


Abrogation “Privity of Contract” Due To One Sided Withdrawal of A Third Party As An Emergency Contact From Borgtocht Perspective

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Abstract

Introduction: The inclusion of a third party's personal data as an emergency contact in an agreement is often done one-sidedly by the debtor, to the detriment of the third party who is often disturbed to find the debtor's whereabouts, even though the third party does'nt know and never agreed to have his personal data included as an emergency contact.

Purposes of the Research: This research aims to find out the abrogation of the principle of privity of contract in the context of one-sided withdrawal of a third party as an emergency contact in the perspective of personal guarantee law (borgtocht).

Methods of the Research: This research is using the normative juridical method. The approach is through legislation, which is the Civil Code and conceptual approaches.

Results of the Research: The principle of privity of contract in the perspective of personal guarantee law (borgtocht) will be invalid and cannot be applied to emergency contact if the third party whose name is included is not asked for prior approval by the parties in the agreement.

Keywords: Privity of contract; Emergency Contact; Borgtocht.


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INTRODUCTION

The principle of Privity of contract is a principle that prioritizes the parties involved in the agreement only who can bind themselves to each other and be bound by the things agreed upon. Mutual binding can only occur if there is an agreement between the parties.¹ It prevents parties other than those mentioned in the agreement from involving themselves in the agreement. The principle of privity of contract is explicitly regulated in Article 1340 of the Civil Code which states that "The agreement is only valid for the parties who make it". This principle then applies and develops in every agreement in the community which sometimes raises new legal issues where the binding of legal relations not only involves the parties who bind the agreement but may bind third parties even though they are not bound by the agreement. This then occurs in many agreement transactions between the

¹ Agus Marzuki and Arvie Johan, “Universalitas Asas Privity Of Contract,” *Jurnal Tapis* 10, no. 2 (2014): 106-24, <http://ejournal.radenintan.ac.id/index.php/TAPIS/article/view/1609>.

parties which then include the Identity of the third party contact who can be contacted if the debtor is unable to fulfill his obligations.

The Inclusion of Third Party Contact Identity as Emergency Contact raises problems because this is often done without the permission and understanding of the third party, which then has the effect of binding the Third Party in the agreement made between the creditor and the debtor. Problems occur when the debtor is in a bad faith and causes payment arrears to the creditor and when the debtor is unable to be contacted, the Creditor will look for the debtor's whereabouts by contacting the third party who is the Emergency Contact. Of course, this problem disturbs the private rights of the party who is the Emergency Contact because they are not aware of the existence of agreement between the debtor and the creditor. The owner of the emergency contact often gets unpleasant disturbances and even tends to be detrimental.² Personal data is shared among debt collectors, making many people accessible to be accessed by debt collectors. But often the people who are the emergency contacts or the surroundings of the borrower's home or work environment can't do anything about it because their personal data has already been shared.

Emergency contact as mentioned above can also be considered as a guarantee of a third party in the transaction of the debtor and creditor when the debtor fails to carry out his obligations and can't be contacted so that this emergency contact can be connected as an additional guarantee in the form of personal guarantees to guarantee the least to be contacted. The next matter that comes up is related to the legal protection that can be given to a person whose identity is used as an emergency contact one-sidedly by the loan applicant, considering that such profiteering can certainly cause material or material loss to that person.³ Based on the above described background, the author is interested in examining in this research on how is the legal protection of third parties whose names are often included in agreement activities without the permission and understanding of the third party? And how is the implementation of the principle of "privity of contract" in the legal protection of third parties as emergency contact in the agreement?.

METHODS OF THE RESEARCH

This research is using the normative juridical method, by inventorying, studying, and analyzing, as well as understanding the law as a set of positive rules or norms in the legislative system that govern human life.⁴ The approach is through legislation, which is the Civil Code and conceptual approaches. The specification of this research is descriptive analytical research which is research to describe the flow of scientific communication and analyze existing problems that will be descriptively presented.⁵ The data type used is secondary data. Secondary data includes, among others, literary materials related to research, secondary data includes primary legal materials, secondary legal materials and tertiary legal materials.⁶

² Ricky Shandy and Retno Dewi Pulung Sari, "Aspek Hukum Pencantuman Data Pribadi Secara Sepihak Sebagai Kontak Darurat Dalam Perjanjian Kredit Online," *Binamulia Hukum* 12, no. 1 (2023): 39–45, <https://doi.org/10.37893/jbh.v12i1.452>.

³ Ni Putu Intan Mahadevi and I Made Dedy Priyanto, "Aspek Perlindungan Hukum Terhadap Orang Yang Identitasnya Digunakan Sebagai Emergency Contact Pinjol Secara Sepihak," *Kertha Negara* 10, no. 5 (2022): 521–32, <https://ojs.unud.ac.id/index.php/Kerthanegara/article/view/79328>.

⁴ Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif, Suatu Tinjauan Singkat*, Jakarta: Raja Grafindo Persada (Jakarta: Rajawali Pers, 2015), p. 13.

⁵ Soekanto and Mamudji. *Ibid*, p. 30.

⁶ Soekanto and Mamudji. *Ibid*, p. 13.

RESULTS AND DISCUSSION

A. Implementation of the Principle of Privity of Contract in Agreement according to the Civil Code

Black's Law Dictionary defines a contract as this: “an agreement between two or more persons which creates an obligation, to do or not to do a particular thing”.⁷ Sudikno Mertokusumo defines a contract as a legal relationship between two people who agree to cause legal consequences.⁸ In general, in executing an agreement, it is necessary to consider the conditions as regulated in Article 1320 of the Civil Code, which are: 1) Agreement of parties who bind themselves; 2) Legal competence; 3) The object of the contract; 4) The lawful causa.

The parties who have agreed in an agreement will generally bind themselves to each other as Article 1338 of the Civil Code has regulated it. The drafting of this contract or agreement does look simple because it seems to allow the parties to determine the contents of the agreement freely, this is reflected in the principle of freedom of contract where the parties are free in:⁹ 1) Determining whether or not to execute the agreement; 2) Free to determine with whom he/she will conclude an agreement; 3) Free to determine the contents or clauses of the agreement; 4) Free to determine the forms of agreement; 4) Other rights and freedoms that do not contradict laws and regulations.

However, it is important to realize that agreements must be made and implemented based on common sense and respect for human morality.¹⁰ Therefore, in making an agreement, it must refer to the principles of the agreement as referred to in civil law. From the many transactional activities carried out by the community, credit agreements are one of the activities that are often carried out by the community. The people who are parties to this agreement include creditors and debtors.

The principle of Privity of Contract in credit agreements refers to the fact that only the parties involved in the contract have the rights and obligations to comply with the provisions of the agreement as referred to in Article 1340 of the Civil Code. In the context of a credit agreement, the principle of privity of contract means that only the parties who sign the credit agreement are responsible for the obligations in the agreement. This means that if one of the parties does not fulfill its obligations, only the party related to the agreement can sue or be held accountable for the violation.

However, there are some exceptions to the implementation of the privity of contract principle in credit agreements. For example, if a creditor provides false or misleading information to a third party which then causes harm to that third party, then the creditor may be legally liable for the harm incurred. In addition, in some cases, third parties who are not directly involved in the credit agreement but have an interest involved in the transaction may have the right to sue or be held accountable for the performance of obligations in the agreement. An example of a third party that has an interest in a credit agreement is a

⁷ Henry Campbell Black and Bryan A Garner, *Black's Law Dictionary* (New York: West Group, 2009), p. 322.

⁸ Sudikno Mertokusumo, *Mengenal Hukum: Suatu Pengantar* (Yogyakarta: Liberty, 2010), p. 118.

⁹ Ahmadi Miru, *Hukum Kontrak & Perancangan Kontrak* (Jakarta: Rajawali Pers, 2018), p. 4.

¹⁰ Niru Anita Sinaga, “Peranan Asas-Asas Hukum Perjanjian Dalam Mewujudkan Tujuan Perjanjian,” *Binamulia Hukum* 7, no. 2 (2018): 107–20, <https://doi.org/10.37893/jbh.v7i2.318>.

guarantor or collateral. Their interest in the credit agreement makes them able to have the right to demand or be held accountable for violations in the agreement.

B. Abrogation "Privity Of Contract" Due To One Sided Withdrawal Of A Third Party As An Emergency Contact From Borgtocht Perspective

In practice, collateral that can be used to guarantee a debtor's debt to creditors can be in the form of property and personal guarantees.¹¹ In practice, personal guarantees are widely applied because of the reason that the insurer/guarantor has a common economic interest in the debtor's business (there is a relationship between the guarantor and the debtor).¹² Personal guarantee (borgtocht) is a guarantee in the form of a statement of ability given by a third party to guarantee the fulfillment of the obligations of the debtor concerned to the creditor, if the debtor is unfaithful.¹³ Article 1820 of the Civil Code states that a guarantee is an agreement by which a third party for the benefit of the debtor binds himself to fulfill the debtor's obligations if they are not fulfilled.

Based on this article, it should be underlined that third parties who are used as personal guarantees must obtain prior consent from the party to be included and involved in the agreement made by the creditor and the debtor. Personal guarantee agreements, like other guarantee agreements, are *accessoir* agreements as stated in Article 1821 paragraph (1) of the Civil Code. The acquisition of credit secured by personal guarantee is an agreement by a third party for the benefit of the creditor to promise to bind himself to fulfill the obligations of the debtor, if the debtor personally may or is unable to fulfill the obligations agreed upon.¹⁴ Although with all the weaknesses that exist in personal guarantee agreements, creditors will feel safer than no guarantee at all, because with the existence of personal guarantees creditors can collect not only from the debtor but also from third parties who guarantee which sometimes consist of several people or a company.

There are four types of personal guarantees, namely:¹⁵ 1) The guarantor (borg) is another person who can be charged; 2) Liability; 3) The rights consequences of passive joint liability, which are external and internal. External rights relations, namely rights relations between debtors and other parties and internal rights relations, namely rights relations between fellow debtors with one another; 4) Guarantee agreement, which is responsible for the benefit of a third party. An agreement, in which a third party for the benefit of the creditor, binds himself to fulfill the debtor's obligations, if the debtor does not fulfill his obligations.

The function of collateral in general is to guarantee the repayment of debts if the debtor defaults, especially it will be clearly seen in a material security agreement because of the existence of a collateral object in the form of a particular object, so there is an absolute right, while in personal guarantees it can only be done and considered a guarantee in the sense of guarantee law if there is an ability of a third party to guarantee the fulfillment of the debtor's

¹¹ Margareta Sevilla Rosa Angelin, "Hilangnya Esensi 'Persetujuan' Dalam Jaminan Perorangan Pada Praktik Pinjaman Online," *DIH: Jurnal Ilmu Hukum* 18, no. 1 (2022): 26–36, <https://doi.org/10.30996/dih.v0i0.5882>.

¹² Clara Fransiska Olivia Siahaan and Rica Gusmarani, "Penggunaan Jaminan Perorangan Dalam Praktik Penyelesaian Kredit Bermasalah," *Jurnal Notarius* 2, no. 2 (2023): 278–87, <https://jurnal.umsu.ac.id/index.php/notarius/article/view/17048>.

¹³ Niken Prasetyawati and Tony Hanoraga, "Jaminan Kebendaan Dan Jaminan Perorangan Sebagai Upaya Perlindungan Hukum Bagi Pemilik Piutang," *Jurnal Sosial Humaniora (JSJH)* 8, no. 1 (2015): 120–34, <https://doi.org/10.12962/j24433527.v8i1.1247>.

¹⁴ Nur Intan Yunianti and Ambar Budhisulistiyawati, "Efektivitas Jaminan Perorangan (Personal Guarantee) Dalam Menunjang Penyelesaian Kredit Bermasalah Di Bank BRI Cabang Surakarta Dan Bank BNI Syariah Cabang Surakarta," *Jurnal Privat Law* 8, no. 1 (2020): 111–16, <https://doi.org/10.20961/privat.v8i1.40383>.

¹⁵ Murlyta Nevi Sukmawati, "Personal Guarante Terhadap Perjanjian Kredit Dengan Jaminan Hak Tanggungan," *Airlangga Development Journal* 3, no. 1 (2019): 62–79, <https://doi.org/10.20473/adj.v3i1.18153>.

obligations, without the support of a material security agreement that binds the third party, personal guarantees are only relative rights as well as general guarantees.

Emergency contact comes from the English words "emergency" and "contact" which when translated means emergency contact. In simple terms, emergency contact means a person who can be contacted if something happens in the implementation of the agreement, for example the lender defaults on the fulfillment of the agreement and is difficult to contact.¹⁶ If it is related to Article 1340 of the Civil Code where an agreement is binding for the parties who make it, then emergency contact is part of the agreement between the two parties but cannot be said to be binding like personal guarantee (*borgtocht*). This is because the third party whose name is included in emergency contact is a party who can be contacted when the debtor's whereabouts are unknown or cannot be contacted anymore. So that the existence of emergency contact cannot be asked for responsibility for the contents of the agreement between the creditor and the debtor.

The principle of freedom of contract or also known as the public system is the broadest possible freedom given by the law to the public to conclude agreements on anything, as long as it does not contradict the laws and regulations, decency and public order. Freedom of contract is one of the most important principles, because it is a manifestation of free will emanating from human rights.¹⁷ However, what needs to be considered is that the freedom must never run away from the conditions stated in Article 1320 of the Civil Code, namely the agreement of those who bind themselves together. Oftentimes in a debt and credit agreement, the creditor asks for a guarantee of the identity of a third party who can be contacted in an emergency, and it is not uncommon for the debtor to provide the identity of a third party where the third party has never been notified, much less been asked to agree to include his identity as an emergency contact in the debt and credit agreement concluded by the debtor and creditor.

If the transactional debt and credit goes smoothly, then maybe there will be no problems for third parties, but if it turns out that in the future the debtor cannot fulfill his obligations due to negligence or deliberation, then it is the third party who will often be contacted by creditors to ask for information on the debtor's whereabouts, and this frequently disrupts the privacy and lives of third parties who without their consent become parties who must be included in the agreement between the debtor and the creditor. If there is a default due to the debtor's inability to pay or payment failure due to system failure by the organizer, the collection is often carried out to parties who do not know about the loan agreement made by the loan recipient and the lender through the organizer's platform.

An agreement has the principle of privity of contract, which states that an agreement is only valid and binding for the parties who make it. This, according to the author, violates the essence of the validity of the agreement because the withdrawal of the other party, even though it is done for an emergency, must still get permission and agreement from the party to be included in the agreement. If otherwise, then the subjective conditions in the agreement are invalid and the agreement should be canceled as a legal consequence of the non-fulfillment of the subjective conditions in points 1 and 2 of the validity of the agreement

¹⁶ Erni Nur Shofiyah and Indri Fogar Susilowati, "Penyalahgunaan Data Pribadi Penerima Pinjaman Dalam Peer to Peer Lending," *Novum: Jurnal Hukum* 6, no. 2 (2019): 1-6, <https://ejournal.unesa.ac.id/index.php/novum/article/view/30092>.

¹⁷ I Ketut Oka Setiawan, *Hukum Perikatan* (Jakarta: Sinar Grafika, 2015), p. 45.

as stipulated in Article 1320 of the Civil Code. One thing that needs to be known is that the most important principle in a legal action is the principle of good faith. The existence of good faith is the determinant of the nature of the actions carried out by the debtor towards his actions that should be done or not.¹⁸

The principle of good faith in civil law is the principle that each party involved in an agreement must act with good faith and honesty. This principle is applied in all stages of the agreement, from negotiation to execution and settlement of the agreement. In the context of a credit agreement, the principle of good faith means that the creditor and debtor must act in good faith and honestly in implementing the credit agreement. Creditors must provide clear and correct information about credit terms, including interest rates and related costs. The debtor must fulfill the obligation to pay credit installments according to the agreed schedule. The provisions regarding the principle of good faith are regulated in Article 1338 of the Civil Code which states that "An agreement must be carried out in good faith". Therefore, both creditors and debtors must obey the principle of good faith in implementing credit agreements. If one party violates the principle of good faith in carrying out a credit agreement, the other party has the right to claim compensation or cancel the agreement. In a debt and credit agreement, if the parties include information about emergency contact, the parties should also request approval from the party concerned first before including the information in the agreement. This is important because personal information such as phone numbers and addresses of emergency contacts are confidential and need to be kept confidential. In addition, if the party is not aware that their information will be included in the agreement, this may cause inconvenience or even legal problems in the future.

The principle of "Privity of Contract" states that the rights and obligations in a contract only apply to the parties involved in the contract, and do not apply to third parties who are not involved in the contract. However, this principle can be ignored if the third party has been mutually agreed upon by the parties involved in the contract. In the context of a credit agreement, ignoring the principle of "Privity of Contract" can happen if the parties agree to include a third party as an emergency contact in the credit agreement. In this case, the third party must give approval to be named as an emergency contact and must be informed of the terms and obligations associated with the credit agreement. This third party will not be a party to the credit agreement, but will only act as an emergency contact in case of emergency or when the debtor cannot be contacted. However, it is important to note that the waiver of the principle of "Privity of Contract" must be done carefully and with due regard to applicable legal provisions. The parties must ensure that the third party assigned as emergency contact has given legal consent and does not break the law. In the event of a dispute, the parties may refer to the applicable legal provisions to resolve the matter.

CONCLUSION

The principle of privity of contract in the perspective of personal guarantee law (borgtocht) will be invalidated and cannot be applied to emergency contact if the third party whose name is included is not asked for approval in advance by the parties who bind

¹⁸ Rai Mantili, "Actio Paulina Sebagai Upaya Perlindungan Bagi Kreditor Menurut Kitab Undang-Undang Hukum Perdata Dan Undang-Undang Kepailitan Dan Penundaan Pembayaran Utang (PKP)," *ADHAPER: Jurnal Hukum Acara Perdata* 6, no. 2 (2020): 21-37, <http://jhaper.org/index.php/JHAPER/article/view/127/108>.

themselves to each other in the agreement. Therefore, before adding a third party as an emergency contact, the parties must ensure that the third party has known and agreed to the contents of the agreement to include his personal data as an emergency contact in the agreement.

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