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## CONSUMER LEGAL EFFORTS DUE TO ABUSE OF CIRCUMSTANCES (MISBRUIK VAN OMSTANDIGHEDEN) IN STANDARDIZED AGREEMENTS

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### Abstract

Private law develops with the dynamics of community needs. Law Number 8 of 1999 concerning Consumer Protection Law is a form of regulation aimed at balancing the rights and obligations of both consumers and business actors. But in reality, consumers are always the weaker party; the injured party is due to a more inferior position. The form of consumer losses that often occur is the existence of standardized agreements containing elements of misuse (misbruik van omstandigheden). As a result, the consumers agree not to an agreement in "good faith", but what has been agreed is that the will of the business actor intends to harm consumers by abusing the situation. This study aims to 1) know the categories of circumstances abuse in standardized agreements that harm consumers, 2) know the legal efforts that consumers can do due to abuse of circumstances (misbruik van omstandigheden) in standardized agreements. The method used is juridical normative that is using primary legal materials and secondary legal materials to analyze the problem, but it is contextualized by the dynamics of standardized agreements in the global era. The results obtained that in the current global era the standardized agreements with the abuse of the circumstances are increasingly diverse. If it is proven that there is an abuse of circumstances, then the effort is cancelling the agreement. Minimizing the misuse of circumstances in the standardized agreement requires the participation of all parties, consumers, businesses and the government.

**Keywords:** abuse of circumstances; consumers; legal efforts; standardized agreements

### 1. INTRODUCTION

Nowadays, the rapid economic development requires the community to keep competing and of course, the engagement that occurs in the community will also increase and increasingly complex substance. The engagement can be born because of the agreement or law. The engagement that is born out of a contract or agreement is an agreement between two parties that creates a binding agreement both to carry out what has been promised. The agreement can be made by anyone, as long as it fulfils the conditions set in Article 1320 BW, namely (1) agreed, (2) competent, (3) certain objects, and (4) cause is allowed. The agreement reached in the contract has a position and therefore has the same binding power as the law. Furthermore, each contract implementation must be

carried out in good faith. Normally, if all agreements with binding powers are always carried out, then this is what is said to realize an orderly and fair life, which is this, is expected by humans as social institutions in various aspects of life.

Article 1320 BW stated that the agreement is a legal condition of agreement (the principle of consensualism) which is one of the subjective conditions. In connection with the subjective conditions in Article 1320 BW, the follow-up rules are in Article 1321 BW, which is about willing defects, which states that there is no legitimate agreement if given because of negligence, coercion and fraud. The willing defect in the provisions of Article 1321 BW can occur and result in the contract can be cancelled if there are *bedreiging* (threats), *bedrog* (fraud), and *dwalig* (error). Its

development, the willing defect can also occur in the case of *misbruik van opstandigheden* (abuse of circumstances).

The abuse of the circumstances is an act which is motivated by an unbalanced situation between the parties in an agreement, and in such conditions, the strong party utilize the position of the weak party. The weak party does not have the opportunity to discuss everything that is his right and obligation in an agreement (Winarni, 2015). The abuse of these circumstances develops through doctrine and jurisprudence, this abuse has two elements that must be fulfilled, namely the loss suffered by one party, and the abuse of opportunity by the other party. While the coercion stated in Article 1321 BW requires a threat that causes fear by one of the parties and losses incurred due to the threat. The conditions of circumstances abuse are increasingly developing in the current global era, by set in a standardized agreement. This certainly harms the consumers as the weak party, weak because of an inferior position, low level of education, lack of socialization. Law Number 8 of 1999 concerning Consumer Protection Law is a form of regulation aimed at balancing the rights and obligations of both consumers and business actors.

One of the important principles in an agreement is the principle of freedom of contract; this principle is based on the position of both equally strong parties, has the same bargaining position so that each party is a contract partner. The reality is not so, in making contracts for each party, especially those who are in a strong economic position trying to wrest domination over the other party and face each other as opposed to the contract. The party whose position is stronger can impose its will on the other party for its benefit, thereby creating biased or unfair content or terms, (Paparang, 2016).

Modern business contracts that are more formalistic and tend to a written agreement pattern to guarantee legal certainty if in the future there is a dispute between the parties, then the standardized contract will be used as written evidence to postulate the truth of the relationship that has been established and the rights and its obligations, (Saija, 2016). The relationship between an agreement and an engagement gives rights and obligations to each party to make demands or fulfil these demands, (Ardianti & Handayani, 2018).

Furthermore, Article 1337 of the Civil Code states that a cause (an agreement) is prohibited, if prohibited by law, or if it is contrary to good decency or public order, (Manumpil, 2016). In connection with this, the obligations arising from agreements are not determined by an agreement but are determined by the presence or absence of an abuse of circumstances and what is considered appropriate in the community or the abuse of the situation by one of the parties. Therefore, the more important in an agreement is that it does not contain abuse of circumstances or, good ethics and is not an agreement, (Martono, 2016).

Previously, the similar latest related studies have been done by some researchers, such as (Hernoko & Anand, 2017) who conducted a research entitled "The Application of Circumstance Abuse Doctrine (*Misbruik Van Omstandigheden*) on Judicial Practice in Indonesia". 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 results of this study showed that. 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 effects 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 f law. Particularly, it is still a scope of jurisprudence, which consequences depend on judges' interpretation when handling cases of circumstance abuse. Another similar study is also conducted by (Fahmi, 2017). He conducted a research entitled "Standard Bank Credit Agreement Based on the Value of Justice". The purpose of this study is to find the factors influencing *standaard bank credit agreement* on the distribution of credit to the community based on the value of justice. As a result, the bank credit agreement in the form of *standaard* is still not based on the value of justice because the content is determined unilaterally by the bank, where the debtor's customer does not have bargaining position on some form of agreement used by the bank; application credit agreement and bookkeeping requirements; cash bookkeeping requirements; Deposit book-entry application; application agreement of

remittance. In addition, it still has delicacy on the bank credit agreements which are limited by the Banking Act and the Decree, Regulation and Circular of Bank of Indonesia. The legal provision generates the prudent principle of extending the credit to the community, which is famous for the 5 C's (Character, Capacity, Capital, Collateral, Condition). Meanwhile, the Bank Indonesia Regulation stipulates regulation relating to the regulations, prohibitions, institutions, guarantees, and execution of the guarantee objects. Based on the background and latest related studies above, this study aims to 1) know the categories of circumstances abuse in standardized agreements that harm consumers, 2) to know the legal efforts that consumers can do due to abuse of circumstances (misbruik van omstandigheden) in standardized agreements.

## 2. METHOD

This research is a normative juridical study or known as doctrinal research, that is analyzing the law teaching which is based on the premise that law is the norm that governs people's lives, (Sulaiman, 2018). The problem approach used in this study is the statute approach and the conceptual approach. This research is a deductive study which analyzing the abuse of circumstances towards the standardized contract agreement. The legal materials obtained in this study were analyzed qualitatively with descriptive-analytical models. So the results can be described comprehensively and systematically.

## 3. DISCUSSION

Based on the objectives and the research conducted, therefore the results obtained it can be described in the following discussion.

### ***The category of circumstances abuse (misbruik van omstandigheden) in standardized agreements that harm consumers***

The consumer problems in this current global era are increasingly diverse and complex, one of the factors due to the influence of increasingly rapid technological progress. Technology influences the current implementation of agreements which are no longer carried out conventionally but also online. This will certainly have implications for consumers as weak parties who are often harmed by the agreement of the business actors. The

agreements made by business actors and given to consumers are in the form of standardized contracts.

The standardized contract is an agreement with the contents and composition that is standard. Standardized agreements are often used by companies with the aim that agreements can be done quickly and practically, (Supramono, 2013). According to Law Number 8 of 1999 concerning Consumer Protection Law, the standardized clause is "any rules and conditions that have been prepared and determined unilaterally by a business actor as outlined in a document and/or binding agreement and must be fulfilled by consumers".

In its arrangement, the standardized agreement includes the rights and obligations of consumers as well as the rights and obligations of business actors as stipulated in the standard form. Law No. 8 of 1999 concerning Consumer Protection Law allows agreements with standard clauses to be done. The basic rationale for applying this standard clause is that the standard clause is needed by entrepreneurs for their economic activities, because in business, especially entrepreneurs who manage service activities, such as banking, insurance, liens, transportation, etc., require fast, effective transactions, and efficient. Likewise, with online agreements, consumers are often given instructions to choose without being accompanied by clear information.

In a standardized agreement, the principle of take it or leave it is known, meaning that if the consumer agrees with the agreement prepared by the business actor, the consumer can agree on it, otherwise, if the consumer does not agree, the consumer only needs to leave the agreement or not do an agreement. According to Sutan Remi Syahdeini, almost all clauses in the standardized agreement have been standardized by the maker and other parties, so there is no opportunity to negotiate or request changes to the contents of the standardized agreement, (Syahdeini, 1993).

The organization of clause in standardized agreement because it is made by a dominant party, there is a charge of circumstances abuse. Because these standard clauses are only unilaterally determined, the main issue that arises is that in standardized agreements often found clauses that are not fair and which

incriminate one party, especially consumers. This clause in English literature is called an exonerative clause, meaning that an exemplary clause or an exoneration clause. In the Consumer Protection Act, the term exoneration clause is referred to as a standard clause, (Wahyuningdyah, 2016).

As stated in Article 1321 and Article 1449, that agreement defect or willing defect occur if it occurs due to negligence/error, fraud, and coercion. The Civil Procedure Code does not regulate "Willing Abuse" or often referred to as Misbruik Van Omstandigheden. The circumstances abuse as one of the conditions of willing defect develops, due to the development of several legal events in the legal agreement.

The circumstances abuse occurs when a person knows or should know that the other party for any special circumstances such as emergencies, dependence, mindlessly, abnormal mental state inexperienced moved to do a legal act although he knew or should understand the fact he must prevent it, (Miru, 2010). The term of "circumstance abuse" is translated from the Dutch "misbruik van omstandigheden", and in English "undue influence". Black's law dictionary gives the formula 'undue influence' is the abuse of position/circumstances to take advantage of the weak party, (Asra, 1999).

The provisions of Article 16 of the Indian Contract, mention the abuse, as follows: (1) A contract is caused by abuse of circumstances when it is connected between parties, one party dominates the will of the other party and uses the position to gain an unfair advantage from the other party. (2) Under certain circumstances and without prejudice, a person is considered to be in a position that dominates the will of the other party: a) where he has power over another party, or where he is in a fiduciary relationship with another party; or b) where he contracts with someone who has a temporary or permanent mental capacity that is affected by age, illness, physical or mental stress, (Khairandy, 2013) and based on Book 3, Article 44 paragraph (1) NBW, Nieuwenhuis expresses 4 four conditions of circumstances abuse, as follows:

special circumstances, such as emergencies, dependencies, carelessness, insane, and inexperience;

a real thing, it is required that one party

knows or should know that the other party because of special circumstances moved (his heart) to close an agreement;

abuse, either party has implemented the agreement or he knows or should understand that he should not do it.

causal relationships are important that without abuse of the circumstance the agreement is not closed, (Panggabean, 2010).

The conditions for the circumstances abuse by Van Dunne are differentiated from abuse due to economic and psychological superiority so that it can be used as reasons for cancelling the agreement, as follows:

Requirements for abuse of economic superiority

one party must have an economic superiority towards the other;

another party is forced to do an agreement.

Requirements for the abuse of psychological superiority:

One of the parties abuses relative dependence, such as a special trust relationship, such as between parents and children; husband and wife; doctor-patient.

One party abuses the special mental state of the opposing party, such as a mental disorder; inexperienced, hasty, knowledge's lack, poor body condition and so on, (Khairandy, 2013).

The circumstance abuse is a form of willing defect in an agreement. The willing defects in the agreement occur at the pre-contractual stage, that is, the willing defects at the time of realizing the agreed in the agreement, that is, when conforming the statement of the will of the first party. Clearly, the agreement from the parties that do the agreement is not a free agreement, where there is no balance at the time of bidding the contents of the agreement.

In general, agreements that contain circumstance abuse are consumer agreements in the form of standardized agreements. The creditors as Business Actors in a strong position, while the Debtor as Consumers in a weak position, because psychologically some are in need. With this position, the Business Actor (the creditor) can take the opportunity to get the benefit from the agreement they made, either through economic superiority or psychological

superiority. The difference in position between the creditor (strong) and the debtor (weak) causes a lack of balance in bargaining terms and content of the agreement. The lack of balance of position cause from the beginning, at the pre-contractual stage the Creditor was not based on good morals, which was in his mind utilizing the agreement made would bring huge profits or wealth for him.

***The Legal Efforts that can be done by consumers due to abuse of circumstances (misbruik van omstandigheden) in standardized agreements***

The problem of consumers in the current global era is growing even more diverse models of misuse of the situation (misbruik van omstandigheden or undue) done by business actors in standardized agreements. The abuse of circumstances in the agreement occurs because of intentional factors of business actors who have a dominant position. The agreed agreements should fulfil the legal requirements of the agreement as in Article 1320 of Criminal Code (1) there are agreement, (2) skills, (3) certain matters and (4) halal clauses. But it should be remembered that the implementation of the agreement/contract needs to be freedom restrictions. Ridwan Khairandy argued that the restriction of contracted freedom at least affected by two factors, namely: a) the more influential the teachings of good ethics, where good ethics are not only in the implementation of the contract but must also be present at the time the contract is made. b) influence, (Khairandy, 2004).

In connection with that, the obligations that arise from agreements are increasingly not determined by the agreement but are determined by the presence or absence of circumstances abuse and what is considered appropriate in the community and circumstances abuse by one of the parties. Therefore, the most important in an agreement is that it does not contain the abuse of circumstances nor are there good ethics and not an agreement, (Mertokusumo, 1990).

The agreement law or contract law has a fundamental principle derived from the provisions of Article 1338 paragraph (1) of the Civil Code is the principle of contracted freedom. This principle is universal. Universal because it is related to the parties' willing. However, in business

activities, the principle of contracted freedom is often abused by business actors as a stronger party, a party that has a dominant position so that it can determine the content of agreements made unilaterally as standardized agreements. The position owned by the business actor is inversely proportional to the position of consumers as inferior parties who often suffer losses.

The principle of contracted freedom ultimately affects agreements made between Business Actors (Creditors) and Consumers (Debtors), where Business Actors in legal relations are positioned on the strong side, to determine the contents of the agreement, which is different from the Consumer which is a very weak position, because it cannot make an offer regarding an "agreement" in connection with the contents of the agreement, regarding the terms, rights, obligations and responsibilities of the parties. A strong position of the business actor in making a different agreement with a weakly positioned consumer can lead to an agreement which the contents contain the abuse (misbruik van omstandigheden).

The creditors do not want to think about the consequences for the debtor, that is the debtor will suffer a substantial loss. Therefore, to fulfil his desire (creditors) to get the big enough profit, then the terms of the agreement is formulated in such a manner that its purpose is ultimately realized. The clause example: "If Party II (Debtor) cannot pay off debt along with interest and administrative costs as agreed within 2 (two) years from the debt-receivables agreement made, then the debt guarantee belongs to Party I (Creditors) and all debt payment instalments together with interest and administrative costs belong to Party I (Creditors)".

This clause or provisions of the agreement will be very detrimental to the Debtor if the value of the object (land) used as a very high guarantee and strategically located, while the debt value is only a half of the guarantee value of the guarantee object. The clauses as Posner argued that man as a living being is homo economicus, meaning that taking action to meet the needs of its economy, they prioritize economic value with economic reasons and considerations, (Sugianto, 2013) and making agreements unilaterally, without including the debtor, then makes the position of business actors (creditors) as "legio particuliere wetgever",

(Badruzaman, 1989).

It can be estimated that in the process of making agreements there have been arbitrary acts on the part of the creditor due to economic or psychological superiority, abuse of opportunity, abuse of rights, and without giving a normative explanation of the agreement, have restricted the entry into force of the standardized requirements and has limited good ethics. Above all, the relationship with the agreement agreed by the Debtor will result in substantial losses and the agreement that was made was contrary to the principle of balance and justice, wherein agreeing unilaterally by the creditor (business actor), it has been clearly and disregarded morality or ethics in entering into legal relations or agreements. Thus, an agreement that even if it fulfils the provisions of Article 1320 of the Civil Code regarding the requirements to agree, it does not mean that the agreement that has been mutually agreed upon by the parties is valid as a law, which must be obeyed and implemented. The validity of the agreement and does not cause a request to cancel the agreement to the court, if in addition to fulfilling the provisions of Article 1320 Civil Code juncto Article 1321 the Civil Code also the creditor has a good intention when making and implementing the agreement and/or does not take the opportunity to abuse the circumstances so that the agreement that has been made by the creditor contradicts or violates the principles in the agreement, especially the principle of justice. And if the problem as described above is related to the provisions of Article 1321 of the Civil Code concerning the reasons for cancelling the agreement due to a defect of the will, including a negligence or error; coercion; and fraud. The provisions of Article 1321 of the Civil Code have not or do not regulate the issue (abuse of circumstances), then the debtor who feels greatly disadvantaged by the agreement clauses, can ask the Judge for the cancellation of the agreement. The reasons used due to the abuse of the circumstances that resulted in substantial losses, and beg the fairest decision.

The judges in examining and adjudicating cases have autonomy. This means that judges do not have to be based on statutory provisions, which in this case the Civil Code. If the method of interpretation and/or construction of the judge does not find the law, then it can be sourced from jurisprudence, namely the

decision of the Supreme Court Number 4792 K/Pdt/1998, the decision of the Supreme Court that applies the provisions of good ethics and teachings of circumstances abuse, (Khairandy, 2013) and based on existing jurisprudence, the judge can decide that the agreement was cancelled for the reason of circumstances abuse.

#### **4. CONCLUSION**

From the description above, it can be concluded that a) The standardized contract is an agreement with the contents and composition that is standard. According to Law Number 8 of 1999 concerning Consumer Protection, the standardized clause is "any rules or conditions that have been prepared and determined unilaterally by a business actor as outlined in a document and/or binding agreement and must be fulfilled by consumers". The arrangement of clauses in the standard agreement because it is made by a dominant party, then there is a charge of circumstances abuse. The term "circumstances abuse" is translated from the Dutch "misbruik van omstandigheden", and in English "undue influence". The categories or terms and conditions for the abuse of circumstances referring to Van Dunne's opinion there needs to be a distinction of abuse namely (1) economic superiority and (2) psychiatric superiority so that it can be used as a reason for cancelling the agreement. b) The agreement law or contract law has a fundamental principle derived from the provisions of Article 1338 paragraph (1) of the Civil Code namely the principle of contracted freedom. The principles of contracted freedom ultimately affect the agreement made between the business communities (the creditor) and consumer (the debtor), where business actors in legal relations are positioned on the strong side. Business actors because of economic or psychological superiority often abuse the circumstances. So even though the agreement has met the provisions Article 1320 of the Civil Code of the requirement to agree, it does not mean that the agreement that has been mutually agreed upon by the parties is valid as a law that must be obeyed and carried out. So the consumers who feel greatly disadvantaged by the clauses of the agreement that contain abuse of the circumstances can ask the judge to cancel the agreement. The reason used is because it caused considerable losses, and begged for the fairest possible decision. If the

judge does not find the law, then it can be sourced from jurisprudence, namely the decision of the Supreme Court Number 4792 K/Pdt/1998, the decision of the Supreme Court that applies the provisions of good ethics and teachings of circumstances abuse, and based on existing jurisprudence, the existing judge can decide that the agreement was cancelled for the reason of the circumstances abuse.

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