

## Legal Protection of Peer to Peer Lending Loans in Standard Agreements Based on Legal Assurance Theory

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**Abstract:** *The development of a peer to peer lending platform in Indonesian is called information technology-based lending and borrowing services of Indonesia in years ago, creating a legal problem with the requirements of institutions become organizers or administrators of the peer to peer lending platform. In the process of borrowing these funds, investors certainly use the services of peer to peer lending companies as parties that manage peer to peer lending websites through standard agreements. The standard agreement contains the transfer of obligations which should be the responsibility of the peer to peer lending organizer to users (lenders and borrowers). This research used normative juridical method. The results of this study indicate the legal certainty of the existence of a peer to peer institution is determined through the validity or not of the loan agreement made by the institution, but there is no legal certainty, clarity of regulations regarding the peer to peer institution. Thus, it is expected that in the future a clear regulation will be made regarding the peer to peer institution that develops in Indonesia.*

**Keywords:** *Exoneration Clause; Peer To Peer Lending; Standard Agreement.*

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### INTRODUCTION

Today's business world can be done either directly or using connected computer media called the Internet, because it is supported by an internet network so that business people can sell and offer services via the internet online. The development of technology in Indonesia is growing day by day. These developments were created in line with human needs, namely to make life easier than before.<sup>1</sup>

In 2002 over a trillion dollars of revenue was generated from the internet.<sup>2</sup> The development of electronic transactions in Indonesia is one of the countries with the highest economic growth in the world with the largest middle class growth in Southeast Asia. This condition makes Indonesia fertile ground for business players, especially retail businesses. The large population of 250 million people with a per capita income of USD 3,475 is a

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<sup>1</sup> Hikmahanto Juwana, *Hukum Ekonomi Dan Hukum Internasional* (Jakarta: Lentera Hati, 2002), 23.

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<sup>2</sup> Ibid, 37.

fertile market for this business actor.<sup>3</sup>

“According to The National Digital Research Center (NDRC)<sup>4</sup>, in Dublin, Ireland, defines financial technology as “financial innovation” services” or “innovations in financial technology financial services” which is an innovation in the financial sector that gets a touchmodern technology.<sup>5</sup>

In Indonesia itself, although the P2P Lending business has been carried out quite a lot by companies, according to data from the OJK, the development of Fintech startups in Indonesia is currently very fast. Based on the description above, that the P2P Lending service provides convenience and benefits for the community, borrowing and borrowing money no longer requires a physical meeting between the borrower and the lender but is met through an application or website or online application provided by the P2P Lending provider company. very easy and fast process compared to borrowing money through a bank institution.

The transactions offered by P2P Lending services actually weaken the position of the lender. The application of P2P Lending as a digital banking has made the entrance for cyber crime actors more open. To run a P2P

Lending Company, the manager of the P2P Lending site determines and formulates and implements a standard agreement in providing loans, and does not have a clear reference/standard, which will open up the opportunity to pass a loan application which is very risky and can cause a breach of contract that will result in a loan. detrimental to the lender, this needs to be investigated whether the standard agreement provided by the P2P Lending company is in accordance with applicable law in Indonesia.

In the implementation of peer to peer lending, there is a risk of default or Non Performing Loan (NPL), which means non-performing loans by debtors. The ratio of non-performing loans (NPL) in information technology-based lending and borrowing services in January 2019 rose to 1.68% compared to the position in December 2018 of 1.45%<sup>26</sup> which means this causes losses for creditors as lenders. In addition, the information technology-based lending and borrowing services mentioned above do not provide a protection fund, namely a guarantee for the return of the lender's funds if the loan recipient fails to pay the loan.

Based on Financial Services Authority Regulation Republic Of Indonesia Number 10 /Pojk.05/2022 About Information Technology-Based Collective Funding Services Article 7 paragraph 1 states that “PSP must be responsible for losses suffered by Operator, if the loss arises due to:

- a. PSP either directly or indirectly with bad faith use the Operator to PSP interests;
- b. PSP was involved in an unlawful act which performed by the Operator; or
- c. PSP either directly or indirectly unlawful use of wealth Operator, which results in wealth The organizers become insuffi-

<sup>3</sup> Buyung Muniriyanto, “Menelusur Pajak Atas Transaksi E-Commerce,” *Direktorat Jenderal Pajak*, last modified 2015, <http://www.pajak.go.id/content/article/menelusur-pajak-atas-transaksi-e-commerce>.

<sup>4</sup> Ratna Hartanto and Juliyani Purnama Ramli, “Hubungan Hukum Para Pihak Dalam Peer to Peer Lending,” *Jurnal Hukum Ius Quia Iustum* 25, no. 2 (2018): 320–338, <https://journal.uui.ac.id/IUSTUM/article/view/9741>.

<sup>5</sup> Irma Muzdalifa et al., “Peran Fintech Dalam Meningkatkan Keuangan Inklusif Pada UMKM Di Indonesia (Pendekatan Keuangan Syariah),” *Jurnal Masharif Al-Syariah: Jurnal Ekonomi dan Perbankan Syariah* 3, no. 1 (2018): 6, <http://journal.um-surabaya.ac.id/index.php/Mas/article/view/1618>.

cient to meet financial obligations.”.

In practice, the organizers limit their obligations and responsibilities by making an exoneration clause in the standard agreement for P2P Lending service users. The exoneration clause contains the transfer of the operator's responsibility for the losses suffered by the lender as a user of P2P Lending services. The provisions on the limitation of liability and compensation are clauses that are detrimental to the lender as a user of P2P Lending services and are prohibited by law. This clause shows that there is a form of transfer of responsibility carried out by the P2P Lending service provider company, so that the lender as the user ultimately bears the risk.

Based on the search and examination of the data, to the knowledge of the researcher, it has never been discussed or studied by other parties. The research is similar to the research theme of the researcher, namely, the thesis entitled “Juridical Analysis of Consumer Protection Against Peer Too Peer Lending Lenders” which is the work of Nick Sanjaya, Master of Law Study Program at Parahyangan Catholic University. The difference is that this thesis focuses on providing consumer protection to lenders as lenders in Peer to Peer Lending services, but does not discuss the construction of standard agreements in the lender's agreement and does not discuss the legal position of Peer to Peer Lending institutions as non-financial service providers. bank

Based on the background of the problems described above, in this study the main issues that will be discussed regarding the standard agreement in Peer To Peer Lending in accordance with the provisions of the standard clause in the Regulation of the Financial Services Authority and the legitimacy of Peer To Peer Lending institutions as Financial Servic-

es Institutions viewed from the theory of legal certainty.

## METHOD

The method used by the researcher in this study is normative juridical, meaning that it is only done by examining library materials or secondary data of a legal nature. This normative legal research or library research is a research that examines document studies, which uses various secondary data such as legislation, court decisions, legal theory, and can be in the form of opinions of scholars.

The approach in this research is intended so that the existing legal materials become the basis for the point of view and framework of researchers for conducting analysis. In this study, the approach to the Legislative Approach (Statute Approach) is carried out, namely conducting an assessment of the laws and regulations related to the research center, in this case it is intended that the researcher uses the legislation as the initial basis for conducting the analysis, namely regarding the legal position of P2P Lending as Financial Services Institutions and analysis of standard agreements as an effort to protect P2P Lending service lenders. The legislation that researchers use is Law No. 21 of 2011 concerning the Financial Services Authority.

## ANALYSIS AND DISCUSSION

### Agreement Contract Clause in P2P Lending

In this study, the authors analyze in the form of standard agreements on two (2) P2P Lending management sites operating in Indonesia, namely Modalku.com and Investree.com, that in the two information technology-based lending and borrowing agreements found several clauses that are prohibited

from being included under the Regulations. Financial Services Authority No. 7 of 2013 concerning Consumer Protection in the Financial Services Sector (hereinafter referred to as POJK No. 7/2013 PKSJK) and Financial Services Authority Regulation No. 10 / Pojk.05/2022 information technology-based co-financing services (LPBBTI).

The clauses above are agreements between P2P Lending managers (Modalku.com and Investree.com) and P2P Lending Users (Lenders and Borrowers). Judging from the legal relationship formed between the parties in the P2P Lending agreement, the agreement that is formed directly is between the P2P Lending manager and the lender or P2P Lending manager and the loan recipient, while between the lender and the loan recipient is not formed directly.

Based on the clauses in the agreement above, there are standard clauses that contain the transfer of the loss burden and the transfer of responsibility (called the exoneration clause) from the P2P Lending managers (Modalku.com and Investree.com) such as “the customer agrees that Modalku will be released and will not be liable responsible for the failure or negligence of returning the loan facility by the borrower to the Customer as the lender or any non-compliance or violation of the provisions of any loan agreement by the borrower.

The prohibition on the inclusion of standard exoneration clauses is strictly regulated in Article 22 of POJK No. 7/2013 PKSJK that: “The standard agreement used by Financial Services Providers (hereinafter referred to as PPUK) is prohibited, stating the transfer of responsibility or obligation (bold and underlined by the author) of the PUJK to consumers.”

### **Standard Agreement in P2P Lending Based on Financial Services Authority Regulation**

P2P Lending is the provision of financial services to bring together Lenders and Borrowers in order to enter into lending and borrowing agreements through an electronic system using the internet network.<sup>6</sup> P2P Lending Service is an Indonesian legal entity provider that provides, manages, and operates Information Technology-Based Lending and Borrowing Services. Borrower is a person and/or legal entity that has debt due to an Information Technology-Based Lending and Borrowing Service agreement.<sup>7</sup>

The relationship between the P2P Lending Manager and the Borrower, and the relationship between the recipient of funds and the Lender, the three relationships can be described, namely<sup>8</sup>:

1. Relationship between P2P Lending Management Company and Lenders. P2P Lending Management Companies play a role in providing easy search and distribution of funds for the financial needs of the community.
2. Relationship between Lenders (Lenders) and Borrowers (Borrowers). In the practice of P2P Lending, Lenders and Borrowers interact through available web pages or applications (world wide web), therefore, basically the two do not have a direct relationship or relationship based on an agreement. Lenders make agreements with P2P Lending Managers not with Borrowers.
3. Relationship between P2P Lending

<sup>6</sup> “P2P Lending Dalam Konteks Teknologi Keuangan Dunia,” *Sofis*, <https://sofis.id/p2p-lending-dalam-konteks-teknologi-keuangan-dunia/>.

<sup>7</sup> Ibid

<sup>8</sup> The results of the research, Thursday 12 July 2018.

## Managers and Borrowers (Borrowers)

The Borrower begins to have a legal relationship with the P2P Lending Manager when the Borrower registers a project that requires loan funds on the website or application page, to register, the Borrower must meet various terms and conditions, starting from filling out the registration form and upload various supporting documents. As an example of a standard agreement prepared by Modalku.com, the legal relationship formed is an affiliation relationship, meaning that it is a collaboration between two independent institutions. In Modalku.com there is a similar clause, namely that the Borrower is fully responsible for the correctness of the business activities, implementation and accountability of the project.

If you look at the P2P Lending mechanism and the meaning described previously, the relationship between the lender and the borrower in P2P Lending is the relationship between the creditor and the debtor in a borrowing and borrowing agreement with natural interest Article 1754 of the Criminal Code that: to the other party a certain amount of goods which are exhausted due to use, on the condition that the latter party will return the same amount of the same type and quality. Furthermore, Article 1765 of the KUHPdt states that: it is permissible to agree on interest on loans or other items that are used up due to use.

For example, PT. Mitra Usaha Indonesia Group (Under the name fintech Modalku.com) as one of the P2P Lending companies in Indonesia requires lenders (Borrowers) to create accounts and agree to terms of use, in order to access marketplace lending. The marketplace lending agreement can be

categorized as a standard contract

In the principle of agreement, everyone is given the opportunity to express his wishes or desires related to the agreement he will make. Therefore, the agreement must pay attention to the principle of freedom of contract. With the principle of freedom of contract, the parties can actually not only choose with whom they will enter into an agreement, but can also determine the content and terms of the contract or agreement that they make, as long as they do not conflict with the law, public order and morality. This clause is called the exoneration clause.

Based on the explanation above, according to the author, the exoneration clause is a standard clause that is included in an agreement in which one party avoids not fulfilling its obligation to pay compensation that should or occurs because of a broken promise or unlawful act. This clause is an agreement that is detrimental to consumers whose position is weaker than business actors.

In this study, the authors analyze in the form of standard agreements on two (2) P2P Lending management sites operating in Indonesia, namely Modalku.com and Investree.com, that in the two information technology-based lending and borrowing agreements found several clauses that are prohibited from being included under the Regulations. Financial Services Authority No. 7 of 2013 concerning Consumer Protection in the Financial Services Sector (hereinafter referred to as POJK No. 7/2013 PKSJK) and Regulation Of Financial Services Authority Republic Of Indonesia Number 10 /Pojk.05/2022 About Information Technology Based Joint Funding Services.

Some of the standard clauses prepared by Modalku.com P2P Lending managers are:

1. Article 5 paragraph (2) Modalku



Subscription Agreement; “Customer agrees to indemnify Modalku from, indemnify him and not seek compensation from him (and its officers, directors, commissioners, parent companies, affiliates, subcontractors, suppliers, agents, representatives, proxies and employees of the “Related Parties”) for any losses, expenses and responsibilities that are real or can be suffered or incurred by Modalku as a result of or in connection with the choice of form of granting loan facilities by Modalku for and on behalf of the Customer based on the authority and power granted by the Customer as stated in this Agreement.”

2. Article 5 paragraph (4) : Modalku will not, and the Customer is obliged to ensure that Modalku will not be involved, in any way or under any circumstances, in proceedings, investigations, inspections, examinations, disputes, negotiations and conflicts arising out of or in connection with matters -things as referred to in Article 5 paragraph 3 letters (a) and (b) above unless Modalku expressly chooses or is willing to be involved.”
3. Article 5 paragraph (7) “Customers agree that Modalku will be released and will not be responsible for the failure or negligence of returning loan facilities by the borrower to the Customer as the lender or any non-compliance or violation of the terms of any loan agreement by the borrower”.

While the agreement in Investree.com contains standard clauses, namely:

1. Article 4 paragraph (2) letter (b) Membership Agreement to Provide Investree Loans; “The Lender hereby releases, releases and indemnifies the Investree for granting loans to the

Borrower, based on the Loan Agreement, which is chosen by the Investree as long as the selection is made with the criteria for the Borrower determined by the Lender previously in writing and/or through the Website. ;”

2. Article 4 paragraph (2) letter (d); “The Lender hereby releases, releases and indemnifies the Investree against any and all claims or liabilities submitted by third parties related to the funds placed by the Lender in the Lender’s Account;”

The clauses above are agreements between P2P Lending managers (Modalku.com and Investree.com) and P2P Lending Users (Lenders and Borrowers). Judging from the legal relationship formed between the parties in the P2P Lending agreement, the agreement that is formed directly is between the P2P Lending manager and the lender or P2P Lending manager and the loan recipient, while between the lender and the loan recipient is not formed directly. The prohibition on the inclusion of standard exoneration clauses is strictly regulated in Regulation Of Financial Services Authority Republic Of Indonesia Number 10 /Pojk.05/2022 About Information Technology Based Joint Funding Services Article 30 The LPBBTI implementation agreement must at least consist of: a. agreement between the Operator and the Fund Provider; and b. agreement between the Fund Giver and the Fund Recipient. Article 31 (1) The agreement between the Provider and the Fund Provider is set forth in an Electronic Document

With the POJK No. 10 /Pojk.05/2022 information technology-based co-financing services (LPBBTI), P2P Lending is prohibited from declaring the submission of P2P Lending site users to regulations in the

form of new, additional, continued and/or continued changes made unilaterally by P2P Lending during the loan agreement period. So if there is still such a clause included in the loan agreement, then this agreement should be Requested Cancellation (bold and underlined by the author) by the user. This provision is fully aimed at protecting the interests of consumers (lenders and borrowers) users of P2P Lending fintech financial services.

The clause containing the exemption or limitation of liability from the business actor which is usually contained in this type of agreement, according to the author, is no longer appropriate, because it is not in line with the law that continues to develop. With the POJK No. 10 /Pojk.05/2022 information technology-based co-financing services (LPBBTI), strictly prohibits the inclusion of standard clauses in every document and/or agreement whose purpose is to harm consumers, inclusion of standard clauses can appear in the form of an electronic agreement or agreement document (e-contract).

The term Undue influence or abuse of circumstances is an act to obtain certain advantages by taking advantage of a state of danger or weakness of another party. Undue influence occurs when the stronger party takes advantage of the weaker party's situation, so that the weaker party is willing to agree to an unequal (one-sided) contract made by the stronger party.<sup>9</sup>

Elucidation of Article 18 Paragraph (1) of the PK Law states the purpose of the prohibition on the inclusion of standard

clauses, namely: "This prohibition is intended to place consumers on an equal footing with business actors based on the principle of freedom of contract". Thus, the enactment of Article 18 paragraph (1) of the PK Law will empower and prevent consumers from being in a position as weak parties in contracts with business actors so as to equalize the position of business actors with consumers. In addition, based on Article 7 of the PK Law. The obligation of business actors is to "have good intentions in carrying out their business activities".

Although the P2P Lending agreement has been agreed upon by the parties based on the principle of freedom of contract, it cannot be considered valid if it contains an exoneration clause in it (bold and underlined by the author). The standard clause becomes inappropriate when the position of the parties in P2P Lending becomes unbalanced because basically, an agreement is valid if it adheres to the principle of consensualism, is agreed upon by the parties and binds the parties who make the agreement as a law, a violation of the principle of consensualism in The loan agreement cannot provide legal certainty in providing balance and justice protection.

According to the author's analysis, based on the results of an interview with Noviyanto Utomo, Head of the Supervision of Non-Bank Financial Institutions (NBFIs) of the Financial Services Authority Regional Office 2 West Java, that P2P Lending in providing loans must have confidence based on an in-depth analysis of good faith and ability and ability debtor customers to pay off should be in the event of credit or non-performing loans, legal certainty in reducing credit risk through risk management certainty as a management discipline whose goal is to protect the assets

<sup>9</sup> Fatmah Paparang, "Misbruik Van Omstandigheden Dalam Perkembangan Hukum Kontrak," *Jurnal Hukum Unsrat* 22, no. 6 (2016): 48, <https://ejournal.unsrat.ac.id/index.php/jurnalhukumunsrat/article/view/13192>.

and profits of the Lender by reducing potential losses, then P2P Lending makes efforts to overcome credit problematic until there is no other alternative, and carry out credit write-offs and credit management that have been written-off (extra komtabel).<sup>10</sup>

## CONCLUSION

The Electronic Document must at least contain: a. agreement number; b. agreement date; c. identity of the parties in the form of the name of the Funder and the Identity Number of the Funder; d. rights and obligations of the parties; e. amount of Funding; f. economic benefits Funding; g. the amount of the commission; h. time period; i. cost breakdown; j. provisions regarding fines, if any; k. use of Personal Data; l. Funding collection mechanism; m. risk mitigation in the event of non-performing Funding; n. dispute resolution mechanism; and o. mechanism for the settlement of rights and obligations in the event that the Operator is unable to continue its operational activities.

Providers are required to provide Funders with access to information on the use of their funds. Article 102 (1) In the event that the Fund Beneficiary defaults, the Provider is required to collect the Funds Recipient, at least by providing a warning letter in accordance with the time period in the Funding agreement between the Fund Provider and the Fund Recipient. (2)

The warning letter as referred to in paragraph (1) must contain at least the following information:

- a. the number of days of late payment of obligations;
- b. the final position of the total Funding that

has not been repaid or the principal outstanding;

- c. economic benefits Funding; and
- d. the fine payable.

Operators are required to conduct periodic evaluations for the cooperation with other parties as intended.

According to the author, although the P2P Lending agreement has been agreed upon by the parties based on the principle of freedom of contract, it cannot be considered valid if it contains an exoneration clause in it (bold and underlined by the author). The standard clause becomes inappropriate when the position of the parties in P2P Lending becomes unbalanced because basically, an agreement is valid if it adheres to the principle of consensualism, is agreed upon by the parties and binds the parties who make the agreement as a law, a violation of the principle of consensualism in The loan agreement cannot provide legal certainty in providing balance and justice protection.

When a financial services authority regulation POJK No. 10 /Pojk.05/2022 information technology-based co-financing services (LPBBTI), creates ambiguity and multiple interpretations, the existence of P2P Lending in the financial world should be clearly and concretely regulated in accordance with the facts in the form of a law as a positive law, so that it is not easy to change.

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## Interview

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