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Abstract
This study analyzed the abuse of circumstances as a factor that delimits the freedom of making a contract associated with the onset of the contract, not because of the casue which is not allowed. The abuse of circumstance is not only related to the content of a contract, but rather related to what had happened at the time of the inception of the contract as one of the parties feels constrained to determine their will in a contract. It concerns on the circumstances that contribute to onset of the contract (i.e., taking benefit from other's circumstance does not cause the content or intent of a contract be not permissible, rather, it may cause the missused will be restricted). The abuse of circumstances may happen due to one's superiority over another party. The superiority is not only economic in nature, but also psychological, or both. Misusing such superiority may cause circumstance abuse. It is due to *inequality of bargaining power* that the weak cannot avoid from, while the stronger party abuses the circumstance by imposing the contents of the contract that leads to the inequal advantages for both parties. In Indonesia, the abuse of circumstances is often used as a cause to abrogate a contract due to the defect of will, although it is not yet regulated in legislation but rather derived from a legal construction recognized by the jurisprudence of the Supreme Court. It is definitely differenct from Netherlands that has regulated its *misbruik van omstandigheden* in article 3:44 lid 1 *Nieuw Burgerlijk Wetboek*.

Keywords: Circumstance Abuse, the Freedom of Making Contract, the Defect of Will, Comparison, Netherlands, Indonesia, Judiciary.

JEL Classification: K11, K22, K23.

Introduction

The source of contract law in Indonesia recently applies *Burgerlijk Wetboek* (BW). Another source of law in fragmentary setting is found in multiple legal regulations and jurisprudence. Many countries have made their contract law more modern, including Netherlands that uses a new codification called *Nieuw Burgerlijk Wetboek* (Simamora 2016, 1).

A contract is established based on an agreement. In normal situation, the interest corresponds to the statements of a contract. However, it is not impossible to make a deal due to the defect of will. The establishment of a contract due to the defect of will may make the contract abrogated (*vernietigbaar*) (Huda 2017,56). In BW, there are 3 (three) cause making such contract abrograted/null. Those include: digression or *dwaling* (Article 1322 BW), constraint or *dwang* (Article 1323-1327 BW), and deception or *bedrog* (Article 1328 BW). Furthermore, In Indonesia, the abuse of circumstances is used as a reason to abrogate a contract due to the defect of will, although it is not yet regulated in legislation but rather derived from a legal construction recognized by the jurisprudence of the Supreme

Court. It is definitely differenct from Netherlands that has regulated its *misbruik van omstandigheden* in article 3:44 lid 1 *Nieuw Burgerlijk Wetboek*. (Hernoko, 2010: 168).

Therefore, this study investigated a legal issue that deals with the reason of abrogating a contract due to circumstance abuse. It aimed to figure out the substantial nature of contract cases.

1. Circumstance Abuse as a Factor Delimiting the Freedom of Making a Deal

The nullification and abrogation of a contract is set in Book III Section 8 Chapter IV, Article 1446 up to Article 1456 BW. The provision set in BW briefly yet partly regulates the aspects of nullification, especially the contracts made by a minor, placed under *curatele*, and having the defect of will. A defect of will may happen due to a constraint, error, deception, and circumstance abuse (Budiono, 2008: 367). The term of nullification' has unclear implementation, as Herlien Budiono argued that:

> "When a regulation asserts that there will be a legal consequence, it simply say "null", however, it may sometimes use the term "null and void" (Pasal 879 BW) or "powerless" (Pasal 1335 BW). The usage of those terms is quite confusing since the same terms are sometimes used with different meaning, such as "null and void" or "can be null". In Article 1446 BW and the other ones, to decide the nullification of a legal action, we find some terms such as 'null and void', 'null it' (Article 1449 BW), 'requesting for nullification' (Article 1450 BW), 'statement of nullification' (Article 1451-1452 BW), 'aborted' (Article 1545 BW), and 'null and void' (Article 1553 BW).

Therefore, the terms of nullification and abrogation are considered different, but they are used for the similar reasons. Those all regulations, however, do not describe the execution of nullification and abrogation on a contract, in case of under which conditions or reasons it may lead a contract into the qualification of nullification or abrogation (Utrecht 1986, 109).

Article 1320 BW is one primary instrument used to examine the legality of a contract. In that article, 4 criteria are mentioned to identify whether or not a contract is legal. Those are as follow.

(a) Their contract confines them (*de toestemming van degenen die zich verbinden*);
(b) The proficiency to make a contract (*de bekwaaheid om eene verbintenis aan te gaan*);
(c) Particular notion (*een bepaald onderwerp*);
(d) A rightful and legal cause (*eene geoorloofde oorzaak*).

Agus Yudha Hernoko defines a term called "UJI 1320" to examine the legality of a contract based on the article 1320 BW. It refers to a systematical method to examine and detect the legality of a contract (Simamora, 2010: 30). Examining the legality of a contract by Agus Yudha Hernoko corresponds to *in casu* articles, including "UJI 1335, UJI 1337, UJI 1339, UJI 1347". This method is a further standard to confirm the result of the first examintation "UJI 1320". In addition, M. Isnaeni formulates 4 (four) criteria, which are linked to certain related articles, for the legality of a contract as follow.

(a) The contracting parties agree to make a contract (vide Article 1321-1328 BW);
(b) The contracting parties are proficient to do legal actions (vide Article 1329-1331 BW);
(c) The characteristics and the width of the object of a contract can be identified (vide Article 1332-1334 BW);
(d) The causa is legal or rightful (vide Article 1335-1337 BW).

In relation to those four criteria, based on the article 1320, for the legality of a contract BW, further explanation dealing with consequences that occur due to the unfulfillment of each of those criteria involves: *first*, it deals with agreement and proficiency, considered as subjective criteria since those relate to the subject of a contract. *second*, it deals with the criteria of particular object or legal causa, considered as objective ones (Hernoko 2010,160).

Applying the terms of nullification and abrogation over the legality of a notarial deed must be linked to the legality of a contract or treaty. Those include the term 'null and void' (*nietig*) which

becomes a common term to judge whether a contract cannot meet the objective criteria; referring to certain things (*een bepaald onderwerp*) and rightful causa (*eene geoorloofde oorzaak*), and the term 'can be null' on which a contract is considered unqualified with the subjective criteria; referring to 'their contract confines them' (*de toetsemming van degenen die zich verbinden*) and 'the proficiency to make a contract' (*de bekwaamheid om eene verbindtenis aan te gaan*).

When it does not meet the subjective criteria, a contract can be null (*vernietigbaar*) as long as particular parties with certain interests propose a request for nullification (Prodjodikoro 1989, 121). This subjective criteria is always close to the threat of nullification by parties with certain interests, including parents, relatives, or other representatives. In order to avoid such threat, a request for confirmation that a contract will still be applied and confining can be proposed to those parties. This nullification is called as relative nullification (Adjie 2009,65).

However, when it does not meet the objective criteria, a contract will be null and void (*nietig*) without needing any request for confirmation by contracting parties, and thus, the contract is considered never exist and not confining to anyone. The null contract may absolutely happen on which the contract is unfulfilled, whereas, the regulation for that legal action must be made through predermined fashion or against the morality or common rules. As the contract is considered never exist, any principle is no longer applied for the contracting parties to make a suit through various manner. For instance, a contract for providing security right as a guarantee of loan payment from a debtor to a creditor must be established in the form of PPAT deed; in fact, it is not fulfilled. Thus, the legal action is considered null and void. This nullification is called absolute nullification (*absolute nietigheid*).

Having a deal means that the contracting parties clarify their will to end an agreement or that one party has corresponding will while the others not. The clarification of willing is not always clearly pronounced. It may also be expressed through attitudes or other settings that clarify the willing of the contracting parties.

The first subjective element deals with an agreement independent or without any pressure and intervention from any party but solely the interests of the contracting parties. Article 1321 BW confirms that when it finds that a contract is made under pressure or due to certain threat making the threatened party anxious and has no choice but approving the contract, it may lead to the nullification of the contract.

Subekti defines this matter as a psychological coercion in the form of threat (e.g., a violence causing anxiety or fear) and it refers to an action against the law (Subekti, 1989: 23).

A contract derived from an agreement that emerges because of the existence of demand and offering may possibly be made due to the defect of will (*wilsgebreke*). Such contract has legal consequence including the nullification of the contract (*vernietigbaar*). Based on BW, there are 3 (three) cause for the nullification of a contract due to the defect of will, as follow.

(a) Digression or *dwaling* (Article 1322 BW)
Digression may happen on which it deals with "the nature of things or person" and the opponent party must identify or, at least, see the characteristics or circumstance that causes digression for the other party (in relation to the identified or recognized criteria; *kenbaarheidsvareiste*). Therefore, the digression over the nature of things linked to the forthcoming circumstance due to the self-mistakes or self-risk agreement may not be used as a cause for the nullification of a contract.

(b) Constraint or *dwang* (Article 1323-1327 BW)
Constraint happens on which an individual is willing to end a contract (making a deal) due to a threat that points to an action against the law. The threat considered as one against the law includes:
(1) The threat itself is an action against the law (e.g., murder, abuse).
(2) The threat is not an action against the law, however, it aims to attain something that does not belong to the perpetrator's right.

(c) Deception or *bedrog* (Article 1328 BW)

Deception is a kind of disqualifying digression. It means that deception is likely to happen when an erroneous illustration on characteristics and circumstances (digression) is derived from a misleading action. To succeed the tenet of deception, a misleading illustration is resulted from a series of deceptions (*kunstgrepen*).

Deception is a cause to abrogate a contract. When one of the contracting parties does a deception in such a way making another party approve the deal due to the deception. Such deception is done through a set of misleading statement or utterance that relates to the content of the deed from one contracting party toward another party, and thus, it makes the deceived party approve the deed. It is a must to prove such deception as an actual disadvantage by one of the contracting parties.

In addition to the cause leading to the defect of will as previously described, a doctrine of circumstance abuse has developed (*Misbruik van Omstandigheden/undue influence*) as an element of a will defect which may cause the nullification of a deed or contract. This doctrine is used by means of ones' function allowing them to oppress another party. For instance, using his function (either in government, politic or society), in economic context, the other parties feel incapable to avoid the power of his function but approving the content of the deed offered to them. In short, such doctrine tends to count on one's circumstance (situation and surroundings) rather than displaying any physical violence or threat.

The term 'circumstance abuse' in Indonesia law is similar to the term *misbruik van omstandigheden*, and *undue influence* (Scalise 2008, 42). In common law system, in addition to *undue influence*, it is also known as *unconscionability*. However, although both of them are different, they are similar due to the inequality of offering among the contracting parties. When a contract is derived from infelicity or inequity of inequal relationship, it is called *undue influence* (biased relationship). The circumstance abuse –as a factor delimiting the freedom of making contract- relates to the circumstance on which the contract is made, not due to a legal or rightful cause (Rafiei, 2011: 47). The circumstance abuse relates not only to the content of a deed/contract, but also to all circumstances on which the contract is established since one of the parties feels constrained to determine their will in a contract. It may happen due to one's superiority over another party. This superiority points not only to the aspect of economy, but also to the psychological one, and/or both of them. Abusing such superiority may cause a circumstance abuse. It is because of *inequality of bargaining power* that the weak cannot avoid from, while the stronger one precisely tends to impose the contents of the contract which leads to the inequal advantages for both parties.

In Indonesia, the doctrine or the tenet of circumstance abuse (*misbruik van omstandigheden*) is not yet set in sources of positive law. However, it is implicitly accepted as in Regulation of the Supreme Court of the Republic of Indonesia, on Verdict No. 1904 K/Sip/1982, established on 28th January 1984, that the application of 10% monthly interest is charged to the debtor who is found violating the principles of obedience and equity (Pangabean, 2001: 63). This judgment actually asserts that the statement of will that causes an agreement, when it is due to a "circumstance abuse" by another party, it refers to the defect of will on which making a contract.

Following Z. Asikin Kusumah Atmadja, circumstance abuse is defined as a factor that delimits or disturbs a freedom of will to determine a contract among parties. This possibily happen due to an inequality and incompatibility on functions among the contracting parties. Hence, it is not right to classify the circumstance abuse into unrighful causa (*ongeooloofde oorzaak*), as the unrightful causa has very specific characteristics, and thus, it has nothing to do with the defect of will (Atmadja).

In relation to unrightful causa, although the disadvantaged party does not define such causa as one to clarify the nullification of a contract, *ex officio* judges need to take it into account. Furthermore, in

relation to the defect of will, the statement of null or the nullification of a contract will be examined by judges only if it is postulated by the pertinent parties. Therefore, Cohen argues that classifying the circumstance abuse into the defect of will is rather for the needs of constructing the law, in case that the disadvantaged party requests for the nullification of a contract (Hernoko, 2010: 178).

According to R. Cheeseman, in common law system, there are 3 (three) benchmarks used to classify the existence of *unconscinability* (Simanjuntak, 2006: 160), as follow.

(1) The contracting parties are in a very inequal position to negotiate the demand and the offer.
(2) The stronger irrationally uses his dominate power to make a contract by pressure and inequality on rights and obligations.
(3) The weaks have no option but approving the contract.

2. Proving the Existence of Circumstance Abuse on the Establishment of a Contract

BW does not follow the tenet of *justum pretium*, a principle requiring the contracting parties to meet an equal condition between performance and contra-performance. Thus, the inequal condition of those matters does not clearly prove the existence of circumstance abuse, since it is only an indicator that needs further examination. It needs further investigation that the very inequality on performance happens due to the pressure of certain circumstance abused by one of the contracting parties (Huda, 2016: 1038). This pressure of circumstance and/or inequality is not the actual matter. The more substantial one is proving the existence of any circumstance abuse. Either in part of economic context or psychological one (Satrio, 2001: 322).

Investigating whether or not the circumstance abuse exists should be conducted in casuistic fashion. Up to recent day, Indonesia has no legal regulation that limitatively sets the criteria of circumstance abuse. Therefore, such case must be seen through objective and rational ways in relation to the circumstance and condition on which a contract ends and also through the formulation of both performance and contra-performance within the contract. Subjectively judging the existence of circumstance abuse without counting on its objective criteria may cause uncertainties of law and, as the result, it may harm the justice.

To identify whether or not the circumstance abuse exists, several indicators can be used as the compass, as follow.

(a) The formulation of a contract, performance, and contra-performance assigned to the contracting parties is obviously inequal and even inappropriate.
(b) The process of a contract ends. This happens due to a party abusing a circumstance as he has more advantageous position in offering, whether in economic or psychological context.

As a common request for the nullification of a contract due to a defect of will, any substance of disadvanatage is no longer necessary. It is considered adequate on which evidence shows that a contract is unlikely to be made without any circumstance abuse. Being disadvantageous is seen as a forced agreement (*opgedrongen*), thus, being disadvantageous (*nadeligheid*) is similar to being forced (*onvrijwilligheid*). Regarding to Netherlands parliament, disadvantagesrefers to loss in any form and it relates not solely to legal actions –in terms of inequality on performance or one-sided clause (*exoneratie* atau *onereuze clausules*) but also to subjective and idiil manner. Disputations on Netherland parliament shows that the substance of disadvanatage is, in fact, not set in article 3 ; 44 NBW (Budiono, 2008: 20).

Conclusion

A freedom of making contract refers to a freedom for every individual to make a contract by considering the legality of the contract as set in legislation. An equal-position contract may attain proportional equality on its performance and contra-performance. However, indefinite freedom of making contract

may cause a restraint on other party with lower position to end the contract. The developing freedom of making contract relates to the development of contract law. The developing tenet of having good faith in closing a contract as well as the tenet of circumstance abuse as a cause for the nullification of a contract may delimit the freedom of making contract.

The doctrine of circumstance abuse is actually a kind of appreciation as well as protection for the contracting parties, especially for the weaks. Netherlands sets this doctrine in article 3 : 44 NBW and it holds a more comprehensive effect on its application. The judges, in making judgment on abuse cases, must have a strong base. In Indonesia, however, this doctrine is not yet reinforced by any product of law. Particularly, it is still in a scope of jurisprudence, which consequences depend on judges' interpretation when handling cases of circumstance abuse. In the next future, therefore, the draft of contract law is expected to mention the doctrine of circumstance abuse in one of its articles relating to the legality of a contract, especially ones with the defect of will.

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