

IMPROVEMENT OF SUBSTANTIVE PROVISIONS OF THE VALIDITY OF AGREEMENT IN THE INDONESIAN CIVIL CODE

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Abstract

The legal effect of non-fulfillment of the requirement for the validity of the agreement is that the existence of such agreement is not recognized, cancellation can be requested or it can be declared null and void. Due to the significance of such legal requirements and consequences for the validity of the agreement, it is in need of analysis. With the emergence of the idea of reforming national contract law, this research intends to provide some thoughts for the improvement of the national law of obligations, particularly with regard to the validity of the agreement. These reflections are results of the study regarding to contract validity as regulated under Nieuw Burgerlijk Wetboek. This is normative legal research; with the legislative, conceptual, and comparative law approach, the data used is in the form of secondary data, obtained through a literature review. Based on the results of the study, several recommendations are being put forward for the improvement of the national law of obligations, both with regard to the subjects entering into agreement (provisions concerning consent and capacity) as well as recommendations with regard to the object of agreement (provisions concerning certain things and the contents of agreement).

Keywords: *Improvement; Validity of Agreement; Indonesia*

1. Introduction

The law of obligations provides a guarantee that the rights and obligations of the parties stated in the agreement are legally binding. However, the agreement it must be valid to be legally binding.¹ Agreement validity refers to Article 1320 of the Indonesian Civil Code (hereinafter referred to as ICC) concerning agreement validity, namely the existence of consent, the competence of the parties, the existence of a certain matter and a permissible cause. Non-fulfillment of the requirements for the validity of the agreement is bound to bring about the legal consequence of the agreement's existence not recognized, a potential request for its cancellation or even the agreement being declared null and void.² According to Subekti, consent and competence are subjective requirements, because they relate to the subjects who enter into the agreement. On the other hand, specific matter and permissible cause are objective requirements because they relate to the object of the agreement. If the subjective requirements are not fulfilled, the agreement is voidable. It means that the agreement continues to be binding on both parties as

¹ Moch. Isnaeni, *Pijar Pendar Hukum Perdata*, 1st ed. (Surabaya: Revka Petra Media, 2016), 128–129.

² Moch Isnaeni, *Seberkas Diorama Hukum Kontrak*, 1st ed. (Surabaya: Revka Petra Media, 2018), 154.

long as it is not canceled by a judge based on party request. At the same time, if the objective requirements are not fulfilled, the agreement is null and void.³ Therefore, determining the requirements for the validity of a legal act and all legal consequences thereof shall be a decisive factor in deciding whether an obligation arising from a legal act is acceptable in the constellation of the law.⁴ Due to such legal conditions and consequences, it is important to study the requirements for the validity of the agreement.

Mangara and Al-Djufri state that there is an urgent need to amend the Civil Code as a great number of its provisions have been superseded by other laws.⁵ Recently, the idea of such reconstruction was initiated by the Faculty of Law, Universitas 17 Agustus 1945 on September 16-17, 2022 with the agenda of assisting the government in the context of Indonesia's civil law reform, related to obligations in particular.⁶ The contribution of ideas about the need to update and or add provisions of competence and consent as a requirement for the validity of the agreement in Indonesia is significant for several reasons, among others as follows: first, Article 1320 (2) of the ICC only requires that the parties to the agreement be competent. The issue that arises is that there is no further explanation of whether the definition of "capacity" only includes legal capacity or whether it also includes legal authority. The distinction needs to be drawn between these two things because even though they both fall into the category of subjective requirements, the lack of competence and the lack of authority results in different legal consequences respectively. Namely, the legal consequence of the lack of competence is that cancellation of the agreement can be requested, while the legal consequence of the the lack of authority is that the agreement null and void. Such lack of clarity in substantive law can cause its erroneous application in concrete cases. For instance, in the case between PT Mirota Indah Indonesia v. Siswanto Hendro Sutikno, Niniek Wijayanti, and Indrawati, the judge in Decision No. 81/Pdt.G/2014/PN.Yyk stated that the defendant was not authorized to represent PT Mirota Indah which was a violation of the Limited Liability Company Law and the Company Establishment Deed, therefore the agreement made was null and void due to not fulfilling the permissible clause requirement.⁷ Secondly, there is a

³ Subekti Subekti, *Hukum Perjanjian*, 20th ed. (Jakarta: Intermasa, 2020), 20–21.

⁴ Isnaeni, *Seberkas Diorama Hukum Kontrak*.

⁵ Gerhard Mangara and Tazqia Aulia Al-Djufri, "Urgensi Pembaharuan Kitab Undang-Undang Hukum Perdata Di Indonesia," *Jurnal Hukum Lex Generalis* 3, no. 4 (2022): 286, <https://www.rewangrencang.com/ojs/index.php/JHLG/article/view/248>.

⁶ Ahmad Nasirin, "Ratusan Dosen Ikuti Konferensi Nasional Hukum Perdata VII Di UNTAG Semarang," *Pantaunews.Co.Id*, 1, last modified 2022, <https://www.pantaunews.co.id/2022/09/ratusan-dosen-ikuti-konferensi-nasional-hukum-perdata-vii-di-untag-semarang>.

⁷ Pengadilan Negeri Yogyakarta, "Putusan Pengadilan Negeri Yogyakarta No. 81/Pdt.G/2014/PN.Yyk," 2014, 95–102.

pluralism in the criteria for adulthood. With regard to the capacity of individual legal subjects, one of the benchmarks is adulthood. Article 330 of the ICC generally provides for the maturity limit of a child, namely being 21 years old or less than 21 years old but having been married. Lack of uniformity provisions concerning legally recognized adult age in various laws and regulations in Indonesia,⁸ namely the determination of the minimum age of maturity in Indonesia depends on the context in which maturity is applied,⁹ in other words, the interests of a person who wishes to undertake legal acts or legal action.¹⁰ For instance, to draw up an authentic deed, Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Notary Position, Article 39 (1a) provides that the adult criteria for the Appearer is 18 years old or having being married. For guardianship issues, in accordance with the provisions on child guardianship in Articles 47 and 50 of Law No. 1 of 1974 concerning Marriage *Jo*. Supreme Court Decision No. 447/Sip/1976, the age of maturity is 18 years old.¹¹ I Putu Merta Suadi *et al* in their scientific work stated that the determination of the adult age limit is not merely based on legislation; rather, adult criteria must also be considered based on ethnicity, race, group and religion.¹² According to Norasya Verdiana, the difference in maturity and proficiency limits between regulations in force in Indonesia opens up loopholes in injustice in Indonesian law.¹³ Third, with regard to the requirement of consent, the ICC does not provide further elaboration on the construction of how consent occurs, namely "when" and "how" it can be said that consent has been reached. So far, the construction of the occurrence of consent has relied on legal doctrines.

Likewise, the contribution of ideas about renewal and/or addition of specific matter and permissible cause as objective requirements for the validity of agreement in Indonesia remains important study because: first, Article 1320 (3) of the ICC defines "specific matter" exclusively as

⁸ Ruzaipah Ruzaipah, Abdul Manan, and Qurrota A'yun, "Penetapan Usia Kedewasaan Dalam Sistem Hukum Di Indonesia," *Misaqan Ghalizan* 1, no. 1 (2021): 2, <https://journal.umpr.ac.id/index.php/jmg/article/view/2808>; Ery Agus Priyono, "Berlindungan Hukum Terhadap Konsumen Dalam Perjanjian E-Commerce," *Diponegoro Private Law Review* 4, no. 1 (2019): 432, <https://ejournal2.undip.ac.id/index.php/dplr/article/view/5105>.

⁹ Mhd. Yadi Harahap, "Batas Kedewasaan Anak Untuk Cakap Hukum Dalam Perspektif Peraturan Di Indonesia," *Journal of Gender and Social Inclusion in Muslim Societies* 1, no. 1 (2020): 39, <http://jurnal.uinsu.ac.id/index.php/psga/article/view/6444>.

¹⁰ Delila Kania, "Nilai Kesundaan Cageur (Sehat Akal), Bageur (Baik) Dan Bener (Benar) Sebagai Kearifan Lokal Dalam Perspektif Konsep Hukum Perdata Di Indonesia," *Civic Edu : Jurnal Pendidikan Kewarganegaraan* 3, no. 2 (2020): 2, <https://www.journal.unpas.ac.id/index.php/civicedu/article/view/4626>.

¹¹ Isnaeni, *Seberkas Diorama Hukum Kontrak*.

¹² I Putu Merta Suadi, Ni Putu Rai Yuliantini, and Si Ngurah Ardhya, "Tinjauan Yuridis Subyek Hukum Dalam Transaksi Jual Beli Online/E-Commerce Ditinjau Dari Kitab Undang-Undang Hukum Perdata," *Jurnal Komunitas Yustisia* 4, no. 2 (2021): 674, <https://ejournal.undiksha.ac.id/index.php/jatayu/article/view/38164>.

¹³ Norasya Verdiana, "Rekonstruksi Regulasi Batas Kedewasaan Atau Kecakapan Seseorang Dalam Melakukan Perbuatan Hukum Berbasis Nilai Keadilan" (Universitas Islam Sultan Agung, 2022), x.

goods. In fact, based on Article 1234 of the ICC, an obligation is not only to provide something (goods); but also certain actions (providing services) or even prohibition from undertaking certain actions. Secondly, Article 1320 (4) of the ICC provides that the agreement must have a "permissible cause". However, there is no further explanation of the meaning of "cause" in the term permissible cause. The absence of substantive legal provisions concerning the meaning of permissible cause creates a gap for potential error, namely in determining whether an agreement that does not meet formal requirements is null and void solely because of a violation of the law or whether it is null and void because it does not meet the permissible cause requirement. Such error occurred for example in the case of *Nine AM Ltd. v. PT Bangun Karya Pratama Lestari (PT BKPL)*, when the judge declared that *the Loan Agreement* between Nine AM Ltd. and PT BKPL is not valid and it is null and void because it does not meet the permissible cause requirement, namely it does not meet the provisions of Article 31 (1) of Law No. 24 of 2009 concerning Flag, Language and State Emblem and National Anthem.¹⁴ At the same time, referring to the views of Subekti and J. Satrio, both firmly state that the permissible cause requirement is related to the content of the agreement implemented, namely the performance to be carried out or the rights and obligations of the parties to the agreement.¹⁵ Based on the foregoing, this study intends to propose ideas for the improvement of provisions relating to the legal terms of an agreement.

2. Method

This is a normative research with statutory, conceptual and comparative law approaches. The statutory approach is carried out based on legal provisions regarding to the issue.¹⁶ Considering that in Indonesia, the ICC is a source of contract law,¹⁷ the statutory approach is carried out with a view to the ICC. The conceptual approach is used in this study because there are provisions for the validity of agreement that are not or are incompl provided for in the ICC,¹⁸ so the help of scholarly opinions (doctrines) is needed for their interpretation. As this study aims to provide ideas for the renewal of the requirement for the validity of the agreement, a comparative

¹⁴ Johannes Ibrahim Kosasih, *Kausa Yang Halal Dan Kedudukan Bahasa Indonesia Dalam Hukum Perjanjian*, 1st ed. (Jakarta: Sinar Grafika, 2019), 9–11.

¹⁵ J. Satrio, *Hukum Perikatan, Perikatan Yang Lahir Dari Perjanjian (Buku II)*, 2nd ed. (Bandung: Citra Aditya Bakti, 2001), 52; Subekti, *Hukum Perjanjian*.

¹⁶ Kristiawanto Kristiawanto, *Memahami Penelitian Hukum Normatif*, 1st ed. (Jakarta: Prenada Media, 2022), 29.

¹⁷ Nuesyami Ichsan and Muh. Ramli, *Hukum Perjanjian Dan Bisnis*, 1st ed. (Sumatera Barat: Azka Pustaka, 2022), 72; A. Rahim, *Dasar-Dasar Hukum Perjanjian: Perspektif Teori Dan Praktik*, 1st ed. (Makassar: Humanities Genius, 2022), 41.

¹⁸ I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum*, 2nd ed. (Jakarta: Prenada Media Group, 2017), 159.

law approach is also taken. Through the comparative law approach, it is expected to fill the norm void or make changes to existing norms¹⁹ with regard to the requirements for the validity of the agreement. A comparison of law is conducted by examining the provisions of *Nieuw Burgerlijk Wetboek* (hereinafter referred to as NBW).²⁰ The choice of Dutch law was based on the consideration that the ICC currently in force as the legal basis for the law of obligations in Indonesia is a derivative of the Dutch *Burgerlijk Wetboek* which had been formerly enforced in the Dutch East Indies based on the principle of concordance, and is still in force in Indonesia based on Article II of the Transitional Provisions of The 1945 Constitution.²¹

The primary legal materials in this study are the ICC and NBW. The secondary legal materials are expert opinions (doctrines), works that are not legal rules but discuss or analyze the law, including doctrines and research results published in journals. Some of these legal materials are in the form of textbooks, and some have been obtained through electronic research.²²

3. Results and Discussion

3.1. The Change of Adulthood Criteria and Clear Distinction Between "Having No Capacity" and Being "Unauthorized" to Enter into an Agreement

Article 1320 (1) of the ICC provides that for the validity of an agreement, the parties thereto must possess capacity. Capacity is the ability under the law to perform legal acts (agreements). In view of capacity, Article 1329 of the ICC sets out that every person has the capacity to create obligations, unless the law provides that he/she does not have the capacity. It is clear from such provisions that in general everyone is considered as possessing the capacity to enter into contracts, except for those who are expressly deemed as not possessing capacity based on the law. A person who does not possess capacity to enter into an agreement based on Article 1330 of the ICC is a minor, a person who is under custody, a married woman (in this case it has not been in effect since the enactment of the 1974 Marriage Law),²³ all of such persons are prohibited by law from entering into certain agreements. Thus, the definition of "possessing capacity" should not be limited to legal capacity as set forth in Article 1330 (1) and (2) of the ICC, namely being adult and not being

¹⁹ Diantha, *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum*.

²⁰ Frits Brandsma, "Some Remarks on Dutch Private Law and the *Ius Commune*," *Electronic Journal of Comparative Law* 11, no. 1 (2007): 21.

²¹ Muhammad Syaifuddin, *Hukum Kontrak: Memahami Kontrak Dalam Perspektif Filsafat, Teori, Dogmatik, Dan Praktik*, 1st ed. (Bandung: Mandar Maju, 2012), 32–33.

²² Morris L. Cohen and Kent C. Olson, *Legal Research in A Nutshell* (United States of America: West Academic Publishing, 2021), 8–9.

²³ Isnaeni, *Pijar Pendar Hukum Perdata*.

under conservatorship; rather, it should also include legal authority provided for in Article 1330 (3) of the ICC. A person's capacity to take legal action is different from a person's authority to take legal action.

A person who is declared to be unauthorized is actually a person who is generally capable of acting, but for certain matters cannot carry out legal action, in which case he/she is not authorized to enter into a certain agreement.²⁴ Authority, relating to parties representing a business organization or incorporated company where the authority to represent is for and on behalf of the company or acting as a representative of the company. For example, for Limited Liability Companies in Indonesia based on Article 1 number 5 *Jis.* Article 92 (1), Article 98 of Law No. 40 of 2007 concerning Limited Liability Companies, the Directors have the authority to act on behalf of the company. Therefore, agreements made by unauthorized parties are null and void because they are a violation of laws and regulations.²⁵

Different from ICC, Article 6:213 par 1 of the NBW expressly provides an understanding that a contract is a juridical act; therefore it must be ensured that the parties to the contract possess legal capacity. As for legal capacity, it is set forth in Article 3:32 par 1 of the CCN that to the extent that the law does not provide otherwise, any natural person has the legal capacity to undertake juridical acts. Referring to Article 6:213 par 1 Article 3:32 par 1 of the CCN it becomes evident that there are two groups of persons who are not allowed to perform juridical acts, namely persons who do not possess capacity (lacking legal capacity) and persons who are not authorized to enter into contracts (unauthorized to contract). Persons who are unauthorized to contract, namely persons who possess the legal capacity to perform legal acts, but are not allowed or are prohibited from entering into certain contracts for certain matters. They do not belong to the category of lack of capacity, but they have a specific lack of authority to contract. In the event that a person from this category violates the 'lack authority to contract', it is subject to the sanction of such legal action being null and void. All such legal acts are deemed to have been null and void from the beginning (as if they have never existed).²⁶

In line with article 3:32 of the NBW which provides for persons who do not possess legal authority, J. Satrio in his doctrine explains that it is necessary to draw a distinction between the notion of "capacity to act" and "authority to act". The capacity to act refers to the general authority

²⁴ Muhamad Teguh Pangestu, *Pokok-Pokok Hukum Kontrak*, 1st ed. (Makassar: Social Politic Genius, 2019), 215.

²⁵ Kelik Wardiono et al., *Hukum Perdata*, 1st ed. (Surakarta: Muhammadiyah University Press, 2018), 33–34.

²⁶ M.A.B. Chao-Duvis et al., *A Practival Guide to Dutch Building Contracts*, 4th ed. (Den Haag: Instituut voor Bouwrecht, 2018), 4.

to enter into a contract or to perform legal acts in general. On the other hand, the authority to act refers to a specific thing, the authority to act in specific events. A person who is declared as lacking authority is a person who is generally capable of acting, but for some certain things "is not". A person who does not possess the capacity to act is certainly an unauthorized person, while an unauthorized person is a person who generally possesses the capacity to act, but in certain events cannot perform a legal action.²⁷ In view of Article 3: 32 of the NBW and related to the doctrine of J. Satrio to deal with the lack of clarity concerning the definition of possessing "capacity" under Article 1320 (1) of the ICC, it is necessary to reformulate the article. Such revision could be effected by separating out Article 1330 of the ICC number 3 which sets forth that "... and in general everyone prohibited by law from entering into certain agreements," to form a separate part. Thus there would be a clear distinction between "having no capacity" and being "unauthorized" to enter into an agreement. Such unequivocal distinction needs to be made in view of the fact the consequences of each of the two are different.

Under Indonesian law, Article 330 (1) of the ICC states that a person is deemed to be an adult when he/she reaches the age of 21 years or has been married. If a person is placed under custody, juridically such person is also considered as lacking the capacity to perform legal acts.

It has to be considered that in reality, not all the agreements in today's era of progress are still relevant to the concept Articles 1320 Jo. 330 (1) of the ICC. One example of such an agreement is a saving account agreement made by minors (junior high, high school, college, and university students) where the agreement for today has been common practice for children aged under 18 years. Muhammad as Ari AM et.al in their pre-study at Bank BTN UNS branch found that Children who are students are allowed to close a savings agreement without being represented by a guardian or parent, with direct and set their signatures. The identification as a condition of the bank administration equipment is a student card or identity card of the depositor.²⁸ Suminar at.al in their research related to the limit of the age of majority recognized in the field of medical service stated that Indonesia uses a legally fixed age approach to presume that minor is competent to give consent for medical treatment. Therefore, the fixed age of capacity to consent for medical

²⁷ Satrio, *Hukum Perikatan, Perikatan Yang Lahir Dari Perjanjian (Buku II)*.

²⁸ Muhammad As Ari, Moch Nadjib Imanullah, and Setiono Setiono, "Relevance of Legal Capacity as Legitimate Terms of Agreement of Saving for Child in the Bank," *The Indonesian Journal of International Clinical Legal Education* 1, no. 1 (2019): 21, <https://journal.unnes.ac.id/sju/index.php/iccle/article/view/20670>.

treatment is set at a similar age to the age of the legal majority, which is 18 years.²⁹ Bambang Tri Bawono based on his research stated that those who make electronic contracts through click wrap have the potential to be immature because they are under 18 years of age. Especially in the context of the use of smartphones or other devices related to the use of software applications, there are no clear rules regarding the minimum limits of users of such smartphones or devices.³⁰ Because there is a pluralism in the criteria for adulthood, accordingly, all these issues need to be addressed in order to provide clarity and certainty in view of the law that can be used as a basis in practice.

Under The Netherlands Law as regulated under Article 1: 233 *Jis.* Article 1: 234, Article 1: 378, Article 1: 381 of the NBW, the category of persons lacking legal capacity to perform juridical acts includes persons who are yet to reach adulthood and persons who have reached adulthood but are under guardianship. Based on Article 1:233 of the NBW, the age of maturity is 18 years, as for those who are yet to reach adulthood, they can perform juridical acts in compliance with the provisions of Article 1:234 of the NBW. Not possessing legal capacity means that they are not allowed to perform juristic acts. Persons lacking legal capacity are people to be protected. If they perform a juristic act, it is voidable; it means that although the legal act itself is valid, it can be declared legally invalid because the person who has the right to represent him/her cancels it (parent or guardian). The legal procedure of consent from the parents is considered to have been given to a minor if it relates to transactions that are generally accepted in practice, in other words, if it is normally performed independently by children of their age. However, it should be noted that the consequences of legal acts performed by minors or persons under custody are voidable. On the other hand, in the event of a unilateral legal act performed by a minor that is not intended for a particular person, the consequences thereof are not voidable; rather than that, they will become null and void,³¹ it is stated in Article 3: 32 par 2 of the NBW.

According to researchers, the diversity of adulthood criteria in Indonesian legislation in certain fields of law (guardianship, making notary deeds, and so on) can still be applied as specialized (*lex specialis*) to general provisions in the ICC. However, it is necessary to change the adulthood criteria in the ICC as a general legal provision (*lex generalis*), for example by adopting

²⁹ Sri Ratna Suminar et al., "The Legal Capacity In Contract For Medical Treatment (The Comparative Study Between Indonesian Law, Dutch Law, And English Law)," *Bina Mulia Hukum* 5, no. 1 (2020): 43, <http://jurnal.fh.unpad.ac.id/index.php/JBMH/article/view/7>.

³⁰ Bambang Tri Bawono, "The Validity of Electronic Contracts in Software Applications," *Jurnal Akta* 7, no. 1 (2020): 123, <https://jurnal.unissula.ac.id/index.php/akta/article/view/10556>.

³¹ Hans Nieuwenhuis, "Pembentukan Kontrak," in *Hukum Perikatan (Law of Obligation)*, 1st ed. (Denpasar: Pustaka Larasan, 2012), 122–123.

the standard age of maturity as stipulated in Article 1: 233 of the NBW, which is 18 years. In addition, special arrangements can be made for legal acts undertaken by minors, as stipulated in the Netherlands in *Article 1: 234* of the NBW, whereby for legal acts that are commonly accepted as normal for children of their age, they no longer need the permission of their parents or guardians.

3.2. There is a Need to Add Rules Regarding to Formation of Consent

Article 1320 (2) of the ICC only provides that consent is prerequisite for contract validity. ICC does not at all set out provisions concerning the occurrence of agreement (the meeting of wills) based on the concept of offer and acceptance. The criteria for the construction of the manner in which consent occurs has been developed through the opinions of scholars (doctrine). For instance, Subekti's doctrine simply explains that an agreement is reached momentarily at the second of acceptance. If acceptance is made in writing, the agreement is considered to occur when the party who provides the offer receives the answer in the letter concerned, as that very second can be considered as the second of the birth of the agreement. The possibility that he/she may not have read the letter is a risk of their own.³² Likewise, there are no rules regarding the Will Theory, Statement Theory and Belief Theory in ICC, so that they have to be studied through legal doctrines. For instance, according to the doctrine of J. Satrio, ICC adheres to the Statement Theory based on the interpretation of Article 1342 of the ICC which states that, if the wording of an agreement are clear, it is not permissible to deviate from it by means of interpretation. ICC also adopts the Will Theory as evident from Article 1343 of the ICC which states as follows, "if the wording of an agreement can be interpreted in various ways, the choice of interpretation should be guided by the intent of the parties who have made such agreement, rather than strictly following the literal meaning of the words". Furthermore, by looking at Article 1346 of the ICC which sets forth that: "matters raising doubt must be interpreted according to what is customary in the country or the place where the agreement has been made," it would appear that ICC adopts the Belief Theory.³³

In the Netherlands, Article 6: 213 par 1 of the NBW expressly states that a contract is a juridical act, it is paramount to know when the contract is formed. The essence of the primary basis of the creation of a contract is the achievement of the meeting of the will between two or more parties; this is the beginning of the creation of the juridical act. Provisions concerning the occurrence of agreement (the meeting of wills) as set forth in Article 3:33 of the NBW indicate

³² Subekti, *Hukum Perjanjian*.

³³ J. Satrio, *Hukum Perikatan, Perikatan Yang Lahir Dari Perjanjian (Buku I)*, 2nd ed. (Purwokerto: Citra Aditya Bakti, 2000), 232.

that it is of utmost importance that the parties have the will to be legally bound. An agreement without a meeting of the wills is not an agreement. An inner will alone is not enough to bind. The will must be conveyed to the other party.

Unlike the ICC, Article 6: 217 par 1 of the NBW clearly sets out that the basis for creating an agreement is an offer and its acceptance. Thus the will of the parties is expressed through a legal act in the form of an offer (from offeror) and acceptance (from offeree). The NBW does not provide a definition of offer and acceptance. Referring to the opinions of Ewoud H. Hondius and H. J. Van Kooten, an offer is defined as an offer to another party to take part in a contractual relationship, which contains the will of the offeror. At the same time, acceptance is defined as a statement of will from the offeree to the offeror containing approval.³⁴ An offer is considered to be an offer if by accepting the offer there is immediately a contract.³⁵ At the time an offer is accepted, a reciprocal agreement is reached,³⁶ unless determined differently or otherwise in such offer or based on other provisions, or according to applicable practices. Acceptance is a statement in which the terms stated in the offer are agreed upon. Once an offer is accepted, a contract occurs. Based on Article 3:37 par 3 of the NBW, an acceptance will become effective if the statement gets to the person such statement is addressed to. That is, the offeror is not bound until he/she hears that the offeree accepts his/her offer or when the offeror can understand that the offeree accepts his/her offer. Acceptance can be made in an express or tacit manner, by an act, or even by remaining silent or doing nothing. An implementation of what is promised can also be considered acceptance. Whether silence and non-action can be considered as acceptance depends on the situation surrounding the case, it refers to the general rule of Article 3:37 of the NBW.

In The Netherlands, prior to the entry into force of the NBW on 1 January 1992,³⁷ there had been no regulated construction of consent in the old BW based on the formation of acceptance and offer; such formation only developed through doctrine based on legal experts' opinion. The legal doctrine in The Netherlands has been adopted by scholars in Indonesia. By referring to Van Dunne's view (in Yunus, 2019) which states that for such doctrines to become positive law, they need to be expressly set out in national law of obligations, the researchers are of the view that in

³⁴ Nieuwenhuis, "Pembentukan Kontrak."

³⁵ Thomas Kadner Graziano, *Comparative Contract Law, Second Edition: Cases, Materials and Exercises*, 2nd ed. (United Kingdom: Edward Elgar Publishing, Inc., 2019).

³⁶ Ewoud H. Hondius and H. J. Van Kooten, *Principles of European Contract Law and Dutch Law: A Commentary*, 1st ed. (The Hague: Kluwer Law International, 2002), 105, 128.

³⁷ Brandsma, "Some Remarks on Dutch Private Law and the *Ius Commune*."

the upcoming law of obligations, it is necessary to add rules related to the formulation of the formation of the word consent.

3.3. Change of 'Certain Matter' Terminology as Requirement of Agreement Validity

ICC defines "certain things" in the agreement narrowly, i.e. as goods. This is evident from the provisions of Article 1333 of the ICC which states that as a subject matter, the agreement must have at least one good the type of which is determinable. Similarly, Article 1334 of the ICC states that goods which will only be available in the future can be the subject of an agreement. Bearing in mind that obligations are not limited to providing a thing (goods) but can also include certain acts (services) or prohibiting a certain act, the national positive law of obligations needs to be modernized by adopting a broader definition of subject matter in an agreement. For instance, by adopting Subekti's opinion which defines "certain things" as matters subject to the agreement, namely the rights and obligations of the parties under the agreement,³⁸ or by adopting the opinion of J. Satrio stating that "a certain thing" in the agreement is the content of the performance which is the subject of the agreement concerned. Such performance can be a certain conduct, it can be in the form of giving something, doing or not doing something.³⁹

Unlike the ICC, the NBW provides for "certain things" in the agreement broadly by defining them as "rights and obligations," as evident from Article 6:227 of the NBW asserting that the contracting parties' obligations must be capable of being determined in a concrete manner. The parties must be able to agree on the matters included in the agreement. The rights and obligations of the parties can be reciprocally determinable; however, it does not mean that the parties must have agreed to a complete contract under which the rights and obligations are stated in detail; it is sufficient for the certain things agreed upon to be determinable.⁴⁰

As the substantive provisions of Article 1333 of the ICC are not consistent with Article 1334 of the ICC, the researchers are of the view that there is a need for redactional change in the term "certain matter" in Article 1320 (3) and Article 1333 of the ICC to read as "certain performance" as in Article 6:227 of the NBW which provides that "The obligations to which parties subject themselves under the agreement, must be determinable"

³⁸ Subekti, *Hukum Perjanjian*.

³⁹ Niru Anita Sinaga and Nunuk Sulisrudatin, "Hal – Hal Pokok Dalam Pembuatan Suatu Kontrak," *Dirgantara* 7, no. 2 (2017): 115, <https://journal.universitassuryadarma.ac.id/index.php/jihd/article/view/134>; Satrio, *Hukum Perikatan, Perikatan Yang Lahir Dari Perjanjian (Buku II)*.

⁴⁰ Hondius and Van Kooten, *Principles of European Contract Law and Dutch Law: A Commentary*.

3.4. Changing the Term "Permissible Cause" and Additional Provisions of Formal Agreements

Article 1320 (4) of the ICC requires that for an agreement to be valid, it must have a "permissible cause". The meaning of "permissible cause" refers only to Article 1337 of the ICC, which provides as follows "A cause is forbidden, if prohibited by law, or when it is contrary to decency or public order". The problem is that the definition of "causa" is not at all elaborated upon in the ICC. An explanation of this is found in the opinions of scholars.⁴¹ For example, J. Satrio by quoting the *Dutch Hoge Raad* of November 17, 1922 in the case of *Zeilemaker v. Mirandolle* interpreted "cause" as a common goal to be achieved by the parties.⁴² Such understanding was subsequently applied in Supreme Court decision No. 268/K/Sip/1971. Such understanding of cause is then further emphasized by Subekti, namely that the common goal to be achieved by the parties is none other than the content of the agreement, namely performance and counter-performance exchanged by the parties.⁴³ Dutch law has eliminated the term cause in the NBW and replaced it with the term "prohibited contract" as a combination of certain terms of affairs and permissible cause.⁴⁴ According to Agus Yudha Hernoko, the complexity of understanding the meaning of cause has an impact on difficulties in its application in practice, therefore many scholars want this requirement to be removed. In line with this thinking, the researchers consider it necessary to make changes to the wording of Article 1320 (4) of the ICC, namely to replace "permissible cause" with "prohibited agreements".

Another issue is the legal consequences of agreements that do not meet formal requirements. According to Subekti, a formal agreement is defined as an agreement for which certain formalities are stipulated for it to be valid, with the threat of cancellation of the agreement if it does not follow the formalities prescribed by law.⁴⁵ Referring to Subekti's opinion, it is clear that a formal agreement that does not fulfill the formal requirements stipulated by law is null and void solely because it violates the law. However, the regulation on "permissible cause" in Article 1320 (4) in conjunction with Article 1337 of the ICC provides that "a non-permissible cause", is bound to cause confusion if applied to formal agreements. For example, in Supreme Court decision Number 1572K/PDT/2015 in the case of the Loan Agreement made between PT Bangun Karya Pratama

⁴¹ Syaifuddin, *Hukum Kontrak: Memahami Kontrak Dalam Perspektif Filsafat, Teori, Dogmatik, Dan Praktik*.

⁴² Satrio, *Hukum Perikatan, Perikatan Yang Lahir Dari Perjanjian (Buku II)*.

⁴³ Subekti, *Hukum Perjanjian*.

⁴⁴ Agus Yudha Hernoko, *Hukum Perjanjian: Asas Proposionalitas Dalam Kontrak Komersial*, 1st ed. (Jakarta: Prenada Media Group, 2010), 196.

⁴⁵ Subekti, *Hukum Perjanjian*.

Lestari and Nine Am Ltd., the Supreme Court has erroneously applied the law because the use of the English language in the Loan Agreement is considered a violation of the "permissible cause" requirement as provided for in Article 1320, Article 1335 and Article 1337 of the Civil Code, in this case it was considered unlawful.⁴⁶

Unlike the ICC which does not regulate formal agreements, based on Article 3:39 of the NBW, any juridical act undertaken in contradiction to formal requirements under the law is null and void, unless provided for otherwise under the law. Contract law adopts the principle of freedom of contract. However, certain exceptions are recognized under this principle, namely a specific form is required for certain agreements; if such terms are not met, the agreement is null and void. The principle of the freedom of contract is also limited by the provision that a violation of the requirements under the written law, mandatory law, morality, good faith and public order cause the agreement to be null and void, which means that such act is deemed non-existent under the law and it is non-enforceable.⁴⁷ Such exceptions are clearly provided for in Article 3:40 of the NBW.

Learning from Article 3:39 of the NBW about the consequences of non-fulfillment of formal requirements of certain agreements. In the context of establishing the national law of obligations, it may be considered to include provisions concerning violations of formal requirements in a specific article. There are currently no specific provisions in ICC about the non-fulfillment of formal requirements in certain agreements; a reference can be found in Article 1320 Jo. 1337 of the ICC, namely by linking the *halal causa* requirement with the prohibition of violating laws and regulations.⁴⁸ Therefore, it is also being recommended to amend Article 1337 of the ICC in order to include provisions on the legal consequences of an agreement the contents of which are contradictory to law and regulations, public order and decency.

⁴⁶ Ifada Qurrata A'yun Amalia, "Akibat Hukum Pembatalan Perjanjian Dalam Putusan Nomor 1572 K/Pdt/2015 Berdasarkan Pasal 1320 Dan 1338 KUHPerdara," *Jurnal Hukum Bisnis Bonum Commune* 1, no. 1 (2018): 67, <https://jurnal.untag-sby.ac.id/index.php/bonumcommune/article/view/1757>; Windy Yolandini and Mada Apriandi, "Kewajiban Penggunaan Bahasa Indonesia Dalam Kontrak Asing Di Indonesia," *Lex Lata : Jurnal Ilmiah Ilmu Hukum* 2, no. 1 (2020): 415, <http://journal.fh.unsri.ac.id/index.php/LexS/article/view/555>.

⁴⁷ Chao-Duvis et al., *A Practival Guide to Dutch Building Contracts*.

⁴⁸ Muhammad Natsir Asnawi and Edi Hudiata, "Delimitation of Freedom of Contract Principle and Judge's Corrective Function in Assessing the Parties' Positions on an Agreement," *Mimbar Hukum* 29, no. 1 (2017): 154, <https://jurnal.ugm.ac.id/jmh/article/view/16889>.

4. Conclusion

Based on the results of comparison between the provisions of the legal provisions for the validity of agreement under the Civil Code and NBW, it can be concluded that It is necessary to change or supplement to several aspects, namely: drawing a clear distinction between "lack of capacity" and "unauthorized" to enter into an agreement; considering changes in adult age; setting out the authority of minors in performing legal acts; provide for construction in the formulation of the creation formation of agreement based on offer and acceptance into the national law of obligations. In addition, related to subject matters and permissible cause to the agreement, we need to provide a broader articulation of the definition of the subject matter of certain things in the agreement so that it includes not only giving something (goods) but also committing certain acts, or prohibitions to perform a particular act; as well as providing for the consequences of violations of formal requirements in particular.

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