

THE ANALYSIS ON COMBINATION INDEMNITY CLAIMS UPON THE CANCELLATION ACT OF UNILATERAL AGREEMENT

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Abstract

In reality, there is a possibility that a party unilaterally canceled (before the agreement is implemented). This course can be detrimental to others, on the basis of which the aggrieved party should be able to claim compensation. To make demands, it needs the right legal basis. Whether it is a default or illegal act. There are major differences in claims on the basis of default and claims based on illegal acts. Because there is a difference between claims for compensation in default and illegal acts, a study of agreement cancellation is needed unilaterally. Merging claims against law and default agreements is possible because it does not conflict with the law and in accordance with the jurisprudence and the opinion of Supomo that the claim merger requires a close relationship (*innerlickesamenhangen*). As a result of the law being granted, the merging claims of unlawful conduct and default in the aforementioned decision, the judge sentenced the Defendant for the act against the law and Default to the Defendant to pay material compensation which is obviously suffered and the Immaterial loss in the form sum of money payment.

Keywords

compensation, treaty law, cancellation of unilateral agreements, illegal acts

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Introduction

In article 1338 of the Civil Law which contains, "All Agreements made in accordance with the law apply as laws for those who make them. The agreement is irrevocable other than by agreement with both parties, or for reasons determined by law. Approval must be carried out in good intention". Broadly speaking, it can be concluded that the agreement made is a law for the maker of the agreement where there are debtors and creditors and the agreement cannot be unilaterally revoked.

The agreement is binding which means that the debtor must carry out the agreed obligations, but there is a possibility that one party, both the debtor and the creditor, will cancel the agreement unilaterally. In agreements, not implementing an agreement or implementing something that is prohibited is an act of default. In other words, defaults can be interpreted as not performing the agreement due to a debtor's mistake either its intentional or negligent. Default (negligence or oversight) of a debtor can be of four type: (Subekti, 2001)

1. Not doing what he/ she is willing to do;
2. Carry out what is promised, but not as promised;
3. Do what he promised but late;
4. Doing something that according to the agreement cannot be done.

If the negligence or oversight is carried out by the debtor (the party who owes) it will be subject to sanctions or penalties. Penalties or unpleasant consequences for negligent debtors are of four kinds, namely: (Subekti, 2001) First: paying for losses suffered by creditors or briefly called compensation; Second: cancellation of the agreement or also called the breakdown of the agreement; Third : risk transfer; Fourth: pay the court fee, if it is brought before the judge.

In reality, there is a possibility that a party who unilaterally canceled (before the agreement is implemented). This of course can be detrimental to others, on the basis of which the aggrieved party should be able to claim compensation. To make demands, it needs the right legal basis. Whether its default or illegal act. There are major differences in claims on the basis of default and claims based on illegal acts. Because there is a difference between claims for compensation in default and illegal acts, a study of the cancellation of unilaterally agreement is needed.

Discussion

In the Civil Law, article 1313 explained that agreement is "An action which one person or more bind himself or herself to one person or more." While according to Prof. Subekti, "An agreement is an event where someone promised to another or where two persons promised each other to do something." (Subekti, 1992).

In making an agreement, it should be fulfilled the conditions in order the agreement is legitimate and could requested responsibility before the law. In the Civil Law Article 1320-1337 is explained the conditions of legitimate agreement namely:

- a. The agreement are binding themselves
The agreement should free from erroneous, force, or fraud element (article 1321)
- b. The Skill for making an agreement
Everyone is competent for making agreements, if the person is not stated competent by the constitution. The person who stated not competent by the constitution include (article 1330):
 - 1) People who haven't matured
 - 2) Those people who are put below remission
 - 3) Those women, in things set by law, and on generally everyone to whom the Constitution has been forbidden the act of certain agreements.
- c. A certain thing
Only items that can be traded will be able to be the principal agreement (article 1332).
- d. A reason that is lawful
The cause of which is not contradictory to the law, good decency or public order (article 1337).

Provision about woman as an unskilled people have been abolished and considered invalid based on the Supreme Court circular No. 3/ 1963 August 4th 1963 to Chairman of the State and High Court in Indonesia. (Subekti, 2001) Besides the emergence of marriage law No. 1 of 1974 which equalizes the level of husband and wife within marriage, so now which considered unskilled is only people who haven't matured, people under remission, and people who are set by the constitution as unskilled for making certain agreement.

The first and second term called subjective term, which if those terms unfulfilled, then the agreement made could request a cancellation by its party; whereas the third and fourth term called objective term, which if those terms unfulfilled, then the agreement is null and void for the sake of law. This will caused the agreement is deemed to have never existed.

Due to the law of a valid agreement, namely that meets the conditions on the article 1320 of Civil Law act as a law for the makers, cannot be nullified without the agreement of both parties or because of sufficient reasons according to the law, and should be carried out with a good intention.

Legal agreement acts as a constitution for the makers parties; it means the parties should obey the agreement which is the same as obeying the law. If there is a violation, it considered the same as violate the law, which has certain law consequence that is law sanction. So, for those who violate the agreement that he/ she has made, then he/ she will get sanction as it has been set by the law. (Abdulkadir Muhammad, 2006).

Legal agreement could not be nullified unilaterally. The agreement binds its parties, and cannot be nullified or canceled unilaterally. If he/ she want to withdraw or cancel the agreement, he/ she must obtain the approval from the other parties, so it will be

agreed over. However, if there are sufficient reasons according to the law, the agreement can be nullified or canceled unilaterally. (Abdulkadir Muhammad, 2006).

The implementation of good intention, there is two types, which are as subjective element, and as objective measurement to assess the implementation. In the Civil Law the subjective element means "honesty" or "chastity" of its maker. Nevertheless, in the article 1338 paragraph 3 of Civil Law, it's not the meaning of this subjective element, but as the agreement implementation must go on by heeding the norm of decency and ethic. So, the meaning of good intention here is the objective measurement to assess the agreement implementation. As for what it meant by decency and ethic, the law does not provide its formulation, because of that there is no the accuracy of meaning limitation of the terms. Yet, if it is seen from the literal meaning, decency means appropriateness, feasibility, suitability, compatibility; while ethic means politeness, civilization. From the literal meaning, it can be described that decency and ethic as values that are appropriate, feasible, suitable, compatible, decent, polite and civilized, as both parties wish to do the same. (Abdulkadir Muhammad, 2006).

According to *Mayers*, actions that do not carry out obligations arising from the agreement, can not be included in the *onrechmatigedaad* (illegal acts). Agreement due to an illegal act (*verb type onrechmatigedaad*), is in addition to the binding due to the agreement. These two fields are two different things. (Rosa Agustina, 2012).

The difference between these two kinds of notions does not mean that an action cannot fit into both definitions at once. So, an action in the form of an agreement unfulfilled act, at the same time it can fit into an act against the law. This is possible, if in addition to not fulfilling the agreement, the same act also violates legal obligations. For example, a person who owes or a subjective right of collector except of his claim rights based on that agreement. If what is violated is a legal obligation that is a result of an agreement, then what can be done is a lawsuit because the agreement is not fulfilled, if the violation is an obligation, which also exists except each agreement toward the goods owner, then the lawsuit based on the act of which against the law can be accepted. (Rosa Agustina, 2012).

So in this case if it is associated with *Mayers'* opinion, one consideration of the cancellation of a unilateral agreement can be sued by lawlessness, because it is deemed the cancellation of a unilateral agreement is not based on reasons justified by their agreement to be canceled, and can be said to have violated legal obligations out of each agreement, namely to always have good intention and act in accordance with decency and prudential principles.

Agreement termination, indeed regulated in the Civil Law, namely article 1266, must fulfill the conditions that the agreement must be reciprocal, default and its cancellation must request the judge (court). But if the cancellation made does not meet these conditions, it can be said that the cancellation act violates the law, namely article 1266 of the Civil Law.

Moreover, if it is seen from the cancellation reason of the agreement, if the cancellation contains arbitrariness, or uses its dominant position to take advantage of a weak position (adverse condition) on the other party, then it is included in an illegal act, because taking advantage of weak positions or adverse conditions of the opposing party out of the obligations implementation that are set in the agreement, so that it is not a default, but rather in violation of its legal obligations to always have good intentions in the agreement. Good intention can be seen from two benchmarks, first is seen from the agreement contents, whether the rights and obligations of the parties are rational or not, appropriate or not. The second, it can be seen from the agreement implementation.

In the case of the elements proof of its unlawful actions in the cancellation of unilateral agreements, it should again refer to the theoretical perspective of acts against the law, namely by using the notion of opposing the law in the broadest sense, as decided by *HogeRaad* in the *Lindenbaum versus Cohen* case, namely that Unlawful acts not only violate a written rule, but can also be caused by a violation of the subjective rights of others, contrary to the legal obligations of the perpetrator, violating the rules and procedures, and contrary to the principle of decency, accuracy and caution that should be possessed by someone in association with fellow citizens or to the others property in a sense contrary to a good attitude in the society to pay attention to the others interests. (Rosa Agustina, 2012).

Furthermore, to violating the legal obligation to have good intentions, acts of abuse or exploiting the weak position of others party can also be said to violate propriety. Propriety depends on the rational community evaluating these actions. So the cancellation of the unilateral agreement without a valid reason is not fulfilling the conditions stated in article 1266 of the Civil Law, it includes illegal acts, especially if the cancellation of the agreement is a result of exploiting its dominant position to commit arbitrariness to other parties who are weaker or have an adverse position. This includes illegal acts.

This is in line with Suharnoko's opinion, that an agreement violation or agreement termination carried out by one party can also be a violation of the law provisions or an act that violates propriety and prudence that must be considered in the relationship between citizens and other people's property. (Suharnoko, 2004).

Not to speak of seeing the basis consideration concept of unlawful acts in the cancellation of unilateral agreements, besides having to prove the elements of acts against the law contained in article 1365 of the Civil Law, it must also be considered whether the cancellation of the agreement is free from things that eliminate the nature of illegal acts. So if it is related to the decision of *HogeRaad* in 1919, opinion of Mayers also Suharnoko, the concept of unlawful acts can be applied to the case cancellation of unilateral agreement, and one legal consideration is that a unilateral cancellation can be said to be a violation of decency and contrary to good attitude in the society.

Combination claims in practice is known to have two forms, namely: (M. YahyaHarahap, 2005).

- a. Subjective cumulation, in this form in one claim there are several plaintiffs or several defendants. Variations that could occur with several plaintiffs with a defendant or one plaintiff with several defendants or there could also be several plaintiffs with several defendants.
- b. Objective cumulation, in this form the plaintiff joins several claims in one claim, so the cumulation factors are a lawsuit.

Cumulation claims both subjective and objective constitute a merger (cumulation) of the rights demands and must be distinguished from the concussion which is together with the existence of several rights claim. Concussions occur when a plaintiff submits a lawsuit containing several claims which all lead to the same legal consequences, with one of them being fulfilled or granted, the other demands are fulfilled at the same time.

The benefits and objectives of the combination claims are: (M. YahyaHarahap, 2005).

- 1) Actualize a simple trial.
Through a system of combining several claims in one claim, a settlement of several cases can be carried out through a single process and considered and decided in one decision, whereas if each is sued separately and independently, the process of resolving each case must be forced. Under such circumstances the inspection process takes time and is expensive.
- 2) Avoid conflicting decisions
Through the combination system, it can be avoided the emergence of conflicting decisions in the same case. Therefore, if there is connectivity between several lawsuits that are effective in avoiding the occurrence of conflicting decisions by taking the cumulation system or combine the claims.

Subektias quoted from his book Supomostates that to avoid decisions that contradict each other toward the case that has connectivity when certain State Court there are two or more cases which are interconnected, and the parties involved in the same, more accurately those cases combined into one so that it is examined by only one assembly. (Soepomo, 1993: 74).

Possible Merger of the Article 1240-1242 and Article 1365 of the Civil Law as the Legal Basis of Claims Due to Unilateral Termination of Agreements by Other Parties in the Reciprocal Agreement, then the Plaintiff's claim about the concrete event is the same, namely referring to the description of the same material action in the claim The Plaintiff, so that there is clearly no conflict between the arguments of the lawsuit and it is not complicate in the process of examining the case.

The combination case must not violate the prohibition provisions of the combination claims. Where according to the doctrine there are three things that are prohibited to combining a claim, namely: if for a certain claim (claim) a special occasion is required (divorce), while the other demands must be examined according to an ordinary occasion (claim to fulfill the agreement) then both demands should not be combined in

one lawsuit, as well as if the judges are not arbitrary (relatively) to check out one demand which put together in one lawsuit with the other claim. So the two demands must not be brought together in one claim, claims of *bezit* must not be brought together with claim of *Eigendom* in one claim. (Sudikno Mertokusumo, 1982).

This can be seen from the Decision of the Supreme Court of the Republic Indonesia No. 2443 K/Pdt/2008 and the Decision of Semarang High Court No. 88/Pdt./2008/PT. Smg., Jo. The Decision of Purwokerto State Court No. 46/Pdt.G/2007/PN.Pwt. From this decision, it can be seen that the law application of the Supreme Court Judge of the Republic Indonesia and the Judge of the Purwokerto State Court granted the lawsuit combination against the law and default. This is supported by the opinion of Supomo that the combination claims *require* a close relationship (*innerlickesamenhangen*). (Army Ekonanto, 2012).

Regarding the compensation that will be prosecuted, the plaintiff can base his/ her compensation claims from losses that may be suffered due to the cancellation of the unilateral agreement. For example, one party has produced, or incurred a large fee to carry out agreement, but because the agreement is canceled by another party, then he/ she suffered a loss.

In terms of juridical glasses, the compensation concept in law is known in 2 (two) legal fields, namely as follows:

- a. Compensation concept due to contract defaults
- b. Compensation concept due to an agreement based on the law including compensation for illegal acts.

There are many similarities between the two compensation concepts because of contract default with the compensation concept for illegal acts. But the difference is also many. There is also the compensation concept that can be accepted in the compensation system due to illegal acts, but too hard if it is applied in the contract defaults concept. For example *punitive damages* that can be well received in compensation due to illegal acts, but the principle is difficult to accept in compensation due to contract defaults. This punishing compensation is compensation that must be given to the victim in an amount that exceeds the actual loss. This is intended to punish the party who committed the act against the law. Because the amount exceeds the actual loss suffered, the punitive compensation is often referred to as "smart money" (*smart money*).

The plaintiff underlying the lawsuit in article 1365 of the Civil Law cannot at all expect that the amount of loss will be determined by a law which has become a permanent jurisdiction. The Indonesian Supreme Court in the decision of R. Soegijono versus the Mayor, Head of Regional Level II Medium Blitar City No.610K/Sip/ 1968 dated May 23rd 1970, contains considerations including the following: "Even though the compensation claim is considered inappropriate, the plaintiff is absolutely demanding that amount, the judge has the authority to determine how much should be paid, this does not violate article 178 (3) HIR (*ex aequo et bono*)" (Rosa Agustina, 2012) That the

judge has the authority to determine how appropriate compensation must be paid, even though the plaintiff is demanding compensation in an inappropriate amount. (Rosa Agustina, 2012).

In the case of the Civil Law, it does not explicitly or even regulate in detail the compensation for illegal acts, or about one aspect of compensation, based on the guidelines of several articles in the Civil Law and judges' considerations in the above jurisprudence, the rules used for this compensation are, analogically, using compensation rules as a result of the default provisions stipulated in articles 1243-1252 of the Civil Law, besides the recovery returned to its original state. (Rosa Agustina, 2012).

Compensation claims in illegal acts can be: (Rosa Agustina, 2012)

- a. Money and could be forced money
- b. Recovery in its original state
- c. Prohibition of repeating the action
- d. Could request the judge's decision that his/ her actions are deeds against the law

If in compensation due to default, usually the amount of the loss has been determined in advance and the provisions in the agreement, whereas in the case of compensation due to illegal acts, the judge has the freedom to determine the amount of compensation in accordance with the principle of propriety, insofar as it is requested by the plaintiff, even the Indonesian Supreme Court's permanent jurisdiction state that the judge in determining the amount of compensation must determine according to justice. Although, this is very dependon the subjective judgment of the judge who handles it. Sometimes for the sake of determining the amount of compensation must first ask an expert to do a calculation of the amount of the loss. Costs to be incurred for the purposes of these needs are called the costs of *expertise*, which must also be replaced by the offender. It is more difficult to determine the magnitude of the *gederfdewinst* (the expected profit which is can be accepted) so that in calculating the *gederfdewinst*, people always calculates *ex-equo ex bono* (*naarredelijkheid en billijkheid* or according to feasibility and reasonableness). Similarly, idiosyncratic losses will always be calculated as *ex aequo ex bono*. (Rosa Agustina, 2012).

However, the possibility of applying *ex aequo ex bono* does not mean giving the judge the authority to reduce compensation payments based on the personal conditions of the parties, it must also be endeavored to provide compensation that really suffered. In the Netherlands in several decisions of the *Hoge Raad*, it has been formulated that the determination of losses must be based on objective measures. In a Court in the Netherlands a verdict can be found in which the so-called abstract or objective loss calculation is contrary to the calculation of losses in a concrete or subjective manner. In determining the abstract method, the judge does not merely consider the specific matters in the occasion concerned with the subjective state of the suffered. Rather, the judge examines the general disadvantages of a creditor who is in the same position as

the plaintiff in the case concerned. Losses are determined objectively according to the wealth of people who have defaulted.

The Civil Law itself regarding the amount of compensation due to Unlawful Acts in article 1371 (2) which states that compensation is assessed according to the position and ability of both parties, and according to circumstances. (Rosa Agustina, 2012).

Even though in principle, all losses incurred must be replaced, but it is clear that article 1365 of the Civil Law does not cover losses suffered due to an illegal interest. For example, the damage suffered of a smuggled car, the car owner will be entitled to reimburse for his/ her material losses, but is not entitled to sue for the profits expected to be received. (Rosa Agustina, 2012).

The amount of the loss is determined by interpretation, where it is attempted so that the sufferer as much as possible is returned to its original state before the occurrence of unlawful acts. Regarding the law which states that the judge in determining the amount of compensation must not exceed what is demanded by the plaintiff, it will cause problems if according to the judge what is claimed by the plaintiff is considered smaller and has not fulfilled a sense of justice. (Rosa Agustina, 2012).

If this is the case, the judge should decide on compensation in what is demanded by the plaintiff. This is to avoid other legal remedies that can assume the judge's decision exceeds the claim of the plaintiff is not true, and finally the verdict which originally wanted to give justice to a case was canceled and the plaintiff who expected compensation to demand justice did not get their wish because reasons for mere legism.

Conclusion

The lawsuit combination of deeds against the law and default is can be done because it is not contradictory with Constitution and in accordance with the Jurisprudence also opinion of Supomo that lawsuit combination required a close relationship (innerlikesamenhangen). The consequence of lawsuit combination of deed against the law and default granted in the aforementioned decision, the judge passes the sentences on Act Against the Law and Default to Defendant for paying material loss compensation which obviously suffered and immaterial loss in the form of payment a number of money.

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