist, tour and travel company

## **A. INTRODUCTION**

Any accidents of tourism activities, especially whitewater rafting adventure tour package always cause harm to tourists who follow this activity. Of course, it will lead to legal issues, mainly with regard to the responsibility of the Tour and Travel company as a business actor against tourists as consumers. Besides, there will be another issue for the consumers that there is no legal effort can be made to the problem.

In relation to this matter, the government of Indonesia since April 20, 1999, has issued a legislative instrument that has dimensions to protect the consumers, that is the enactment of Law No. 8 of 1999 on Consumer Protection. This law regulates many things such as rights and obligations of consumers, as well as the rights and obligations of producers.<sup>1</sup> The presence of consumer protection legislation is expected to create a fair trade activity not only for

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<sup>1</sup> State Gazette of the Republic of Indonesia Number 42 of 1999. Supplement to the State Gazette of the Republic of Indonesia Number 3821.

business actors but directly for the benefit of consumers, whether as beneficiaries or as users of goods and/or services offered by business actors.<sup>2</sup>

Theoretically, legal relations require equality among the parties, but in practice, these legal relations often run unbalanced, especially in the legal relationship between producers and consumers, it also occurs in the legal relationship between consumers or tourists with Tour and Travel company, where consumers or tourists do not obtain their rights properly.

In connection with that, it is required a legal protection for consumers in whitewater rafting adventure tourism activities, especially conducted by tour operators who are not professional. The most important element in the protection of the law for the users of tourism services and other types of tourism is the element of security and safety and responsibility of the Tour and Travel company as a producer.<sup>3</sup>

A legal protection system for consumers of Tour and Travel company services is a system consisting of legislation and procedures governing all aspects either directly or indirectly concerning the interests of consumers of Tour and Travel company services, consumer protection is a total legal protection will provide protection to tourists starting from the stage of departure until when they have survived to the destination, or if they have an accident, until they or heirs are entitled to obtain compensation in an easy, cheap and fast way.

The elements of consumer protection of Tour and Travel Company services cover various aspects, among others; safety aspect; security aspect; comfort aspect; service aspect; tariff aspect and aspect of travel arrangement.<sup>4</sup>

## **B. RESEARCH METHOD**

### **1. Type of Research.**

The type of research conducted in this study is normative juridical research. Normative juridical research is a study focused on assessing the

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<sup>2</sup> Gunawan Widaja dan Ahmad Yani, 2003, *Hukum Tentang Perlindungan Konsumen*, (Jakarta: PT Gramedia Pustaka Utama) h. ix.

<sup>3</sup> Article 20 of Law No. 10 Year 2009 on Tourism

<sup>4</sup> *Ibid*

application of norms or positive legal norms.<sup>5</sup> Taking the term of Ronald Dworkin, this kind of research is also called the term doctrinal research, ie research that analyzes the law written in the book as well as the law decided by the judge through the judicial process.<sup>6</sup>

Besides, it is also used empirical legal approach which describes the real condition in the field research concerning the legal protection to tourists who follow the whitewater rafting tour package on the Alas river, Southeast Aceh conducted by Tour and Travel company.

The nature of research in this study is an analytical descriptive. Analytical descriptive research is a study that describes, examines, explains, and analyzes a rule of law. In addition, this research is also prescriptive (problem solving).

## **2. Research Sites**

The implementation of field research carried out at Tour and Travel company. and Alas River in Gunung Leuser National Park, Southeast Aceh, Indonesia.

## **3. Data source.**

The sources of data needed in this study are secondary data as the main source obtained from literature study. To obtain the data as a comparison in accordance with the need for the required analysis are:

- a. The Primary legal material is a binding legal material and is the main foundation to be used in the framework of research. Regulations relating to Law Number 10 of 2009 on Tourism and, Law No. 8 of 1999 on Consumer Protection, 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.

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<sup>5</sup> Johny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*, Surabaya: Bayumedia, 2008, hal. 295.

<sup>6</sup> Bismar Nasution, *Metode Penelitian Hukum Normatif dan Perbandingan Hukum*, disampaikan pada dialog interaktif tentang penelitian hukum dan hasil penulisan hukum pada majalah akreditasi, (Fakultas Hukum USU, tgl 18 Februari, 2003), hal. 2.

c. Tertiary legal material namely supporting legal materials in the form of scientific journals, magazines, newspapers and other data to support the research process.

#### **4. Legal Material Collection Technique**

Data collection method used in this research is Library Research. This literature research is intended to obtain secondary data by studying the literature, legislation, theories, the opinions of scholars and other matters related to the subject matter. In addition, Field Research is also used to collect primary data by conducting direct observation in the field and conducting in-depth interviews to the relevant sources within the object research.

#### **5. Legal Material Analysis**

The analysis will be conducted qualitatively by using a deductive method. This analysis begins with research activities and review of regulations on tourism and consumer protection of tourists who follow the whitewater rafting tour package on the Alas river conducted by Tour and Travel company includes analyzing cases based on existing literature materials. This activity is expected to facilitate the researcher in analyzing the problems proposed, interpret them and then draw conclusions.

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

#### **Legal protection to tourists who follow the whitewater rafting adventure package tour on the Alas river conducted by Tour and Travel company.**

A consumer is defined as a person or a company that buys certain goods or uses certain services. Consumers are end users without requiring consumers to act as purchasers of such goods and or services.<sup>7</sup> Tourists are consumers of services of Tour and Travel Company. This means that tourists are parties that use the products of services of Tour and Travel Company. With its position as a consumer, where the position between tourists and the Tour and Travel Company is opposite, tourists need to have legal protection that can provide a sense of security in the use of services provided by the Tour and Travel Company which in this case acts as a producer.

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<sup>7</sup> Rieyke Ustadiyanto, *Framework e-commerce*, (Yogyakarta:Andi, 2001), hal. 331-333

However, it can not be denied that tourists as parties who use the services of Tour and Travel Company often ignored their rights. According to Law Number 10/2009 on Tourism states that every tourist is entitled to:<sup>8</sup>

1. Accurate information on tourist attractions;
2. Tourism services in accordance with the standards;
3. Legal and security protection;
4. Health services;
5. Protection of private rights; and
6. Insurance coverage for high-risk tourism activities.

Whereas in article 62 of Law No. 8 of 1999 on Consumer Protection has been regulated on violations committed by business actors. But in every problem it is necessary to determine who is responsible, thus causing harm to the consumers. The problem of civil liability for negligence or errors in the company may be related to the management of the Tour and Travel company acting on behalf of the company's legal entity, which they deal with under the terms of the company's articles of association.

Thus the responsibility of the board consists of two kinds, namely; first, personal responsibilities and second, the responsibility of the company. If the board acts outside the prescribed authority then the personal responsibility exists. However, if he/she acts in the implementation and authority set forth in the company's articles of association then it is the responsibility of the company.

In each agreement, the position of the parties are equal. It means that the rights and obligations of the parties with respect to the agreement they make must be balanced. The position of tourists as the service users of Tour and Travel Company are very weak especially if there is a problem or dispute. In reality, the practice of the agreement between the Tour and Travel Company and the tourists can not be made as it should be, in the sense that it only protects the interests of the Tour and Travel Company, but does not provide adequate protection against the interests of tourists.<sup>9</sup>

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<sup>8</sup> Article 20 of Law No. 10/2009

<sup>9</sup> *Ibid*

This is because the Risk Agreement of Liability Agreement is created in the form of a standard agreement, whereby the agreement occurs by way of the party having prepared the standard terms on a printed agreement form and then presented to the other party to be agreed with virtually no freedom at all to the other party to negotiate on the terms proffered.<sup>10</sup>

For the assumption of Risk and Release of Liability Agreement, the draft agreement shall be drawn up by the Tour and Travel Company under the standard provisions made by them, as stated in the risk rapport accountability agreement form. All terms and conditions applicable to the execution of the agreement are those contained in the form.<sup>11</sup>

Referring back to Article 20 of Law Number 10 of 2009 on Tourism and Article 4 of Law No. 8 of 1999 on Consumer Protection and UN Resolution Number 39/248 of 1985 concerning Guidelines for consumer protection part II (General Principles) number 3, Tour and Travel Company must provide aspects of protection to tourists in the form:<sup>12</sup>

### **1. The Aspect of Safety Rafting.**

The main purpose of rafting adventure tourism activities is the safety of the trip. This aspect is closely related to the consumer protection of service users of Tour and Travel Company. In this context, the Rafting Company must anticipate all possibilities that can harm passengers while wading through the spectacular rapids that flow the Alas river from Ketambe, Southeast Aceh to Gelombang, South Aceh.

Therefore every rafting adventure activity on the Alas River is required to provide all rafting equipment, a reliable fleet and always in a state of use. Safety rafting is closely related to all physical equipment such as the inflatable boat, paddle, life jacket, helmet and others as well as maintenance aspects so as to meet the requirements of the standard of rafting technique.

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<sup>10</sup> Sutan Remy Sjahdeini, *Kebebasan Berkontrak dan Perlindungan yang Seimbang Bagi Para Pihak*, Jakarta: PT Gramedia **Pustaka** Utama, 1993, hal. 66

<sup>11</sup> Interview with Jaksin Limbeng, Director of PT. Jeram Tirta Sumatera, Medan on January 5, 2017

<sup>12</sup> Article 20 of Law Number 10 of 2009 on Tourism and Article 4 of Law No. 8 of 1999 on Consumer Protection and UN Resolution Number 39/248 of 1985 concerning Guidelines for consumer protection part II (General Principles) number 3

In addition, the safety aspects of rafting adventure tour are also closely related to the human resource factors involved in these adventure tourism activities. Safety is the overall result of a combination of factors, such as; the quality of inflatable boats which are able to crash the huge rapids, and various sharp rocks in rivers and river cliffs, as well as all personnel involved in organizing their own rafting adventure tour packages including tour guide, river guide/skipper), means of rafting, as well as rescue operations if in case of any participant falling and being dragged by the swift currents.

## **2. The Aspect of Security of Rafting**

Physically, the security aspect is an aspect most felt by tourists as consumers of service users of Tour and Travel company in following the rafting adventure tour package, in addition to the aspect of a rafting accident. Rafting security means that it is safe from a variety of disturbances, both technically and disturbingly from robbery and assault by wild animals as the boat goes through the dense tropical rainforest which is the habitat of wild animals such as; tigers, bears, snakes, wild pigs, crocodiles, and elephants and other beasts. In this aspect of security Tour and Travel company is required to ensure security during the whitewater rafting adventure tourism activities.

## **3. The Aspect of Leisure During Adventure**

In the aspect of comfort during following whitewater rafting adventure tourism activities on the Alas River, meaning that the Tour and Travel Company is obliged to provide convenience to its consumers. The aspect of adventure comfort before arriving at the put-in point or starting point during the overland tour are closely linked to the tourist coach such as seating, amenities, air conditioning, including accommodation facilities when customers stay at the hotel, and a decent tent when tourists are in the field, because usually, the program on the first day begins from Kualanamo Airport, Medan to Berastagi for accommodation. Then on the next day the journey continues to Ketambe, Southeast Aceh to start the tour package for rafting adventure for 5 (five) days 4 (four) nights.

#### 4. The Aspect of Service

Business adventure rafting tour is one form of trading services, so the service is one indicator is often used as the choice of potential customers. In connection with this aspect of service in the tour package of whitewater rafting adventure is closely related to the tour guide either on land or those who are in the river or during the adventure takes place. Tour guides as front liners in the field must pay attention to the duty of care principle to minimize or avoid potential risk/neglect.

When referring to the Queensland Adventure Activity Standard of Australia, every tour guide should prepare an Activity planning checklist prior to starting their assignment as described below.<sup>13</sup>

##### *Activity planning checklist:*

- ✓ *Sought approval for activity from relevant land or water manager*
- ✓ *Clearly stated objectives and learning outcomes*
- ✓ *Completed area assessment (e.g route, area significance, maps, river levels etc)*
- ✓ *Checked weather and made necessary alterations (e.g. gear, route)*
- ✓ *Maintained equipment logs*
- ✓ *Identified participants' social and cultural needs*
- ✓ *Assessed competence of leaders and assistant leaders (including the Working with Children check)*
- ✓ *Determined the leader to participant ratio*
- ✓ *Briefed all staff on activities, objectives, responsibilities, communications and emergency procedures*
- ✓ *Briefed all participants on activities, expectations, communications and emergency procedures*
- ✓ *Collected the names, addresses, and medical and emergency contact details for all participants*
- ✓ *Sought parental consent where appropriate*
- ✓ *Established cancellation, modification or postponement procedures*
- ✓ *Completed and shared the communication plan*
- ✓ *Packed appropriate first aid kits*
- ✓ *Checked all water, food, equipment and transport arrangements*
- ✓ *Identified support and evacuation abilities*
- ✓ *Completed and shared the contingency plan*
- ✓ *Identified emergency procedures*
- ✓ *Determined review procedures for activities*

In Queensland, Australia if the guide dismisses an Activity planning checklist, resulting in an accident, the court will consider that the guide/skipper

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<sup>13</sup> Queensland Adventure Activity Standard Australia, *River Rafting*, Version 2.0 November 2011



violates the principle of duty of care. The Judge will use the Transport Operations (Marine Safety) Act 1994), and the Transport Operations (Marine Safety) Regulation 2004, the Civil Liability Act 2003, the Competition and Consumer Act 2010 (Commonwealth) and the Fair Trading Act 1989 (Queensland) a minimum sentence of 2 (two) years in prison.<sup>14</sup>

In Indonesia in the case of a whitewater rafting accident that occurred in Progo River on February 2, 2011, which brought the group from Semarang and Magelang on the Adventure resort from Kali Elo - Progo River with Klamong-Ancol-Dekso Bridge (16 km) 2 (two) tourists were killed. The two guides as the responsible person of the activity were subject to article 356 of the Criminal Code concerning negligence with the threat of the maximum sentence of imprisonment for 5 years.<sup>15</sup>

### **5. The Aspect of Claim Submission**

In the rafting adventure activity is often the occurrence of risk of accidents that cause harm to tourists, in connection with it required consumer protection for tourists, namely the existence of settlement procedures or claims submissions are easy, fast and satisfactory. An easy procedure means that the passengers or their rightful heir, no need to take complicated procedures in realizing their rights. While the procedure is cheap means the tourists or heirs who have an accident do not need to spend expensive costs to settle compensation. Rapid dispute resolution implies that the procedure does not take a long time, in this case it can use an out-of-court settlement of disputes, because usually dispute resolution through the court takes a long time.

### **6. The Aspect of Protection Through Insurance**

In general, Tour and Travel Companies insure themselves against risks that are likely to arise in the implementation of its activities, including ensuring the risk of responsibility to passengers. In addition, insurance is covered by the company, in Indonesia is also known mandatory insurance services which is provided by the insurance company, PT. Jasa Raharja. In this insurance, the payer

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<sup>14</sup> See chapter 5 verse (3) Queensland Adventure Activity Standards - Version 2.0 November 2011

<sup>15</sup> <http://us.detiknews.com/read/2011/02/05/213327/1560855/10/buntut-insiden-perahu-arung-jeram-2-operator-diperiksa-polisi?n991103605>

is the passenger itself, while the company or the Tour and Company is merely acting as the collector.

As from the results of this study that in carrying out activities of rafting adventure tour packages often occur various accidents such as reversed boats when wading through a variety of rapids that are spectacular and malignant caused by nature and human error. The human error such as the guides do not scout the river that will be passed or giving the wrong command to the participants, as well as the rafting gears, do not meet the safety standard. If this is the case, the tour guides in the field have made a breach of the safety agreement (the agreement of Adventure Activity Standard). This has neglected the duty of care principle.

Based on theories and laws of travelers agreement as the injured party is given the right to claim compensation to the tour operator. Similarly, it is expressed by Mariam Darus Badruzaman, where one of the rights of consumers is the right to claim compensation (*schade vergoeding*). So, legal protection can be given under the agreement they make, that is, Risk and Release of Liability Agreement.

The loss that is experienced by tourists caused by human error, which in this case is done by the tour guide along with other staff is an act against the law as it is regulated in article 1365 of the Civil Code. The law provides legal protection for the aggrieved person by claiming the party causing the loss to provide compensation to the tourists who experience the loss of the Travel Service. Tour and Travel company as the organizer (producer) must provide legal protection and provide confidence for services that have been given.

In practice, however, the implementation of the tourist protection as the user of the service of Tour and Travel company. In general, if it is merely based on the agreement is very difficult to implement. The absence of Tour and Travel company's accountability clauses on matters that disadvantage tourists as such consumers undermines their position to obtain their rights. Meanwhile, Law Number 10/2009 on Tourism can be said does not contain provisions on legal protection for tourists. Therefore, Law No. 8/1999 on Consumer Protection is expected to be the legal basis for tourists to claim their rights.

Every agreement made by tourists and Tour operator. It can not contain a standard clause which states the transfer of corporate liability entirely to the tourist and covers the submission of a tourist complaint to the regulations in the form of new, additional, advanced, and/or advanced arrangements made unilaterally by the Tour and Travel company.

In practice this is still the case. The standard clauses that declare a complete transfer of responsibility to tourists certainly do not meet the sense of justice seen from any angle. This standard clause becomes standard in every agreement with tourists. An excerpt (*klausul ekseonerasi*) clause aims to release or limit the liability of either party to the other party's claim in respect of whether or not to properly perform its obligations specified in the agreement. This is a violation of article 18 paragraph (1) letter a and letter g of Law Number 8/1999 on Consumer Protection which says:<sup>16</sup>

"Business actors in offering goods and/services intended for trading are prohibited to make or include a standard clause in every document and/or agreement if:

- a. to declare the transfer of responsibility of business actor;
- b. to declare consumer's compliance with regulations in the form of new rules, additions, continued and/or advanced alterations made unilaterally by the business actor in the period of the consumer utilizing the services he /she purchases."

In addition to the inclusion of standard clauses, there is actually one important thing that it sometimes escapes the attention, which includes a standard clause with a very small writing that is difficult to read, or the use of words that are not understood by ordinary people in general. This is very common in field practice in Indonesia and causes potential tourists to be unwilling to read carefully the contents of the agreement and directly sign it. Whereas all the rights and obligations of tourists are listed in the agreement, so that when a problem occurs, then the tourists realize the unequal position.

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<sup>16</sup> Article 18 paragraph (1) letter a and letter g of Law Number 8/1999 on Consumer Protection

## D. CONCLUSION

Based on the above discussion it can be concluded that tourists as consumers of products of Tour and Travel company have been entitled by Law Number 10 of 2009 on Tourism to have accurate information on tourist attractions; tourism services in accordance with the standards; legal and security protection; health services; protection of private rights; and insurance coverage for high-risk tourism activities. Whereas article 62 of Law No. 8 of 1999 on Consumer Protection has regulated on violations committed by Tour and Travel company as a business actor.

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