
Abuse of Circumstances as a Reason for the Cancellation of Financing Agreements

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Abstract:

Article 1 of Presidential Regulation No. 9 of 2009 concerning Financing Institutions states that a financing institution is a business entity engaged in financing activities in the form of provision of funds or capital goods. Business activities of financing institutions give more emphasis on the function of financing in the form of provision of funds or capital goods.

The development of financial institutions in Indonesia is increasingly in demand by the community because of the ease of the procedure. In practice many problems arise, among them is the agreement by default, and the case of abuse of circumstances.

The abuse, according to this development, is not only limited to the presence of threat/coercion, errors, fraud, but in the field of jurisprudence known as the causes of disability, or the abuse of circumstances.

In some cases decided by the Supreme Court of the Republic of Indonesia, the abuse of circumstances has been applied by the judges. It is unfortunate, however, that in some cases the financing agreement that the judge handling the case for the cancellation of the treaty does not apply abuse of circumstances.

Keywords: *Abuse of circumstances, cancellation of agreement, financing agreement, venture capital company, Indonesia.*

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1. Introduction

The development of financial institutions in Indonesia is increasingly in demand, because of the ease of the procedure (Ibrahim, 2012). The best example of such a type of financing is through venture capital. A venture capital company (hereinafter written VCC) in Indonesia offers financing to Small and Medium Enterprises (hereinafter SMEs). The nature of venture capital financing is management assistance given the fact that the corresponding SME fulfills the financial requirements, and the non-financial needs. To meet these non-financial needs, specific skills are required in accordance with the type of venture capital. VCC in carrying out its business may use the equity participation solution into the corresponding companies. By doing the capital investment, the VCC is not merely a kind of social institution, that is a philanthropic or a charity club running their business based on social responsibility and compassion.

VCC is a business institution in contrast to high risk and high return investment and not a speculative venture. The basic concept of venture capital is financing in the form of equity participation into a joint-venture company. This capital investment by VCC cannot be equated with a loan or lending agreement or a banking credit agreement. In a venture capital agreement, there is no loan amount of money, so the position of VCC is not as a creditor, but as a business partner in the corresponding companies. It is found that 70% of the industry's total venture capital is now deviated from its main function, namely the inclusion of capital (equity participation) to companies, especially start up's. Currently, the majority of venture capital is engaged in crediting and direct loans like banks.

This situation is triggered by the increasing number of business actors who need loans for their business. Venture capital industry is not only needed for a start up company but also for the high growth potential of the economy. On the other hand, there are still many business actors who do not understand the true nature of venture capital companies. They consider that VCC is like a bank providing the loan. Because of lack of understanding, in the urgent condition many businesses have entered into loan agreements with VCC.

Agreements are like a banking credit agreement. This agreement requires security in the form of collateral or guarantees. The collateral or guarantees may include the imposition of mortgage rights. VCC makes this agreement with the business actor because it understands the true state of the company which needs the loan. VCC does not have the authority to conduct loan agreements like banks. In such a condition, an agreement for a loan, can be referred as an abuse of circumstances. As regulated in Article 1320 of the Civil Code (hereinafter the Civil Code) on the terms of the validity of this kind of an agreement, is the agreement of the parties. The conditions agreed cannot be met due to coercion, errors, and fraud. An agreement that the deal is deformed because it contains coercion, errors, and fraud resulting in the position of the relevant agreement can be canceled.

The agreement failure is not only limited to the presence of coercion, errors and fraud, but in the field of jurisprudence has been known again one of the causes of disability, or the abuse of circumstances. Abuse of circumstances can be used as a reason for cancellation of venture capital agreement. Although venture capital agreements have been made on the basis of the parties' agreement, the agreement has become flawed in the event of abuse of circumstances by VCC. The abuse was initially set in Nieuw Burgerlijke Wetboek (hereinafter written NBW), while in modern Indonesia the abuse of circumstances arises from the field of jurisprudence. In some cases that have been decided by the Supreme Court of the Republic of Indonesia, this abuse has been applied by the judges. However, it is unfortunate, in some cases judges handling the case did not understand the request for cancellation agreement regarding the abuse of circumstances.

2. Research Methods

The present research is classified by the type of normative legal research, research that examines the legislation in a coherent legal order (Budiharseno, 2017; Nugroho *et al.*, 2017). The study also uses legal material as its main source. Therefore, it aims to examine how the law has collected, explained, systematized, analyzed, interpreted and assessed the norms of positive law relating to abuse of circumstances as the reason for the cancellation of the financing agreement, by and within the framework of the order or the applicable legal system whereby law is one of the sub systems of the entire financing agreement system.

The study of abuse of circumstances as the reason for the cancellation of this financing agreement is done by using:

- (a) the philosophical approach;
- (b) the statute approach;
- (c) the conceptual approach;
- (d) the historical approach.

3. Venture Capital in Indonesia

The development of financial institutions in Indonesia is quite rapid. The existence of financing institutions is increasing in demand by the community. Through the instrument of the consumer financing agreement, in an instant way, the consumer can immediately buy and drive a desired vehicle. However, not many consumers are aware about the consequences and the various negative possibilities that are binding behind the various conveniences offered.

VCCs are not as popular as banking and financial institutions, because the existence of VCC financing is relatively new compared with the conventional financial institutions or banks. Unlike a bank, these new financing institutions grow in line with the 1988 Deregulation Package, on 27 October 1988 (Pakto 88) and the

Package of Deregulation in December 20, 1988 (Pakdes 88) (Sunaryo, 2008). Although financing institutions together with banking institutions are viewed from equivalent terms, the business activities of banks and financial institutions are different. These financing institutions focus more on financing functions in the form of provision of funds or capital goods by not collecting funds directly from the community (Sunaryo, 2008).

As a business entity, the financial institution runs its business in the field of financial services, by providing funds to productive businesses and consumer needs, as well as non-financial services. Thus, in the business activities of financial institutions more emphasis is given in the financial function, namely financial services and non-financial services. Financing institutions are part of the financial sector of the economy (Sunaryo, 2008). Article 1 of Presidential Regulation No. 9 of 2009 concerning Financing Institutions states that a financing institution is a business entity engaged in financing activities in the form of provision of funds or capital goods. When viewed from this definition, it appears that the financing institution is a business entity. Therefore, it can be interpreted that a financing institution is a company engaged in financing activities in the form of provision of funds or capital goods.

Similarly, leasing is in demand by entrepreneurs who need capital goods (Shofie, 2000; Wahyuni and Ginting, 2017). Leasing is quite popular in business. Leasing capital goods are fairly expensive, such as leasing an aircraft by an airline company, leasing equipment for office purposes, leasing motor vehicles to be used by a person everyday. Almost all business and non-business areas have been entered into leasing businesses, including but not limited to, the areas of industrial transportation, construction, agriculture, mining, offices, health and others (Fuady, 1996; Kurniawan, 2017).

4. Financing Company as Business Service and Business Actor

The state policy in the development of financing activities was initially regulated by Presidential Decree No. 61 of 1988 on Financing Institutions and Decree of the Minister of Finance No. 1251/KMK.013/1988 regarding Provisions and Procedures for Implementation of Financing Institutions. Contemporary, Presidential Decree No. 61 of 1988 has been replaced by Presidential Regulation No. 9 of 2009. According to Article 1 paragraph 1 of Presidential Regulation No. 9 of 2009, financing institution is a business entity conducting financing in the form of provision of funds or capital goods. Article 2 provides the financing institutions including (a) a financing company, (b) a venture capital company (c) an infrastructure financing company. Furthermore, article 3 provides that business activities of financing companies include (a) rent, (b) factoring of receivables, (c) credit card business and (d) consumer finance. With the establishment of the Financial Services Authority (FSA) pursuant to Law No. 21 of 2011 on the Financial Services Authority, the regulation and supervision of the financing institution shall

be conducted by FSA. The authority is a state institution that serves to organize an integrated regulatory and supervisory system to the overall activities within the financial service sector. FSA is an independent institution which has the functions, duties and authority of arrangement, supervision, inspection and investigation of any kind of financial activity. FSA was established to replace the Capital Market Supervisory Agency and Financial Institution's role in regulating and supervising capital markets and financial institutions, and replace the role of Bank Indonesia in regulating and supervising banks, as well as protecting consumers of the financial service industry.

The financing company is governed by the Regulation of the Financial Services Authority No. 29 of 2014 on the Operation of the Financing Company. Article 2 paragraph (1) of the regulation states that the company's business activities include (a) investment financing, (b) working capital, (c) multipurpose financing (d) other business activities under FSA approval. In addition to the business activities above the financing company may undertake to operate lease and/or fee based on activities as they do not conflict with legislation in the financial service sector. Furthermore in Article 4 of the regulation is mentioned that investment financing as referred to in Article 2 paragraph (1) section a, shall be done by (a) finance lease, (b) sale and leaseback, (c) factoring with receivables and factoring with recourse, (d) payment by installment, (e) project financing, (f) infrastructure financing, (g) other financing after approval from FSA. While, working capital financing herewith shall be done by (a) sale and leaseback, (b) factoring with receivables and factoring with recourse, (c) factoring without collateral from the factoring receiver, (d) business capital facility, (e) other financing after approval from FSA. Moreover, multipurpose financing shall be done in some manners of finance lease, payment by installment, and other financing after approval from FSA.

Financing companies have proven to play an important role in the distribution and allocation of financial resources to businesses and the people of Indonesia, either through the provision of financing of productive goods required by businesses or by supplying the consumer goods to satisfy the needs of the society, which ultimately will encourage the occurrence increasing the economic activity in Indonesia. On the other hand, the realization of a robust, contributive, inclusive and equitable financing industry can contribute to maintaining a stable and sustainable financial system that helps reduce the vulnerability of Indonesia's financial system stability to future financial turmoil. Furthermore, in order to increase the role of the financing industry, there are needs to be strategic breakthroughs expanding the alternative business activities that can be done by financing companies in order to provide access to financing, especially for people who still face limited access to financing options. Expansion of financing activities is expected to encourage financing companies to be more efficient in allocating capital. In order to face the rapid development of the national economy, dynamic and increasingly complex challenges integrated with the global economy, various comprehensive policy adjustments are needed in the field of business operations of the financing

companies, including business activities, health levels, funding sources, and financing cooperation. These policy adjustments are expected to create clear regulation and provide legal certainty, which can increase the role of financing companies in the national economic system.

5. Abuse of Circumstances for Canceling Financing Agreement

An agreement must meet the validity requirements as set forth in Article 1320 of the Criminal Code. Article 1320 of the Criminal Code states that for the validity of the agreements three conditions are required. First, the authority to make a commitment; second, the object of the commitment; third, a lawful cause. Hence, the agreement of the parties and the commitment are classified as subjective elements, while the certain object and the lawful cause are classified as objective elements. When the subjective elements are not fulfilled, it will result in an annulled voidable agreement while not fulfilling the objective element of the treaty being null and void. Disability of agreements according to developments could be simple because there is no compulsion (Articles 1323 to 1327 of the Civil Code), oversight (Article 1322 of the Civil Code), fraud (Pasal 1328 Civil Code). An agreement that is deformed because it contains coercion, errors, and fraud results in a cancelable agreement position. If the agreement has been declared canceled, the situation will be returned as before (Article 1451 jo. 1452 Civil Code). The application for cancellation of an agreement for not fulfilling the subjective element is referred in Article 1454 of the Civil Code.

The disability of agreements is not only limited to the presence of coercion, errors, and fraud, but also in the field of jurisprudence has been known as the abuse of circumstances. This abuse is set in New Burgerlijk Wetboek (hereinafter written NBW). In NBW, Article 3:44 chapter 1 states that legal acts may be canceled in the event of: a) threat; b) deception; c) abuse of circumstances. Nieuwenhuis suggests four conditions of abuse of circumstances (Panggabean, 2010). First, special circumstances, such as emergencies, dependence, carelessness, insanity and inexperience. Second, a case requiring that one party should know that the other is due to special circumstances moved his or her heart to close a covenant. Third, abuse one of the parties has executed the agreement or it knows or should understand that it should not do it (for instance in the case of VanElmbt vs. Feierabend widow). Fourth, a causal relationship, that is important that without abusing the situation the treaty will not be closed.

Van Dunne (1987) distinguishes the abuse because of economic advantages and superiority of psychiatric breakdown. The requirements for the abuse of economic benefits are like in some cases that one party shall have an economic advantage over another and the other party is forced to enter into an agreement. Moreover, the requirements for the abuse of psychological superiority are such as in cases that one of the parties abuses the relative advantage, such as the relationship of special confidence between parent and child, husband and wife, patient and doctor, pastor of

the congregation and that one of the parties abuse the special mood of the opposing party, such as the presence of mental disorders, inexperienced, reckless, lack of knowledge, and physical condition. Van Dunne further states that abuse of circumstances is not merely related to the content of the covenant, but relates to what happened at the time of the birth of the covenant, namely the abuse of circumstances that led to the declaration of the will and the self-acceptance of one-sided parties with no defects (Van Dunne, 1987). Initially abuse of circumstances in Indonesia was emerged from the field of jurisprudence. In subsequent developments, abuse of circumstances is regulated by FSA regulations which aim to protect consumers and society. To protect the consumers and the community, FSA is authorized to conduct preventive measures and public consumer losses. Article 31 of Law on FSA states that consumer protection and the public is regulated by the FSA. To implement Article 31 of this law, FSA shall issue Regulation No. 1 of 2013 concerning Consumer Protection of Financial Services. Article 1 point 1 FSA Regulation No. 1 of 2013 states that Business Service Providers are Commercial Banks, Rural Banks, Securities Companies, Investment Advisors, Custodian Banks, Pension Funds, Insurance Companies, Reinsurance Companies, Financing Institutions, Companies Pawn and the Guarantee Company, both of which carry out their business activities in a conventional or sharia manner.

Article 1 point 15 FSA Regulation No. 1 of 2013 states that a financing institution is a business entity engaged in activities in the form of provision of funds and or capital goods as referred to in legislation concerning a finance institution. Article 21 of FSA Regulation No. 1 of 2013 states that businesses shall meet the balance and fairness in making agreements with consumers. As a follow up of the FSA Regulation on Consumer Financial Service Protection has issued by FSA Circular Letter No. 13 of 2014 regarding the Standard Contract. In Part II, it is entitled The Clause in the Standard Agreement states that:

(1) Financial services business actors is required to meet the balance, fairness and fairness in making agreements with Consumers.

(2) In the case of financial services business actors designing, formulating, stipulating and offering the Standard Contract, financial services business actors shall base on the provisions as referred to in No. 1.

(3) The clauses in the Prohibited Standard Contract shall include:

a. The exoneration/exemption clause is the content of which adds the rights and / or reduces the financial services business actors obligation, or reduces the rights and / or adds to the consumer's obligation.

b. Misuse of circumstances is a condition in the standard agreement which has an indication of misuse of the circumstances. Examples of such conditions are for example to take advantage of urgent consumer conditions due to certain conditions or in emergencies and intentionally or unintentionally financial services business actors do not explain the benefits, costs, and risks of the products and / or services offered.

In practice, an activity of a finance company performs a misuse of the conditions in making the agreement, as occurs in the case between the VCC and the investee company. Venture Capital Business Development in Indonesia is still considered slow. FSA monitors Indonesia's venture capital industry from year to year conditions are less good when compared to other industries, both financing institutions and the non-bank financial industry in general. In fact, since the industry was first developed until the end of 2014, the growth of venture capital industry assets has not shown any significant growth despite the growth trend. The total assets of the venture capital industry in 2014 grew 9.10% from Rp 8.24 trillion in 2013 to Rp 8.99 trillion at the end of December 2014. However, the market share of the venture capital industry is currently very small compared to other financial services industries such as industrial finance companies. The financing industry developed by the government in almost the same period as the venture capital industry has grown significantly. Currently, the total assets of finance companies has reached Rp 420.44 trillion by the end of 2014. Thus, when compared with the financing industry, the total assets of the venture capital industry is only 2.14% of the total assets of the financing industry. On a larger scale, when compared to the total assets of the non-bank financial industry of Rp1,351 trillion, the market share of venture capital firms is still relatively small at only 0.67% (www.ekbis.sindonews.com).

Besides the development of the industry is running slowly, in fact, the core business of VCC has shifted much from its original purpose. This is indicated by the lack of activity in the form of participation to investee company either in the form of equity participation or purchase of convertible bonds. As many as 70% of the venture capital industry is currently deviated from its main function is equity participation to investee company, especially beginner entrepreneurs. Currently, the majority of the venture capital industry is engaged in crediting and direct loans like banks. The financing arrangements made by VCC as well as the financing process also resemble crediting by banks. VCC even though the agreement uses the term financing but substantially the same content as the credit agreement of the bank (www.medanbisnisdaily.com). The State of Indonesia is a State of Law as stipulated in Article 1 paragraph (3) of the 1945 Constitution of the third amendment to aspire social justice. Justice is the most important virtue in human life, therefore it cannot be exchanged or compromised with any value. Therefore, according to Dennis Lloyd the law without justice is mockery, if not a contradiction. Greek philosophers view justice as an individual virtue. In the event of unfair prejudice in the social intercourse, the law plays a role in reversing the situation, so that the lost of justice can again be found by those who have been treated or exploited unfairly (Bodenheimer, 1978).

Justice according to Aristotle in his work "Nicomachean ethics," means to do good, or in other words, justice is the main virtue (Hernoko, 2008). According to Aristotle "*justice consists in treating equals equally and unequals unequally, in proportion to their inequality*". This principle departs from the assumption "*for the same things*

treated equally and not the same is also treated unequally, proportionately." According to Aristotle, since the law binds all men, legal justice must be understood in the sense of equality. Ulpianus describes justice as "*justitia est constants et perpetua voluntas ius suum cuique tribuendi*" (justice is a constant will and still gives each one what is entitled) or "*tribuere cuique suum*" (to give everybody his own), giving to everyone he is entitled to (Notohamidjojo, 1971). According to Thomas Aquinas, law is a sensible command, aimed at general welfare, made by those who undertake the task of a society and promoted (enacted) (Sumaryono, 2002).

According to Geny in ethical theory, the content of the law is determined by ethical beliefs about justice and unjust or arguable, justice must be realized as the goal of law (Mertokusumo, 2008). Justice is the goal to be achieved by law, because the law in its function provides a protection of human interests. According to Gustav Radbruch, the ideals of law are none other than justice (Admadja, 2011). He explains in the terms, "*Est autem just a justitia, sicut a matre sua ergo prius fuit justitia quam jus*" (but the law comes from justice as it was born from the mother's womb; therefore justice has existed before the law). In relation to the theory of justice, in achieving its objectives, the law has the duty to divide the rights and obligations among individuals in the society, to divide authority and to organize ways of solving legal problems by maintaining legal certainty.

Law as the bearer of the value of justice, according to Radbruch becomes the measure for a fair unjust law. Not only that, the value of justice is also the basis of law as law. Thus, justice has both normative and constitutive properties for law. It is normative, because it serves as a trasendetal prerequisite underlying every positive law stems. Constitutionally, justice must be an absolute element for the law as a law. Without justice, a rule does not deserve to be law. According to Gustav Radbruch, the idea of law as a cultural idea cannot be foral (Tanya *et al.*, 2010). Instead, he directed to justice. Justice as a goal indicated by Aristotle, the same is treated equally, and the unequal treated not the same. To fill this ideal of justice with concrete content, the readers have to look at the finality of it. To complete justice and finality, it needs certainty. Thus, for Radbruch, the law has three aspects, namely justice, finality and certainty. The aspect of justice points to equal rights before the law. The aspect of finality pointing to the goal of justice promotes goodness in human life. This aspect determines the content of the law. The certainty shows, henceforth, the assurance that the law containing originality and norms is to promote goodness and actually serves as a regulated rule.

Therefore, if the law is governing the financing agreement also provides equity to the parties. In this connection, the contents or clauses of the financing agreement cannot be based solely on the principle of freedom of contract alone. Submitting the financing agreement to the working mechanism of the principle of freedom of contract solely, creates imbalances and unconformity in the financing agreement. There is no absolute freedom of contract. States may regulate by prohibiting clauses

in a contract which may adversely affect or harm the interests of the public. Moreover, in the natural state of the Republic of Indonesia based on Pancasila, it is appropriate that the state not allow the act of the treaty in general and the act of the financing agreement in particular to be solely handed over to the operation of the unrestricted mechanism of freedom of contracting principle. Each contract must be based on *pretium iustum* which refers to the reason and the equality which is required to be in balance between the loss and profit for both parties in the contract (Khairandy, 2015). This is in line with the objective of the law itself, namely the realization of justice. The legal content, including the contents of the contract must contain the values of justice. Regarding this justice, it is clearly regulated in Circular Letter No. 13 of 2014 stating that financial service business actors shall meet the balance and fairness in making the agreements with consumers.

However, in practice there is still injustice in the financing agreement (Subekti, 2010). In the context of contract law, judges have the authority to prevent the occurrence of violations of the sense of justice. Under its jurisdiction, the judge shall reduce or even completely exclude a contractual obligation of a contract containing injustice. One of the circumstances that can be misused is the existence of economic (over-the-head) power on one side, disturbing the balance between the two parties so that there is no free will to give consent which is one of the conditions for the validity of a treaty. According to Asikin Kusumah Atmadja, what matters now is to create some point of contact which is the basis for judges to judge fairly whether a situation can be interpreted as a misused economic power. Factors that can provide indications of abuse of economic power include the existence of terms which are agreed upon, which is unreasonable or inappropriate or that is contrary to humanity, depressed conditions of the debtor; there are no other options for the debtor except to enter into an agreement under aggravating conditions; the value of the outcome of the agreement is very unbalanced when compared to the mutual achievements of the parties.

6. Conclusion

Misuse of circumstances can serve as one of the reasons for the cancellation of the financing agreement. The legal basis is the FSA Regulation No. 1 of 2013 on Consumer Protection of the Financial Services Sector and Circular of the Financial Services Authority No. 13 of 2014. Concerning the Standard Contract which expressly states that the clause in the banned standard agreement is containing a misuse of a circumstance that is a condition in the standard agreement which has an indication of misuse of the circumstances. One of the circumstances that can be misused is the existence of economic power on one side, disturbing the balance between the two parties so that there is no free will to give consent which is one of the conditions for the validity of a treaty. Suppose to take advantage of the conditions of the urgent financing recipient due to certain conditions or in the event of an emergency and intentionally or unintentionally the financing company does not explain the benefits, costs, and risks of the products and / or services offered.

The reason for declaring null or void an agreement arising out of misuse of the circumstances is a construction that can and is still being developed.

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