



# CONTRACT CANCELLATION BASED ON MISUSE OF CIRCUMSTANCES FACTOR

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## ABSTRACT

*The purpose of this study is to analyze (1) the factors that determine the existence of a misuse of circumstances in a contract; and (2) the basis for the judge's consideration in canceling an agreement containing a factor of misuse of circumstances. The research method used is normative legal research. The results of the study show that (1) The determination of the factors of misuse of circumstances in a contract can be seen from (a) the presence of a defect of will in the making of the contract; (b) there are conditions in the agreement that are actually unreasonable or inappropriate or contrary to humanity; (c) the weak party is under pressure; (d) if there are circumstances where the weaker party has no choice but to enter into a contract with onerous terms contained in the contract; and (e) the party is weak, the value of the reciprocal rights and obligations of the two parties is very unequal; (2) The basis for the judge's consideration in canceling an agreement that contains a factor of misuse of circumstances by using jurisprudence and a sense of justice, considering that misuse of circumstances in contracts/agreement has not been strictly regulated in the Civil Code or other laws and regulations. Arrangements for misuse of circumstances can also be applied in the event that the agreement contains errors, or oversight (dwaliing), coercion (dwang) and fraud (bedrog), which the weak party feels is very burdensome and contrary to a sense of justice and humanity.*

**KEYWORDS:** Accountability, Notaries, PPAT, Sale and Purchase of Land, Fake Evidence

## INTRODUCTIONS

The most important characteristic of an agreement is the mutual consent of the parties. This collective agreement is not only a characteristic in making agreements, but it is important as an intention expressed to other parties. In addition, it is very possible that a valid agreement was made without a mutual agreement. (Arthur s' Hartkamp & Marianne M.M. Tillema, 2013)

Agreements must be formed based on free will and in a free atmosphere as well. The agreement was born ex nihilo, namely the agreement as a manifestation of the free will of the parties making the agreement. The agreement is the result of free choice. No one is bound by an agreement as long as it is not carried out on the basis of a free choice to carry out a contractual obligation that can only be created by the intent and will of the parties. The agreement is exclusively the free will of the parties making the agreement (Ridwan Khairandy I, 2014). Thus, the agreement must be based on the agreement of the parties to the agreement. Agreements must be formed based on free will and a free atmosphere as well.

The agreement in the formation of the agreement is a "round" agreement and is an agreement that is mutually beneficial (mutual benefit). In practice, agreements are often the result of coercion, error, or fraud. The agreement did occur, but in the agreement, for example, contained factors of fraud or coercion. Such agreements contain defects of will. (Ridwan Khairandy II, 2013)

Defect of will (*wilsgebreken* or defect of consent) is a defect in forming an agreement in an agreement. The defect of this will is the imperfect agreement. If the agreement contains a flawed will, it does appear as if there is an agreement, but the agreement was formed not based on free will. This volitional defect usually occurs in the pre-contract period or phase. (Ridwan Khairandy II, 2013)

The agreement in the formation of an agreement should be a unanimous agreement and is a mutually beneficial agreement. In practice, often the agreement obtained is the result of coercion, fraud, error, or misuse of circumstances. Agreements that happen due to the presence of one of these factors are called agreements that contain defects of will. (Ridwan Khairandy II, 2013)

In this regard, Article 1321 of the Indonesian Civil Code (hereinafter referred to as the Civil Code) states that no agreement has force if it is given due to an oversight, or obtained due to coercion or fraud. Thus the defects of will mentioned in Article 1321 of the Civil Code include error or oversight (*dwaling*); coercion (*dwang* or *bedreiging*); and Fraud (*bedrog*). The defect of will mentioned in Article 1321 of the Civil Code is called a classic defect of will. In addition to the defect of will referred to in Article 1321 of the Civil Code, in judicial practice as reflected in jurisprudence there is also a fourth form of defect of will, namely misuse of circumstances (*misbruik van omstandigheden*). (Ridwan Khairandy II, 2013)



The legal institution (*rechtsfiguur*) of misuse of circumstances (*mishruik van omstandigheden*) is a new form of handicapped will in the legal system of Dutch legal agreements. Dutch Treaty Law adopted this institution of misuse of circumstance from English law (J.M. Van Dunne, 2011). Initially, the misuse of this situation in Dutch law developed in jurisprudence. Now this institution is regulated in Article 3.44.4 *Nederland Burgerlijk Wetboek* (commonly referred to as *Nieuwe Burgerlijk Wetboek* (Bw), New Bw) (Ridwan Khairandy I, 2014). In Indonesia, this institution has not yet been regulated in the Civil Code, but it has been accepted in jurisprudence as the fourth form of handicapped will.

Misuse of circumstances can result in an agreement having no legal force, if the agreement is made based on a cause that is contrary to good morality and the use of circumstances which results in the opposing party being unable to make an independent decision. In legal developments, misuse of circumstances can be used as a reason to cancel an agreement, although this is expressly not regulated in the Civil Code (blank norm), especially in the articles which state the reasons for cancellation, namely Article 1322 of the Civil Code concerning oversight, Article 1323 of the Civil Code concerning coercion and Article 1328 of the Civil Code concerning fraud, as reasons for canceling the agreement. From this, it can be concluded that agreements made with the factors of *dwaling* (mistakes/oversights/ misguidance), *dwang* (coercion) and *bedrog* (fraud) as well as agreements made based on unbalanced economic conditions, can be canceled by the Judge because they fulfill factors of state misuse.

Based on the description above, it can be stated that the laws and regulations in Indonesia have not thoroughly regulated the misuse of circumstances in making agreements (empty norms), as a result the courts in deciding cases of misuse of these conditions are based more on the jurisprudence of judges, both judges at district courts, high court or a judge at the Supreme Court or even just based on the judge's consideration alone.

Based on the background of the problems described above, the formulation of the problem in this study can be stated in the research questions are (1) What factors that determine the existence of a misuse of circumstances in a contract? and (2) What is the basis for the judge's consideration in canceling an agreement that contains a factor of misuse of circumstances?

### Research Methodology

The research method used in this research is normative legal research. Normative legal research is research conducted by examining the laws and regulations that apply or apply to a particular legal issue. Normative legal research examines law from an internal perspective with the object of research being legal norms (I Made Pasek Diantha, 2017). Normative research is often referred to as doctrinal research, namely research whose object of study is documents of laws and regulations and library materials (Peter Mahmud Marzuki, 2011). Normative legal research is also called research that is focused on examining the application of rules or norms in positive law (Johny Ibrahim, 2012). According to I Made Pasek Diantha, normative legal

research has a role in defending the critical aspects of his legal science as a normative science. (I Made Pasek Diantha, 2017)

### DISCUSSION

#### FACTORS WHICH DETERMINE THE MISUSE OF CIRCUMSTANCES IN A CONTRACT

The principle of consensualism as contained in Article 1320 (1) of the Civil Code, means that the agreement has been born simply by having an agreement (Dian Fitriana, 2013) and therefore has created obligations for one or more parties to the agreement, as soon as these people reach an agreement or consensus, even if such agreement has been reached verbally. This means that in principle an agreement that is binding and acts as an agreement for the parties who promise does not require formalities, however, to protect the interests of the party who is obliged to fulfill the achievements, forms of formalities are held, or certain concrete actions are required (R.Subekti, 2016). What is emphasized here is the meeting of mind as the core of contract law. The principle of consensualism is the "spirit" of an agreement, but in certain situations there are agreements that do not reflect the actual form of the agreement. This is due to a defect of will (*wilsgebreken*) which affects the emergence of an agreement. (Sudikno Mertokusumo, 2017)

Therefore, in the existence of a contract where there is an indication of a factor of misuse of circumstances, the contract can be requested for cancellation. In its development, a factor of defective will appears which is called misuse of circumstances (*misbruik van omstandigheden*). Thus the principle of consensualism as inferred from the provisions of Article 1320 of the Civil Code number 1 concerning agreement (*toestemming*), which states that an agreement has been born simply by having an agreement, should also not be interpreted purely grammatically. Understanding the principle of consensualism which emphasizes the "agreement" of the parties, departs from the idea that the person dealing with the agreement is a person who upholds commitment and responsibility in traffic law, a person with good intentions, who is based on "one word and one deed".

So, with the assumption that the "gentleman" who is dealing in the contract will also manifest a "gentleman agreement" between them. If the agreement given by the parties is not within the actual framework, in the sense that there is a defect in the will, then this will threaten the existence of the agreement itself. In the end the understanding of the principle of consensualism is not limited to just basing it on an agreement, but other conditions in Article 1320 of the Civil Code are considered to have been fulfilled so that the agreement becomes valid.

One thing that must be remembered, misuse of circumstances from the start cannot be considered as something that can be justified by law. Misuse of circumstances has long been included as a general condition or good habit (*goede zeden*). On that basis an agreement can be declared invalid, either in whole or in certain parts. Thus, there is an assumption that the forbidden "cause" is the same as the "content" of the agreement which is not justified. Even though the misuse of circumstances is not solely related to the contents of the agreement. The contents may not be prohibited, but there is something else that happened at the time the agreement was



born, which caused losses to one of the parties. This is what is called misuse of circumstances. The teaching on misuse of circumstances concerns the realization of the principle of freedom of contract, because it involves misuse to interfere with the existence of free will to enter into agreements or pure consensualism in an agreement.

If you pay attention to the descriptions that have been stated above, the relationship between the misuse of circumstances and the principle of consensualism can be said to be a relationship that is closely related to one another, but this linkage has bound one of the parties. The developments in contract law have confirmed the misuse of circumstances to be one of the factors limiting the application of the principle of freedom of contract (Setiawan, 2012). In contrast to the rules of contract law in force in Indonesia, which do not yet regulate the misuse of circumstances, but still use the rubric of coercion, deception, and erroneous as a basis for declaring the defect of the agreement, then the new Dutch Civil Code contained in the NBW (*Nieuw Burgerlijk Wetboek*) has determined misuse of circumstances to be one of the reasons for canceling the contract. (Herlien Budiono, 2017)

As regulated in the Civil Code, defects of will affect the terms of the validity of the agreement, namely regarding the agreement of the parties. Starting from this, the misuse of circumstances is then included as a matter that can affect the agreement as a subjective condition for the validity of the agreement. One of the characteristics of the misuse of the condition of having a disability as stipulated in Article 1321 of the Civil Code is that there is an oversight (*dwang*), coercion (*dwaling*), and fraud (*bedrog*).

J.M. van Dunne and Gr. Van den Burght in a Diktat Course on Legal Engagement Part III in 1987 which was translated by Sudikno Mertokusumo, responding to several opinions of legal experts stated that "misuse of Circumstances is not solely related to the contents of the agreement, but relates to what has happened at the time the agreement was born, namely the misuse of circumstances which causes the statement of will and automatically one party's agreement without blemish". (Bambang Poerdyatmono, 2015)

The teaching of misuse of circumstances itself contains two factors, namely (1) factor of misuse of circumstances (opportunities) by other parties; and (2) The factor of loss for one party. Furthermore, Van Dunne distinguishes the first factor into two, namely the misuse of economic advantage and the misuse of psychological advantage, which are described as follows:

- 1) Requirements for misuse of economic advantage, namely one party must have an economic advantage over another and the other party is forced to enter into an agreement
- 2) Requirements for misuse of psychological advantage, namely (a) One party misuses relative dependence, such as a special trust relationship between parents and children, husband and wife, doctor and patient, pastor and congregation; and (b) One of the parties misuses the special mental condition of the opposing party, such as having a mental disorder, inexperience, rashness, lack of

knowledge, bad physical condition, and so on. (Henry P. Panggabean, 2011)

## BASIS OF THE JUDGE'S CONSIDERATIONS IN CANCELING THE AGREEMENT THAT CONTAIN MISUSE OF CIRCUMSTANCES FACTOR

The misuse of circumstances in the Maonah case against Herman Santoso occurred because Herman Santoso concealed the real situation that the land purchased from Maonah was not for his own interests, but that the land would be purchased by the City Government of Magelang c.q. Mayor of Magelang with many times higher prices. This act was carried out with the aim of seeking personal gain for Herman Santoso and harming Maonah. This act was an act of misusing the actual situation which was intended to seek personal gain which resulted in a great loss to Maonah, and was an illegal act.

Unlawful act in the form of misuse of circumstances by hiding the purpose of the purchase made by Herman Santoso, namely Herman Santoso's legal act of buying land from Maonah and selling it to the City Government of Magelang c.q. The mayor of Magelang is not in accordance with decency and decency and acts against the law are arguments that are not based on strong evidence and are mutually inconsistent.

Regarding the lawsuit, the Magelang District Court has made a decision, namely decision No. 24/PDT/G/2008/PN.MGL., dated 11 June 2009, stated that Herman Santoso had misused the situation/opportunity to buy land SHM No. 86 on behalf of Maonah so that he decided to cancel the private sale and purchase between Maonah and Herman Santoso on land SHM No. 86 in the name of Maonah which is located in Dukuh Sanden, Kelurahan Kramat, Kecamatan Magelang Utara, Kota Magelang.

The District Court's decision has been upheld by the Semarang High Court with Decision No. 288/Pdt/2009/PT.Smg, dated 10 November 2009. This decision was also upheld by the Supreme Court in Decision No. 1992 K/Pdt/2010. In this case, both the judges at the Magelang District Court, the judges at the Semarang High Court and the Supreme Court were of the opinion that Herman Santoso had committed an act of misuse of circumstances, which fulfilled the factors of *dwang*, *dwaling* and *bedrog* considering the legal conditions for misuse of circumstances had been determined if first special circumstances such as an emergency, dependency, carelessness, mental insanity and inexperience, secondly there must be something real such as being required to know that the other party due to special circumstances is moved (his heart) to conclude an agreement, thirdly misuse, here it is emphasized that one of the party has carried out the agreement even though he or should have understood that he should not have done so and knew, the four causal relationships. The most important thing is buying and selling land in this case based on bad faith to gain excessive profits.

The judge's decision in the Maonah case against Herman Santoso was based on the consideration of one of the reasons for canceling the agreement, namely the defects of the classic will of Article 1321 of the Civil Code, namely oversight (*dwang*), coercion (*dwaling*), and fraud (*Bedrog*). As stated in





the Civil Code, this defect of will affects the terms of the validity of the agreement, namely regarding the agreement of the parties. Starting from this, the misuse of circumstances is then included as one of the things that can affect the agreement as a subjective condition for the validity of the agreement.

Misuse of circumstances as a factor that limits freedom of contract, related to the occurrence of the contract, not because of a cause that is not permissible. The misuse of circumstances is not only related to the contents of the agreement, but also related to what has happened at the time the agreement was born because it is not free to determine its will in the contract. Misuse of circumstances relates to circumstances that play a role in the occurrence of contracts, namely enjoying other people's conditions does not cause the contents or intent of the contract to be prohibited, but causes the will that is misused to become not free. The real disease does not lie in the cause of what is not permissible, but lies in the defect of the will. (Sudikno Mertokusumo, 2017)

Someone who has an advantage in bargaining position will be able to dominate and influence the will of the other party in a contract, so that the other party is forced to enter into the contract. More or less there must be a forced position on the part of the needy, in which case there is no real alternative to entering into a contract with another person, and thus there is also no possibility of holding a real contract (Sudikno Mertokusumo, 2017). Unbalanced advantages can give birth to unequal agreements, thus giving birth to contracts based on pseudo agreements, which are made because of the compulsion of the weaker party to fulfill their needs. At first glance, the event is protected by the principle of freedom of contract, and therefore has binding force, but because the agreement given is not based on free will, but because of coercion, the contract can be canceled on the basis of misuse of circumstances. Presumably it can be said, that freedom of contract that is not responsible will tend to lead to misuse of circumstances. By admitting that misuse of circumstances is one of the reasons for canceling a contract, it simultaneously functions as a limiting factor against the practice of freedom in making contracts.

In misuse of circumstances the problem is regarding the superiority of one party over the other. This advantage is not only economic, but also psychological advantage or both, both economic advantage and psychological advantage. When there is a misuse of advantage, there is a misuse of circumstances (Sudikno Mertokusumo, 2017). Misuse of circumstances happens because there is an inequality of bargaining power which cannot be avoided by the weaker party and the stronger party misuses it by forcing the contents of the contract which gives him an unequal advantage.

Cases of misuse of circumstances that occur based on economic imbalances occur in the interconnection cooperation agreement between Telkomsel and PT. Naprindo Ponsel Cellular (NTS) as stated above. A misuse of circumstances can be identified by checking the conditions or certain conditions regarding whether there is a misuse of circumstances. As previously described. Thus, the fulfillment of the factors of these terms and conditions indicates that there has been a misuse of circumstances. This case is based on the Decision of the Commission for the Supervision of Business Competition Case Number: 26/KPPU-L/2007.

In order to prove that there was misuse in the Telkomsel-NTS Interconnection Cooperation Agreement, it is necessary to link it to Van Dunne's statement which stated that this misuse of circumstances could happen due to economic or psychological advantages. The party with a special position takes unfair advantage of the weaker party. This was done without coercion or fraud. Here there is an imbalance in the relationship between the processes of the contract. In addition, existing facts will also be included to prove whether there was such misuse. The existence of economic advantage alone does not result in misuse of circumstances. Still other conditions are needed to show the existence of a misuse of circumstances. But this factor is still needed to prove it. Telkomsel's market dominance shows its superiority compared to other cellular operators. Based on these matters, it has been proven that Telkomsel has an economic advantage over NTS before the creation of the Tekomsel-NTS Interconnection PKS. The factor of economic advantage in this case is fulfilled. Telkomsel is proven to have an economic advantage compared to NTS. Because of this, Telkomsel is considered as the economically more powerful party and the party considered as the counter party is NTS.

In terms of fighting for customers, the incumbent will certainly be superior. Prospective customers will prefer the incumbent as an operator that has advantages in network and subscribers because these prospective customers can communicate with many subscribers in the network (Agus Tjahayana, 2012). This certainly does not apply to NTS as an operator with a small network and subscribers. Prospective customers, of course, will carefully consider choosing a new operator. Prospective customers, of course, do not want if they can only communicate with a few customers who are covered by the new operator's network. This makes it very difficult for new operators to develop.

To be able to overcome this, NTS requires interconnection with Telkomsel, which has a wide network and many subscribers. With this interconnection, NTS subscribers can communicate with Telkomsel subscribers so that NTS subscribers are not limited to only being able to communicate with fellow NTS subscribers. This effort has opened up more opportunities for NTS to acquire potential customers and compete with other cellular operators to penetrate the market by utilizing the interconnection with the Telkomsel network.

Telkomsel, in this case, must have known that due to the special circumstances it experienced, NTS was moved to close the Interconnection Agreement. If this is not the case, Telkomsel should know about this condition because it is a real thing (Henry P. Panggabean, 2011). This condition is of course unbalanced. NTS does not have equal bargaining power with Telkomsel. So, like it or not, NTS must follow these provisions. If not, the interconnection will not be provided by Telkomsel (take it or leave it contract). Basically, NTS never took the initiative from the start in an agreement to fix the c price.

The signing of the Interconnection Cooperation Agreement and the Addendum by the NTS Directors at that time was solely to protect business interests (business necessity) so that NTS could immediately obtain interconnection with Telkomsel's network. In fact, if the minimum tariff for Short Message Service is not set in the



Telkomsel-NTS Interconnection Cooperation Agreement, it is hoped that NTS will be able to carry out a marketing strategy by selling short message services at low prices. The strategy is basically to increase NTS's market shares, only previously only around 0.015% of the cellular market share.

Based on this description, there is a real imbalance that actually benefits Telkomsel. Although in principle the agreement was made regarding interconnection, the terms for setting the price of the Short Message Service became a part that also had to be agreed upon. Even though there is no regulation regarding the price of the Short Message Service, NTS is not free to negotiate it due to the condition of inequality of bargaining power.

The principle of *iustum pretium* in this case is used in connection with losses suffered by NTS as a result of lack of free will. The fact is, Telkomsel actually benefited. The losses suffered by NTS were in the form of economic losses which although they were not directly experienced, the potential economic losses actually occurred due to the delays in obtaining customers due to the Short Message Service pricing clause. Thus, the conditions or conditions of imbalance/bias and the benefits of the party with more economic power are fulfilled. (Kim Min Soo, 2015)

Even though one of the parties has an advantage in circumstances, this is not a reason for that party to use it in making an agreement. The advantage of using circumstances tends to be done so that it results in misuse. This will eventually result in a one-sided situation (Kim Min Soo, 2015). This condition, of course, cannot be justified. In this case, even though Telkomsel has an economic advantage, Telkomsel cannot misuse this advantage to make or determine a one-sided clause. Utilization of such advantages interferes with the freedom of NTS in rendering its agreements. Telkomsel as a party with a strong economic position may not require a clause on the basis of an imbalance in the conditions that occur. NTS's need for interconnection has increasingly supported Telkomsel in determining this one-sided clause.

The factor of misuse (*misbruik*) itself has been seen. Telkomsel basically knows or should understand that Telkomsel should not enter into an agreement that contains a pricing clause for the Short Message Service. In fact, Telkomsel should not have carried out the contents of the agreement containing this clause which in fact was one-sided and benefited Telkomsel personally. There is no justification for this condition.

Between the misuse and the making of the agreement there is a causal relationship (*causaal verband*). Without such misuse, agreements with pricing clauses will not be made and approved by NTS. According to NBW, the misuse of circumstances that lead to one-sided circumstances is included in things that can damage the agreement. In Indonesia itself, there have been several decisions stating that the misuse of this situation cannot be justified so that agreements containing these factors were canceled in several of these decisions. Thus, this kind of condition cannot be justified and therefore this factor is fulfilled. (Ridwan Khairandy II, 2013)

Based on the analysis associated with the decomposition of factors taken from Van Dunne's previous statement, Telkomsel was proven to have misused the circumstances in

making PKS Interconnection with NTS. The existence of one-sided clauses and the absence of power from one of the parties to negotiate clauses has basically shown misuse (Sudikno Mertokusumo, 2017). In summary, the terms or conditions that constitute a factor of the misuse of economic conditions by Telkomsel against NTS are:

- 1) There is an economic advantage for Telkomsel compared to NTS, seen from the breadth of its network, infrastructure, market share, and technology.
- 2) There is an urgent need for NTS to enter into a contract/agreement with Telkomsel considering the economic market and market position of NTS. NTS requires interconnection with Telkomsel to maintain its business and develop it considering NTS' limitations and NTS's weak position in the cellular telecommunications market.
- 3) The Interconnection Cooperation Agreement and the First Addendum that have been approved contain unbalanced and favorable terms for Telkomsel so that the agreement is one-sided. Telkomsel's "forced" SMS pricing clause hindered NTS's rate of acquiring subscribers but this actually benefited Telkomsel because it would be difficult for its competitors to develop. Such an agreement is one-sided.
- 4) Such a one-sided situation cannot be justified by Telkomsel's superior circumstances. Even though Telkomsel has such advantages, this is not a reason for Telkomsel to enter into a one-sided agreement.

## CONCLUSION

Based on the discussion that has been described above, it can be concluded the following matters

1. The determination of the existence of factors of misuse of circumstances in a contract can be seen from (a) the existence of defects of will in the making of the contract; (b) there are unreasonable or inappropriate terms or conditions that are contrary to humanity (unfair contract terms); (c) the weak party is under pressure; (d) if there are circumstances where the weaker party has no choice but to enter into a contract with onerous terms contained in the contract; and (e) the party is weak, the value of the reciprocal rights and obligations of the two parties is very unequal.
2. The basis for the judge's consideration in canceling an agreement that contains a misuse of circumstances factor by using jurisprudence and a sense of justice, considering that misuse of circumstances in contracts/agreement has not been explicitly regulated in the Civil Code or other laws and regulations. Consideration of justice is needed considering that the misuse of circumstances that often occurs is the misuse of economic conditions, the substance of which is that one of the parties who have a dominant position misuses their dominant position either psychologically or economically so as to influence the other party to agree to the agreement. The regulation on misuse of economic conditions is intended to protect parties with a weak position in agreeing to an agreement against parties who have many advantages. In addition, arrangements for



misuse of circumstances can also be applied in the event that the agreement contains errors, or oversight (*dwalig*), coercion (*dwang*) and fraud (*bedrog*), which the weak party feels is very burdensome and contrary to a sense of justice and humanity.

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