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Method Determining the Contents of the Contract

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Abstract: *The contents of the contract are primarily determined by what the real mutually agreed upon by the parties. By interpreting some certain statements, in this case to determine its meaning, to be clear based on what the parties committed themselves. Why is the interpretation required? In facts, on the many cases provided a valuable lesson, how many commercial disputes arise when the performance of the contract. The dispute begins when the parties have a different understanding of the statement that they use in the contract. Indeed, businesses are very familiar with the business processes that they do, but at the time of the business process are set forth in the contract language and designed by those who do not understand the legal aspects of the contract, the contract can be ascertained open possibility for disputes. The power of contract binding (the contents of the agreement) toward to the characteristic and the wide spectrum of the rights and obligations contractually, basically a contract represents the power of performance among others in order implementing the rights and obligations of the parties. As an instrument to understand the contract, the method of determining the content of the contract (e.g., through interpretation, autonomous and heteronomous factors), further can be used to assess the reciprocation of rights and obligations in a meaningful and proportional contractual relationship.*

Keywords: *Contract; Determining Content; Interpretation*

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INTRODUCTION

Contract is the day to day activities of people. Starting from meals, beverages, clothings, real estates, transportations are facilitated by contract as a legal container. Believe it or not, contract is daily activities in the social life. Every step of life is a step in the legal business which it drawn up by contract. Contract is an expression of the right to explain the actuality of today's business dynamics. As the primary basis to be aware of the parties who interact in

the business world, where the contract is a major node that connects their interests. Although they often do not realize it, but keep in mind that each party is entering the business wilderness basically perform legal measures with all its consequences.

In a business perspective, the legal aspect is manifested in the form of contract is an important part of a business process, which is loaded with the exchange of interests among actors. The contract is essentially a casting formulation business process into a legal format that is constructed in a comprehensive manner. Therefore, success in business, among others, will also be determined by the structure or building contracts made by the parties. Surely as a process, which is ideal contract should have been able to facilitate the exchange of interests of the parties in a fair and equitable (proportionate).

Perspective to understanding of the relationship business-law, as it is like a train, which it will only be able to run to the final destination if it is supported by a rail that serves as the foundation of motion. The success of a business process that is the final destination of the parties will manifest properly regard the contractual aspects of the business activities that frame.[1] Thus, the contract as an instrument for the exchange of rights and obligations of the parties are expected to take place with good, fair and proportionate as agreed by the parties. This exchange rules the domain of the parties, except within certain limits appear interventions, among others, both of legislation coercive or of certain authorities (judges). But the nature of this intervention is intended to safeguard the rights and obligations of the exchange process takes place fairly.

The nature of business which is dynamics with the ebb and flow circumstances, also have an impact on the continuity of the contractual relationship of the parties. ”Who can ensure rain tomorrow”, as well as contracts. Sometimes bright business prospects may change losses and terminate business relationship of the parties. The parties expect complete the contract of their projected runs smoothly, fortunately, satisfactory, on the other hand the obstacles lead to the failure of the contract, even lead to the termination of the contract. The failure which led to the disputed of contract is often rooted in a wide variety of causes.

Wanprestatie or breach of contract is often found as the most reason of the contract dispute in the practice of the court. The main problematics basically can not be separated from the context of the content of the contract on which the exchange (the offer and acceptance) of interests in a contractual relationship in question. When the contents of the contract can not be constructed with the precise formulation of the clause in the contract, it will be not not interpreted correctly and the systematic implementation of the contract will undoubtedly be constrained (ic *wanprestatie* or breach of the contract) and even lead to the termination of the contract. Therefore, in this paper, authors tried to present a simple issue but still important and requires a comprehensive understanding of the building principles of contract law, with the hope to be able to capture the essence or substantive value in cases contracts that

[1] Alan Schwartz and Robert E. Scott. (2013). “Contract theory and the limits of contract law.” *The Yale Law Journal, 113*(3): 541-619. Doi: 10.2307/3657531

arise and use appropriate methods in the solution. The legal issues related to this paper as an important instrument for understanding, managing and resolving the problem of contracts.

ANALYSIS AND DISCUSSION

The Nature Contents of the Contract

Before entering the discussion of the essentiality elements of the contract, some of the following illustrations try to describe the problematic contents of the contract in many variants.

Case Illustration 1:

The parties concerned the definition of "first floor or level one" in the lease agreement booths in shopping centers, for the implementation of the achievement was rejected by the tenant by postulating "the first floor or level one" is equal parts with a flat road (ground floor),on the other hand, the lessor argued that "the first floor or level one" is the part that is above the average street (ground floor). What is the meaning of "one floor or level one", what is the criteria, what is legal consequences if there is no common ground between the parties related to the implementation or fulfillment of the intended achievements, as well as what is legal remedies of this case?

Case Illustration 2:

A: "Send me a chicken, yesterday the chicken turned out less warm."

B: "Do you want a local or imported chicken? There are from Russia, China and Thailand."

A: "First, I will try local chicken."

B: "OK. Local chicken, rural chicken or campus chicken?"

What is meant by the word "chicken" in the context of the above transaction? Whether the parties should be subject to the understanding/general terminology in the community or the parties are free to determine the sense/terminology that is exclusively agreed upon by them?

Case Illustration 3:

In the purchase agreement in installments, if not set on the mechanism/procedure for payment must be made in specific place, in place of the seller or the buyer, it turns out later this raises the issue of "who is obliged to perform" if a seller who came to charge to the buyer or otherwise buyers are coming to the seller to meet the payment obligations?

Illustrations cases mentioned above can be developed with a variety of questions and variants of different cases, but one thing is fundamental and crucial is to find and determine the content of the contract agreed by the parties. It is not easy, but it is not impossible, if it can be understood according to the systematic method of thinking on reasoning basis of contract law.

What is the content of the contract should be distinguished from the causa (goal) contract. Causa contract is defined as a common goal to be achieved the parties in contractual relationships they create.[2] While it is concerned with understanding the content of the contract, relating to the determination of the nature and extent of the rights and obligations arising from the contractual relationship of the parties (ic

[2] *Vide* Article 1320 of the Indonesian Civil Code 4 jis requirements. Article 1335 and 1337.

related to the substance of the rights and obligations exchanged by the parties).[3]

Niewenhuis[4] found to determine the nature and extent of the rights and obligations arising from the contractual relationship, considering two main aspects, namely: 1) Interpretations (exegesis; uitleg) on the nature and extent of the rights and contractual obligations; and 2) The factors that influence the nature and extent of the rights and contractual obligations, including: a) autonomous factors (related to tying power contract); and b) heteronomic factors (factors that come from outside the party), consisting of: Enactment, Customs (*gebruik*); a condition commonly agreed (*bestandig gebruikelijk beding*); and appropriateness (*billijkheid*).

The Niewenhuis's thought above, actually can be traced from source Article 1339 Civil Code which stating that "the contract is not only binding for matters expressly stated therein, but also for everything according to the nature of the contract, required by decency, customs, and laws."[5] This formulation explicitly provides that in addition to the contractual engagement that comes from the agreement of the parties (autonomous factors), also note other factors (factors heteronomic). It is given a contract made by the parties is sometimes just a set of things that are fundamental, so that when problems arise in the implementation of the contract has been anticipated through the application heteronomic factor. So that it can be concluded that the factors that determine the content of the contract is the will of the parties as a primary factor (autonomous), as well as other factors (heteronomic) include: custom, law, decency and fairness.

The Interpretation of the Contract: An Attempt to Find the Meaning of the Essentiality

According to Scholten,[6] to understand a text of the law, contracts and business documents would need to do a good interpretation. The law is not always clear, the law may not provide a solution to the 1001 problem posed to it too easily. Thus, is an arrogance or a mistake made by the parties stating that the codification of the law has been able to accommodate all the problems that arise in the community, they consequently assume that the interpretation does not have to even prohibited. Every law, also the most well formulated though, requires interpretation.

3 Agus Yudha Hernoko. (2014). *Hukum Perjanjian, Asas Proporsionalitas Dalam Kontrak Komersial*. Jakarta: Kencana Prenada Media Group, p. 225.

4 J.H. Niewenhuis. (1985). *Pokok-pokok Hukum Perikatan*. (Translated by: Djasadin Saragih). Surabaya: Airlangga University Press, pages 37-45. Regarding the content of the contract, the legal literatureof contract divides it into several elements, namely: a) Esensialia element, an absolute element which it must be exist in a contract. For example: in the sales contract, the goods and the price are some esensial elements in the agreement; b) Naturalia element, an element that is defined by law as the regulations are set, however, the parties are available to not pay attention to them. For example: underwriting (*vrijwaring*); c) Accidentalia element, an element that is added to by the parties in terms of the law does not set it. For example: buying and selling houses and their furniture. See J. Satrio. (2001). *Hukum Perikatan, Perikatan Yang Lahir Dari Perjanjian Buku I,* Bandung: PT. Citra Aditya Bakti, pages 57-58.

5 The Essential of article 1339 Civil Code in the principle is in accordance Article 6:248 New Code Civil about Juridical Effects of Contracts (*Juridical Effects of Contracts; Rechtsgevolgen van overeenkomsten*), which states, "*A contract not only has the juridical effects agreed to by the parties, but also those which, according to the nature of the contract, result from law, usage or the requirements of reasonableness and fairness*." A contract is not only legally binding refers to the content which have been agreed by the parties , but also based on the nature of contract, but also refers to the enactment, custom, decency and approriateness.

6 Paul Scholten. (1993). *Mr. C. Asser Handleiding Tot De Beoefening van Het Nederlandsch Burgerlijk Recht: Algemeen Deel,* (Translated by: Siti Soemarti Hartono), Yogyakarta: Gadjah Mada University Press, p. 3-4.

At any interpretation, that justice should always be considered and in any attempt to find a concrete law, justice is the beginning and the end.

Vollmar[7] recalled the importance of interpretation,consider the language used in the legislation, including the contract, it is difficult to realize the thoughts that always appear constituent events in whole or in part are not included in the formulation. Through interpretation, according to Vollmar[8], we are looking for purpose and intent of the words contained in the legislation, so that interpretation means to discover the law (*rechtsvinding*).

The content of the contract is primarily determined by what is mutually agreed upon by the parties. By interpreting certain statements, in this case to determine its meaning, to be clear on what the parties committed themselves. Why interpretation is required, the facts on the ground provided a valuable lesson, how many disputes (ic commercial disputes) in fact arise when the execution of the contract. The dispute begin when the parties have a different understanding of the statements that they use in the contract. Indeed, businesses are very familiar with the business processes that they do, but when the business process is expressed in the language of the contract and designed by those who do not understand the legal aspects of the contract, the contract can certainly open up possibility for disputes.

Respond to the conditions above, to consider the factors which determines the meaning of the statements is disclosed in the contractual relationship between the parties. There are two possibilities that can be used as a basis in determining the meaning of these statements, namely: a) The intention underlying the statement, and b) The terms used in the statement.

Important instrument to find the meaning of the statements in the contractual relations of the parties is through the "interpretation". Interpretation is a method to locate or find the meaning of the intrinsic (real) of a provision, regulations, statements and others. In short interpretation aims at "looking implicit than explicit", but this effort is not an easy thing to do everyone, especially those who lay the law. The interpretation of the contract is the process by which a person gives meaning to a symbol of expression used by others (either in the form of oral language, writing or deed).[9] Interpretation of this contract must be distinguished from the construction contract. In the contract that always begins with the interpretation of the language (grammatically), therefore interpretation process stops until the determination of the legal relationship between the parties.

The interpretation of a contract is the determination of the meaning that must be determined from statements made by the parties to the contract and the legal consequences arising from it. Thus, a comprehensive understanding of the substance of the arrangement is dependent on the ability and mastery of methods of interpretation, and of course this can only be done by those

[7] H.F.A. Vollmar. (1992). *Pengantar Studi Hukum Perdata Jilid I*. Jakarta: Rajawali, p. 15.

[8] H.F.A. Vollmar. (1990). *Hukum Benda Menurut KUH Perdata*, (Translated by: Chaidir Ali), Bandung: Tarsito, p.17.

[9] Ridwan Khairandy. (2003). *Itikad Baik Dalam Kebebasan Berkontrak*. Postgraduate Universitas Indonesia, p. 217.

who are professionals in their fields (ic the jurist).[10]

Interpretation as a method to determine the full understanding and solid, is not an easy and simple steps, but more than that is needed is comprehensive and integrative understanding of the context of the statement, rule or regulation in question. Thus the process of interpreting literally interpret not just grammatical, but more than that the understanding on the context and lead to a conclusion that proper and valid.

A simple procedure that can be used as guidelines for interpreting the statements of the parties, related to "intent" or "terminology" used, is as follows:[11] *First*, an overview of the parties with respect to the rights and obligations, the words in the statement are not important. Means the interpretation is based on the "intent" of the parties regarding the use of terms in the contract that they make. Not a problem, if the term is interpreted as usual in the community or not. Here the "intention" of the parties is a manifestation of freedom of contract in determining the meaning of terms used unfounded, and thereby bind them; *Second*, if the picture with regard to the rights and obligations can not be demonstrated, meaning that the parties are not equal insight and understanding of the "terminology" used, then the statement is determined by the reasonable belief of the statement. Reasonable belief here means handing assessment meaning of "terminology" is in community practise.

Unlike the old Civil Code (*Burgerlijk Wetboek*), including the Indonesian Civil Code governing the interpretation in a special section,[12] the Dutch New Civil Code (NBW) is no longer set up specifically. Elimination of the provision of interpretation in the NBW because the substance of the articles about the interpretation is considered too general formulation, so it means to be imprecise and difficult to implement. However, according to Arthur S. Hartkamp and Marianne MM Tillema there are some general principles related to the interpretation of the contract received in practice of the application of the interpretation in a Dutch court.[13]

Determinants Factors of Contents Contract: Autonomous Factors and Heteronomous Factors

Autonomous factors

Contract or agreement *obligatoir* is the primary means for the parties to create their own legal norms that will rule the behavior of their own. Rights and obligations arising from the contract is determined by what is mutually agreed (exchanged) by the parties through their statements. The meaning of the statement, which is determined through the interpretation of the "autonomous factors" that determine the rights and obligations of the parties.[14]

Autonomous factors or known as the "autonomy of the parties" (*Partij Autonomie*) is the main factor or "primary determining factor"[15] in determining the content of the

[10] *Ibid.*

[11] J.H. Niewenhuis, *Op.Cit*., p. 38.

[12] Part IV on Interpretation of Treaties, Article 1342-1351 Civil Code

[13] Ridwan Khairandy, *Op.Cit*., p. 226.

[14] J.H. Niewenhuis, *Op.Cit*., p. 38.

[15] "The Primary Determining Factor" (autonomous factors) is a decisive factor in efforts to determine the contractual engagement of the parties. In a contract dispute, evidence and justification arguments of the parties, first of all rated at 'what is stated by the parties to the contract' (autonomy of the parties; Partij Autonomie). Further, if the autonomous factors are not able to give answers to the settlement, the judge has obligation to

contract, meaning that the nature and extent of the rights and obligations of the contracting parties can be seen in what they agreed upon. As a primary determining factor, factor occupies a hierarchy or sequence of autonomous primary to determine binding contract.

The rationale for that factor autonomously is an important determinant of primary source to the parties themselves, as defined in Article 1338 (1) Civil Code, that "all treaties that drawn up, legally binding as a law for those who make it." According to the provisions of Article 1338 (1) Civil Code , it has the binding power of a contract, as long as the contract was made legally, and its formation must consider the validity of the contract in terms of Article 1320, 1335 and 1337 Civil Code. As long as the contract has fulfilled the four basic statutory requirements set out in Article 1320,1335,1337 of the Indonesian Civil Code, The Contract should not contravene the prevailing regulations and principles of public order and morality, it will be regarded as law for the signatories, and they should comply. Legislation that is intended Article 1338 (1) Civil Code is the provision of qualified as a coercive law is not a law complementary.

Furthermore, Article 1339 Code Civil states that, "the contract does not only bind to things that are explicitly stated in it, but also for everything according to the nature of the contract, required by decency, customs and laws." In a contrario charge of Article 1339 Code Civil, concluded and emphasized that the contract was binding on the parties because the parties expressly made the agreement in accordance with the autonomy of the parties (the autonomous factors-the primary determinants). In addition, to the force of binding of the contract is also based on the nature of the contract, decency, customs and laws (heteronomic factor - determinants subsidiary).

By analyzing the provisions of Article 1338 (1) and (2) and Article 1339 of the Code Civil, the strength of binding contracts which derive their power to reach out to parties because it is desired by them. Legal consequences of force of the contract is recognized as a primary determining factor (even the equivalent of a law), so it can not be dismissed by the parties. It is as contained in the provisions of Article 1338 (2) Code Civil, which states that, "the contract can not be terminated, except in addition refer to parties agreement or for the reasons specified by law." Accordingly, pursuant to Article 1338 (2) Code Civil that the the power of legally binding of contracts are based on the autonomy of the parties is recognized and increasingly emphasized the strength of the entry into force of the parties. The termination of a contract that has been made by the parties can only be done through: a) the parties agreement to take back what has been agreed; or b) legislation coercive (*dwingend recht*).

Even if it turns out analyzed deeply formulation of Article 1338 (3) Civil Code stating that, "the contract must be performed in good faith", it is intended to provide confirmation of the power of legally binding of contract that is based on the autonomy of the parties. So that through a systematic interpretation-comprehensive review of the

consider a secondary factor (factor heteronomic).

charge of Article 1338 Code Civil arranged in three verses above, it can be concluded that the contract is a process that is linked to one another in one system, starting from formation of contract to performance of contract.

Heteronomic factors

If the autonomous factors derived from the party's own self (*partij autonomie*), to jointly determine the nature and extent of the rights and obligations of the parties, then the reverse heteronomic factor is a factor that comes from outside the parties. Heteronomic factor is the "deciding factor subsidiary"[16]which occupies the hierarchy or sequence after the autonomous factors to determine the binding contract.

Factors heteronomic which is a subsidiary decisive factor for determining the power of legally binding a contract can be traced to the provisions of Article 1339 Civil Code, which puts the nature of the contract, decency, customs and laws as the elements. Meanwhile another article which can be referred to elaborate heteronomic factor in the contract is Article 1347 Civil Code which states that "The terms and condition which are usually asigned according to custom, should be considered to have been included in the contract, although not expressly included in the contract".

The formulation of Article 1347 Civil Code is related to terms commonly agreed (*bestandig gebruikelijk beding*) are also associated with the nature of the contract as referred to in Article 1339 Civil Code. Therefore presumably proper, both articles are placed as heteronomic factors (subsidiary determinants factors) which determine the legally binding power of a contract. Based on Article 1339 and 1347 Civil Code, obviously can be concluded that heteronomic factor is a subsidiary decisive factor for determining a strenght of legally binding of a contract, which it consits of: a) the terms commonly agreed (*bestandig gebruikelijk beding*); b) the appropriatness; c) the custom; and d) legislation.

Some critical questions that may be raise in order of the hierarchi of heteronomic factors, first, whether this sequence shows the hierarchy of these elements in assessing the strenght of legally binding contract ? Moreover, if the "terms and conditions are commonly agreed" (*bestandig gebruikelijk beding*) is superior then appropriateness, appropriateness is superior then custom, and so on, or is this only a placement matter. Therefore, it will be discussed the each elements as contents of the contract in the following description:

Legislation

Provisions that regulate the field of civil law, particularly contract law, more characterized by its governing and complements (regelend recht; aanvullend recht). As known, the substance of Book III Civil Code (About The Law of Obligation) are dominated the addition or supplement rules. It is consistent with the open nature of the book III, which adheres to the principles of freedom of contract (autonomy of the parties). The addition

[16] "The subsidiary determinat factor" (a factor that appears beyond what it has been stated in the contract among the parties), is the next decisive factor in the effort to know the contractual engagement of the parties. This subsidiary determinant factor appears when the autonomous factors are not able to give an answer completion.

or supplement rules (*aanvullend recht*) is characterized by nature subsidiary. The nature of this subsidiary is intended to provide a ”way out” –complete– the contractual relationship of the parties if they do not set it.

However, it can not be concluded that all the provisions of Book III BW is addition or supplement rules (*aanvullend recht*). There are several chapters in Book III Civil Code coercive cargo materials, among others, Article 1320, 1335, 1337 and 1339 Civil Code. Through the coercive rules, laws are limiting the autonomy of the parties. So that, in creating a contractual relationship, the parties can not override the rule of law coercive. Therefore, although the legislation is a factor related to power of heteronomic legally binding of contract, but the legislation has an influence on the existence of a contract in two aspects, namely:

Coercive laws (dwingend recht)

To the provisions of the legislation that is forceable, the autonomy of the parties (autonomous factors) should be submissive and obedient. Such provisions could not be infringed the parties in any way. The Infringement of this provision will have consequences on the breach of the contract or even termination of the contract. Restrictions on the autonomy of the parties by laws are forceable based on various motives, eg Article 23 AB (Algemene Bepalingen) give coercive powers to all the laws relating to public order and decency. Thus, it with some substance Book III Civil Code, among others, Article 1667 Code Civil limits the possibility of grant (*schenking*) which it be carried out by people who are too generous or the like to give (*vrijgevigheid*), is limited to existing goods. Similarly, Article 1601 letter l, which gives protection to those who are economically weak (workers) to the dominance of the employer.[17]

Laws as addition or supplement rules (aanvullend recht)

By their characteristic which to add or supplement the rules, when faced with the ’terms and condition commonly agreed’ or custom, then the law must give give in. For example: in the lease contract, the small improvements if the parties do not set it, then Article 1583 Civil Code assigns the tenants, who should be responsible. Similarly, in the sales contract, if not agreed then pursuant to Article 1476 Civil Code, the delivery of goods is the responsibility of the seller, while taking the goods the responsibility of the buyer.

Customs

Law relationship that exists between members of the community especially the left to the parties as well as the practices and habits that prevail among them. Similarly, a contract made by the parties are not only binding for what they have agreed but also affected other aspects, ic custom, meaning that the contract also binds based on the demands of custom. On this aspect of the relationship between customs and laws to obtain confirmation of Article 1339 Code Civil stated that “the contract is not only binding for matters expressly stated therein, but also for everything according to the nature of the contract, required by decency, customs[18] and laws.”

[17] J.H. Niewenhuis, *Op.Cit*., p. 3.
[18] Emphasis by authors.

Custom means a manner or behavior commonly followed in the performance of a certain contract types within a particular region or business field. Furthermore manner or behavior are followed in practice as a legal obligation, it does not matter whether the parties intend to follow these practices (know or are not aware of these customs). Therefore, the custom is emphasized on line behavior in the performance of the contract.[19]

Generally people assume, that the words of an ability to be interpreted in such a way as 'can and may be' accepted by the person to whom it is addressed abilities. Instead of what is meant by those who promised, but what the other person may be or may be considered to be intended by the person who promised it (objective criteria).[20] Furthermore, Scholten[21] explained the meaning of words in everyday conversation into the handle, hopes that rests on the meaning of the words that must be made a reality.

Through custom, the extent of the obligations born of a statement can be determined by investigating the extent of the range of words that are used. Each contract custom, can be viewed from two perspectives: *First*, according to its individual sense (what is meant by that word?); *Second*, according to community function (whether the nature of this contract as a phenomenon in social relations?). Both, according to both their individual meaning and community function together determine its contents. The parties are free to set their own what they want, but as long as they do not set it, then the contract in its words to be understood by the common sense of a kind of contract (custom).

In accordance with Pitlo,[22] custom of behavior can involve all members of society (a common habit - *Algemene gewoonte*), but more often is related to behavior rather than the persons belonging to a particular group (ic group which is united by a commercial or corporate branch). The power of custom of contract comes from custom, lies in the very foundations of the persons in the environment in which it applies, based on those behaviour created some source of law that must be obeyed. Without this common belief, the custom as a source of law would have no meaning at all.[23]

For example, as happened in the habit of labor agreement (contract work), although there is no clause in the contract concerning the obligation of workers cleaning the workplace, but it has become a custom after the work is completed, it is typically required with the cleanup workers. It as also stipulated in the provisions of Article 1603 Code Civil, which states, "Workers contracted to do the work according to his ability as well as possible. If the nature and extent of work to be done is not defined in the agreement or reglemen, then it is determined by custom.[24]

The power to create laws of the customs and laws of power creates the legislation, is located on the same plane, that is the belief of individuals in the environment in which it applies, that it is the source of law that must

19 *Ibid*., p. 41.
20 Paul Scholten, *Op.Cit., pages* 143-145.
21 *Ibid.*
22 A. Pitlo. (1979). *Hukum Perdata*. (Translated by: M. Moerasad). Jakarta: Intermasa, p. 56.
23 Mark Giancaspro. (2014). "Should the Practical Benefit Principle Extend to Contract Formation?". *Australian Business Law Review*, 42(5): 389. Available at SSRN: https://ssrn.com/abstract=2649759
24 Emphasis by authors.

be obeyed.[25] Without this common belief legislation also does not mean anything and lose its fundamental. Customs and laws as the source of law grounded on the same phenomenon, namely the confidence of the mass that it ought to be. Therefore, custom is not under the law, even under certain conditions, the law otherwise have succumbed to the custom.

The Terms and Conditions which are Commonly Assigned (*Bestandig Gebruikelijk Beding*)

The reference's source is recognized of the existence "the term and condition commonly agreed" (*bestandig gebruikelijk beding*) as subsidiary determinants contract can be seen from the provisions of Article 1347 Code Civil, which states, "The terms are always agreed, according to custom, should be considered to have been included in the contract, although not expressly included in the contract ".

Insight and understanding of the "the terms and conditions which are commonly assigned" should be distinguished from the custom. The term and condition commonly agreed only has independent definition usual terms and condition agreed when take on a particular shape, as the clause de style that always (continuously and sustainable) be contained in the written contracts.[26] So then it be propped on what it is usually agreed, the custom what is normally and usually be taken in contract performance by the parties

The difference between 'terms commonly agreed' and custom, custom can be described as a line of behavior, which once made a kind of specific agreements have been unusual to be followed, while the appointment is usually held is a promise that people in making certain agreements have usually been held.

Observing the above opinion about the difference between the two, it can be emphasized in the guidelines that custom line behavior in the execution of the contract, whereas the 'condition commonly agreed' is custom in the closing of the contract to include a certain condition (promise).[27] So that, the difference between them lies in the process of formation ('condition commonly agreed') and contract (custom). Scholars generally agree to put 'the common term and conditions which are agreed' as an inherent part of the contract agreed by the parties. Thus 'term and condition commonly agreed' as one element heteronomic factors take a higher hierarchy than laws that are adding (*aanvullend*), custom and decency.

Appropriateness

Appropriateness (*billijkheid*) is generally placed as a certain source of law of obligation. If the laws, customs and common agreed conditions are not to provide closure on a particular aspect of the contract, the appropriateness will fill this vacuum. In addition appropriateness as a guide in the event of differences between the laws that are adding to the custom or 'condition commonly agreed'. Although it must be admitted that if there is a conflict between the laws that are adding to the custom, the election between them must be based on appropriatness, but it does not mean that laws and customs are

[25] *Ibid.*

[26] Paul Scholten, *Op.Cit.* p. 144.

[27] J.H. Niewenhuis, *Loc. Cit*.

adding new force if it is appropriate.[28] So appropriatness has two functions, first, as a source of law of obligation it self, and second, as a guideline if there is a conflict between the laws that are adding to the custom or 'the term and condition commonly agreed'.

In application appropriatness is often juxtaposed with good faith, meaning that a power legally binding of the contract is measured on the alignment between appropriatness and good faith. This opinion refers to relation concept (relatie begrip) is regulated between Article 1338 (3) and Article 1339 Civil Code, that is in good faith in the execution of the contract is nothing but interpret the contract based on fairness and decency.[29] Moreover, there is a close relationship between the doctrine of good faith in the execution of the contract with the theory of confidence at the time of contract formation.

Hoge Raad reinforces the view of the relationship between good faith and propriety through its decision dated February 9, 1923,[30] and the decision dated January 11, 1924[31], that the judge after the test is based on the propriety of a contract, it can not be implemented (it is associated with the execution of the contract in good faith), it means that the contract is contrary to public order and morality. "The verdict Hoge Raad is shows the relation between goodwill and decency in the execution of the contract. In fact, in many cases, appropriateness (always) associated with "public order and decency", because the formulation precisely nothing formulation. So with regard propriety functions mentioned above, we can conclude a power of legally binding of contract hierarchy that originates propriety ranks lowest.[32]

The application of the various factors that determine binding contract (the agreement) can be determined according to the hierarchy or sequence, as follows: *First*, the contents of the contract are determined by autonomous factors (autonomy of the parties), except when dealing with legislation that is forced, the autonomous factors must give in; *Secondly*, the agreement is determined by factors heteronomic, in order: 1) the terms commonly agreed (*bestandig gebruikelijk beding*); 2) a habit; 3) laws that are add or supplement (*aanvullend recht*); and 4) the appropriateness, with a record of when to follow the mindset NBW,[33] then the propriety and decency is placed parallel to the propriety of coercive legislation.

CONCLUSION

Looking at strenght of legally binding of the contract (the content of agreement) on the nature and extent of the rights and contractual obligations, essentially represents the strenghts the entry to force of reciprocation the rights and obligations among parties.

28 J. Satrio, *Op.Cit*., p. 385.

29 PL Werry, stated that the implementation of the contract must be in good faith, meaning the agreement should be implemented "volgens de Eisen van redelijkheid en billijkheid". The term equated with "according to the terms kindness and decency" or "fairness and justice". P.L. Werry. (1990). *Perkembangan Hukum Tentang Itikad Baik di Netherland.* Percetakan Negara RI, Jakarta. pages 9-10.

30 P.L. Werry, *Loc. Cit*.

31 *Ibid.*

32 However, according to the provisions of NBW which is the latest development of understanding earlier (BW old), as stated in Article 6: 2 NBW, emphatically stated that *"redelijkheid en billijkheid"* or "propriety and decency" have a position fundamental to the formation of the contract. That is, propriety no longer ranks bottom, on the contrary the substance of Article 6: 2 of the NBW has working power to force the parties to submit and obey.

33 *Vide* Article 6:2 NBW

As an instrument to understand the contract, the method of determining the content of the contract, ie through interpretation, autonomous factors, and factors heteronomic, further it can be used to assess the exchange of rights and obligations in a meaningful proportional (fairness) contractual relationships.

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