Overmacht And Unforeseen Circumstances In Agreements According To Indonesian Civil Law And Dutch Law

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Abstract.

An agreement generally includes a clause on force majeure. This is so that the parties understand between negligence caused by the parties themselves and negligence that occurs due to force majeure. This research is a normative-research that studies legal objectives, values of justice, validity of legal rules, legal concepts, and legal norms. The source materials used in this research are primary legal materials, secondary legal materials and tertiary legal materials. Primary legal materials are the Indonesian Criminal Code and the Dutch Criminal Code. Furthermore, the data collected is analyzed qualitatively. Overmacht is intended to provide protection to one of the parties harmed in an agreement, provided that the objective and/or subjective conditions of a situation can be classified as overmacht. Overmacht is a common clause in an agreement in Indonesia, the regulation of this clause is found in the Civil Code in Article 1244 and Article 1245, the position of Overmacht in an agreement is in the main agreement, not separate as an additional agreement and associated with the main agreement. Dutch contract law places great importance on the agreement reached between the parties to the contract. Therefore, Dutch courts are reluctant to set aside binding agreements on grounds based on force majeure events and unforeseen circumstances. Contracting parties should scrutinize carefully the agreed risk allocation (e.g. when drafting a force majeure clause) between them before signing the agreement, as ultimately, the agreed risk allocation set out in the agreement, will most likely be upheld.

Keyword: *Overmacht, Indonesia Law and Dutch Law.*

I. INTRODUCTION

The law has regulated the relationship between individuals whose purpose is to protect each individual interest.Formally, the Civil Code is divided into 4 (four) books, namely Book I (First) regulates persons (van Perrsonen) which is regulated in Article 1 to Article 498, Book II (Second) regulates objects (Van Zaken) which is regulated in Article 499 to Article 1232,then there is Book III (Third) which regulates the engagement (Van Verbintenissen) which is regulated in Article 1233 to Article 1864, and finally Book IV (Fourth) which regulates the Proof and Expiration (van Bewijs en Verjaring) which is regulated in Article 1865 to Article 1993. However, in legal systematics, civil law is divided into personal law (personenrecht), the second part about family law (Familierecht). the third part about property law (Vermogenrecht), and the fourth part about the law of warirs (Erfrecht). (Tan Kamello, 2011). Civil law is the branch of law that governs the relationships between private persons and legal entities. It includes rules and principles that govern individual rights and obligations, legal responsibilities, property ownership, agreements, treaties, inheritance, and various disputes between the parties involved. The main purpose of civil law is to protect the rights of individuals, assist in dispute resolution, and ensure that justice prevails. The Kitab Undang-Undang Hukum Perdata (Civil Code) divides Indonesian civil law into several sections. According to Sudikno Mertokusumo, an agreement is defined in civil law as a legal agreement between two or more parties who agree to do or not do something.

The agreement includes the agreement of the parties, the rights and obligations of each party, and the procedure for resolving disputes if they occur. (Sahruddin; et.all, 2020) The general principles governing agreements under civil law include freedom of agreement, valid agreement, and validity of agreement. The principle of freedom of agreement means that the parties involved in the agreement are free to determine the terms of the agreement as long as it does not conflict with the law or generally accepted decency. One of the important requirements in an agreement is a valid agreement. An agreement must involve a clear and

uncoerced agreement between the parties involved to be considered valid. This agreement must be expressed honestly, freely, and not involve coercion. One of the important principles in the law of agreements is the validity of the agreement.A contract that has been made legally will be binding for those who make it like a law. This means that the contract made applies as a law to those who make it. The parties must carry out the rights and obligations they have agreed to in the agreement.

This is as stated in Article 1338 of the Civil Code. In an agreement, sometimes problems occur where one of the parties does not fulfill its obligations as agreed since the agreement was made, which is called default. Default can occur either intentionally or unintentionally, because the party is unable to fulfill the performance or also because it is forced to perform the performance. Here, default can be in the form of: not performing the performance at all, performing the performance imperfectly, being late in performing the performance, and doing what is in the agreement prohibited to do. (Ahmadi Miru, 2011)The circumstances mentioned above are force majeure. An agreement generally includes a clause on force majeure. This is so that the parties understand between negligence caused by the parties themselves and negligence that occurs due to force majeure. Force majeure is one of the concepts in civil law and is accepted as a principle in law. Mochtar Kusumaatmadja states that force majeure or vis major can be accepted as an excuse for not fulfilling the performance of obligations due to the disappearance of the object or purpose that is the subject of the agreement. (Miftahul Jennah and Emilia, 2023)

II. METHODS

This research is normative research that studies legal objectives, values of justice, validity of legal rules, legal concepts, and legal norms. Normative legal research can also be said to be a process for finding legal rules, legal principles, and legal doctrines to answer the legal issues at hand. It can also be said that legal research is conducted to produce arguments, theories, or concepts as prescriptions or answers to the problems at hand. (Peter M. Marzuki, 2023). The source materials used in this research are primary legal materials, secondary legal materials and tertiary legal materials. Primary legal materials are the Indonesian Criminal Code and the Dutch Criminal Code. Furthermore, the data collected is analyzed qualitatively. (Peter M. Marzuki, 2023)

III. RESULT AND DISCUSSION

1. Overmacht Under Indonesian Law

Civil Law in a broad sense includes all material private law, namely all basic laws governing individual interests. The existence of civil law that regulates human or community relations is a legacy of the political legacy of the Dutch East Indies Government. The political guidelines for the Dutch East Indies Government towards law in Indonesia are written in Article 131 of the Indische Staatsregeling. (M. Muhtarom, 2014). Civil agreements emphasize more on external matters, compared to issues related to “rituele plichtenleer”, therefore in agreements in Indonesia only recognize the law as stated in the Civil Code book III which applies to European and Chinese groups, customary law applies to indigenous Indonesian groups there are provisions that have similarities with the arrangements for the two groups. Treaty Law also basically involves a two-ended legal relationship. On the one hand, the norms in it appear to be related to personal rights to claim, and on the other hand to obligations to perform something (duty to render performance). Treaty Law, on the other hand, regulates the voluntary transfers of resources between members of society. It therefore focuses its attention on the fulfillment of expectations of the parties that are formed on the basis of binding promises. Overmacht is one of the clauses that are usually in an agreement, it is said to be one of the clauses because the position of Overmacht in an agreement is in the main agreement, not separate as an additional agreement and is associated with the main agreement like an accessory agreement.

Overmacht or what is often translated as “force majeure” is a situation where a debtor is prevented from carrying out his performance due to circumstances or events that were unexpected at the time the contract was made, these circumstances or events cannot be accounted for by the debtor, while the debtor is not in bad faith. There are various kinds of force majeure, namely: absolute force majeure (absolut

onmogelijkheid) and relative force majeure (relatieve onmogelijkheid).Absolute force majeure is a situation where the debtor is completely unable to fulfill his obligations to the creditor, due to earthquakes, flash floods, and lava. Meanwhile, relative force majeure is a situation that makes it possible for the debtor to carry out his performance. In the implementation of the performance, it must be done by giving a large unbalanced sacrifice or using mental strength that is beyond human ability or the possibility of being hit by a very large danger of loss.Force majeure or also known as force majeure/overmacht is closely related to the issue of indemnification of a contract, because force majeure brings legal consequences not only the loss or delay of obligations to perform the performance arising from a contract but also a force majeure can also exempt the parties to provide compensation for the non-performance of the contract concerned. In addition, the determination of force majeure in the contract will determine the risk management as a result of the force majeure event.

Force majeure causes the obligation to no longer have the power to work. In this case then: a) The creditor cannot demand that the obligation be fulfilled; b) The creditor cannot say the debtor is in a state of negligence, and therefore cannot sue; c) The creditor cannot request termination of the agreement; and d) In a reciprocal agreement, the obligation to make contraprestasi is canceled. (Mariam Badruszaman, 2020)The provisions in the Civil Code regarding the general provisions of Overmacht are contained in Articles 1244 and 1245 of the Civil Code, basically these provisions only regulate the problem of overmacht in relation to the reimbursement of costs and interest. Overmacht in civil law is regulated in book III B.W in articles 1244 and 1245 of the Civil Code. Article 1244 of the Civil Code: “If there is a reason for it, the debtor shall be liable to reimburse costs, damages and interest if he cannot prove that the non-performance or non-performance of the obligation at the right time was due to an unforeseen event, nor can he be held responsible, all of which even if bad faith is not on his part.” Article 1245 of the Civil Code: “Damages and interest shall not be payable, if by reason of force majeure or accidental occurrence the debtor is unable to render or perform the obligatory act, or by reason of the same has committed a prohibited act.”The event that caused the overmacht was not an intentional event by the debtor. This is an incorrect formulation, because the action should be “outside the fault of the parties (article 1545 of the Civil Code), not accidental”. Because, the fault of the parties either committed intentionally or unintentionally, namely in the form of “negligence” (negligence); the parties are not in a bad state itikat (article 1244 of the Civil Code). If there is an overmacht, the contract becomes void, and wherever possible the parties are returned as if the agreement had never been made(Article 1545 of the Civil Code).

In the event of an overmacht, the parties may not claim damages. Vide Article 1244 juncto article 1245, juncto article 1553 paragraph (2) of the Civil Code. However, because the contract in question becomes void due to overmacht, then to maintain the fulfillment of the elements of justice, restitution or quantum merit is certainly still possible. The risk as a result of overmacht, passes from the creditor to the debtor from the moment the goods should have been handed over (vide Article 1545 of the Civil Code). Article 1460 of the Civil Code regulates this inappropriately (outside the system) In situations categorized as overmacht, creditors have legal ramifications, consequences, or repercussions. In these cases, the creditor cannot demand the fulfillment of the feat and the debtor is no longer declared in default, so the debtor does not have a payment obligation. compensation. In addition, the creditor cannot demand cancellation in the reciprocal agreement because his alliance is considered to be null and void. As a result, force majeure or overmacht-related circumstances and is a risk-related problem. After analyzing the provisions and position of force majeure in Indonesia, in fact, there is no clear and comprehensive regulation on force majeure, because Indonesia still uses the provisions inherited from the Netherlands which may no longer be relevant to the current state of the Indonesian economy. though this provision is needed and very influential on the business climate and economic development in Indonesia.

2. Overmacht Under Dutch Law

The Dutch Civil Code (Article 6:75) establishes the circumstances under which one of the parties to the contract may use force majeure as an excuse for default. In the context of M&A, the defaulting party may try to use force majeure as a defense to reject: guarantee claims, damage claims and/or claims for non-performance of its obligations. This may apply if the default or failure is not due to the fault of the defaulting

party or because of its liability in accordance with the law, contract or generally applicable opinion (verkeersopvattingen). The following Basic Rules should be considered when assessing force majeure defense:

a. Force majeure in most cases will be related to (temporary) obstacles to performing the performance;

b. The inability to make payments will usually remain the responsibility of the failed party. Thus, using force majeure to withhold payment will most likely not work;

c. If the implementation is very heavy, but not impossible, there is no force majeure;

d. In principle, there is no force majeure if the balance between the performance of the parties is disturbed as a result of, for example, price changes;

e. There is no force majeure if an obligation can be carried out in different ways and the impediment only applies to one way of execution;

f. The obstacle is not the fault of the party who failed to pay;

g. Foreseeable impediments at the time the agreement is signed, the negligent party should have considered such impediments when signing the agreement and these will generally not qualify as force majeure;

h. Bankruptcy or other situations of financial difficulty will generally not qualify as force majeure;

i. Industrial disputes and strikes in general will remain the responsibility of the negligent party; and

j. Legal restrictions and regulatory measures (domestic or Foreign) may result in force majeure. This may be different if the government restrictions relate to a single person or entity.

Force majeure is a defense to a claim for damages in which the burden of proof rests with the negligent party. Based on the established case law, the threshold for using force majeure successfully is high. A successful defense by a defaulting party under force majeure will have the following consequences during the period of force majeure: a claim by a non-defaulting party for a specific performance, for example to complete a transaction and/or a claim for damages will be rejected. Although the non-defaulting party's obligations are generally unaffected by force majeure events, it may suspend the performance of its obligations under the SPA (e.g. seller's obligation to transfer shares or buyer's obligation to pay the purchase price) or even terminate the SPA for default, but without being able to claim damages. Unless otherwise agreed, the defaulting party cannot terminate the agreement. This means that if force majeure no longer occurs, the non-defaulting party may again demand the execution of the agreement.As stated above, the main principle of Dutch contract law is freedom of contract. Most commercial contracts contain clauses that allocate risk to one of the parties. Risk allocation can be done through various mechanisms, such as in guarantees, limitation of liability clauses, and force majeure clauses. Some spas exclude appeals of force majeure altogether by one or both parties waiving their rights under Article 6:75 of the DCC.

As such, Dutch courts will generally order the defaulting party to pay damages, or provide other remedies agreed upon by the parties in the event of a breach.A force majeure clause can, but need not, include a specified list of force majeure events (complete or incomplete). Thus, the parties to the contract are free to include examples that can be considered force majeure, such as epidemics or pandemics, and to agree on the implications of such events. Force majeure clauses should always be structured in a clear and unambiguous manner. In the absence of a definition or agreement on force majeure, the Dutch courts will consider all facts and circumstances to determine whether a failure was caused by the defaulting party.The Dutch legal concept of unforeseen circumstances is mandatory and the right to ask the court to change or terminate the agreement as a result cannot be contractually excluded. As a result, the parties to the SPA can always ask the court to dissolve the agreement in whole or in part, for unforeseen circumstances, despite the fact that most spas stipulate that the parties waive such rights. Whether such circumstances were really foreseeable by the parties at the time of signing the agreement or not, is not a decisive factor. More importantly, the assumptions of the parties at the time they signed the agreement and whether they wanted to meet unforeseen circumstances in the agreement (both explicitly and tacitly) should be taken into account. The question of whether the parties really intend to fulfill certain circumstances is ultimately a matter of contract interpretation.

IV. CONCLUSION

Overmacht is intended to provide protection against one of the injured parties in an agreement, with the provision of having fulfilled the objective conditions and/or subjective conditions of a situation can be classified as overmacht. Overmacht is a common clause in an agreement in Indonesia the regulation of this clause is contained in the Civil Code in Article 1244 and Article 1245, the position of the Overmacht in an agreement is in the main agreement, not separate as an additional agreement and is associated with the main agreement. Dutch contract law attaches great importance to the agreement reached between the parties to the contract. Therefore, the Dutch courts are reluctant to waive binding agreements on grounds that are based on force majeure events and unforeseen circumstances. The contracting parties should carefully examine the agreed risk allocation (e.g. when drawing up force majeure clauses) between them before signing the agreement, because ultimately, the agreed risk allocation set out in the agreement, will most likely be enforced.

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