
DISPARITY ON CUMMULATION CASE OF TORT AND BREACH OF CONTRACT

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Abstract

The discussion on the differentiation between breach of contract and tort has been prevail in a long time. In addition, there is judge's disparity on the breach of contract and tort cumulation cases. Three cumulation dicisions were analysed to understand the legal reasoning of the judges. Legal as well as conceptual approach used to reveal the strong relationship between breach of contract and tort in actual cases. Despite the different nature of the cases, the principle of tort existed on the breach of contract. However, the disparities of the awards occured on the actual cases. Firstly, judge consider that the cumulation is formally invalid hence the claim is unacceptable. Finally, on others cases the former reason is put aside and the judges acknowledge the strong relation between breach of contract and tort. Furthermore, systematical legal reasoning is used to grant the claims. With regard to the fairness, judge as the law enforcer need to give reasonable decision with their intellectuality.

Keywords: Legal Reasoning, Tort & Breach Of contract
INTRODUCTION

Tort is one of the civil cases that are often used to obtain compensation for the actions of the perpetrators who harm the victim. With regard to the initial regulation on the tort law which is stipulated on the article of 1365 Indonesian Civil Law, the tort definition has changed to become wider. Firstly, it occurred in 1919 with the issuance of a case decision between Cohen and Lindanboem. Tort is not only interpreted as acts that violate the law, but also violate legal obligations, violate subjective rights, violate decency and public order or are contrary to propriety, violate the attitude of caution in the rules of socializing in society. Thus, the broader meaning has consequences for the extent of a case that can be included in the category of unlawful acts. It has become a "genus" and breach of contract is one of the "species".

Disregard to the change, there is a disparity when the judge decides the cases of tort which is coincide with breach of contract. In one decision, the judge stated that the lawsuit could not be accepted with consideration of

procedural rule. However, in other decisions, the reason for the formal regulation was ruled out by the judge. With the reason that contractual relationship can't be placed as a hindrance for someone to submit claim based on the tort (1). Thus, it is interesting to do in-dept study on the differentiation of judicial cases related to the cumulation of tort and breach of contract. Understanding the legal reasoning in considering the relationship between both issue is the main purpose of this paper.

METHOD

This research is a normative legal research with doctrinal approach. It is done mainly by analyze statutes, doctrine, and also judicial decisions. Therefore, it is based on the secondary data on the literature related to the breach of contract and tort.

DISCUSSION
Finding A Relation Between Tort And Breach Of Contract

To understand the relationship between tort and breach of contract, it is necessary to comprehend the meaning of tort and breach of contract and the origin of both. Initially, both exist from what so called contractual terms. However, experts have different views regarding it's concept. Van Apeldorn which divides the law into subjective and objective defines contractual terms as subjective law because it only regulates certain people which contains rights and obligations as an inseparable device (2).

Objective law is a law or regulation that is generally accepted while subjective law is a law that binds only certain people, in which each of them has rights and obligations. The contractual term binds the related subjects to be able to do or not to do in accordance with the regulations. In each of this relationship, rights and obligations will rise between these subjects.

Soeroso argues that the contractual term is the relationship between legal subjects where the rights and obligations of each legal subject face each other (3). There are two aspects on contractual term which are: "bevoegdheid" (power/authority or rights) and "plicht" (obligations). In addition, there are also two conditions for a contractual term, namely the existence of legal basis and the emergence of legal events. The legal basis is the regulation that governs the legal relationship. A legal event can be interpreted as an event in society that is able to move the law. Both are related since a regulation cannot exist if there is no legal event, in other words a legal event is the only one that can move the regulation (4).

Subekti associates a contractual term with an agreement. He states that an engagement is a relationship between two people or two parties where one party has the right to demand something and on the other hand the other party is obliged to fulfill the demand. It regulated in book III of the Civil Code, moreover Article 1233 of the Civil Code states that the agreement can be initiated by contract or by law (5).

A contract can be categorized as a source of agreement. A contract can bring out rights and obligations as specified in the contract that has been agreed between the two parties, either in writing or orally. For example, a sale and purchase contract between a buyer and a seller. The buyer is obliged to deliver the goods while the seller is obliged to pay a sum of money for the goods to the seller. On the other hand, the seller has the right to the payment money and the buyer has the right to the goods he has paid for. Another example, the contractual term between a doctor and a patient is also a legal relationship arising from an agreement. Doctors have an obligation to provide care or treat patients while patients have an obligation to provide compensation for the care they receive.

Agreement that arises because of the law prevail because of the law and also the law related to the people's acts (1352 code civil). As regulated in 1353 code civil, the latter divided into two, namely lawful acts (actions according to the law (*rechtmatig daad*)) and unlawful acts (*onrechtmatige daad*). The legal relationship that exists between husband and wife, parents and children is a legal relationship arising from the law as regulated in law number 1 of 1974 on marriage. Husband and wife have the right to enforce the household (Article 30 of the Marriage Law) then parents are obliged to maintain and educate children (Article 45 of the Law Marriage)

Regarding the issues studied in this paper, Article 1233 Civil Code provides an illustration that there is a possibility of breach of contract or unlawful act if there is a violation of rights or obligations in the contractual term. Both legal events are distinguished base on the contractual term, whether initiated by the agreement or the law. Therefore, if there is a violation of contract, it will be considered a breach of contract, while if the law is violated, it is called an act against the law. However, it is necessary to study more deeply whether in practice the two contractual terms can be rigidly separated or in some cases interrelated.

Breach of contract can be interpreted as a violation of contractual obligations which can be in the form of denial of agreement, failure to fulfill promises, or interfering with other parties in fulfilling their performance. Default is a condition where the debtor does not fulfill its performance as agreed in the agreement. A person can be called a default if he does not or late in fulfilling the performance, or does not comply with or do something that not allowed by the contract (6). Article 1234 Civil Code categorizes performance into three: giving something, doing something or not doing something. Performance can be defined as things that have been agreed between the two parties in an agreement. Therefore, the type of performance depends on the agreement.

As a result of breach of contract, the injured party has the right to claim compensation. In addition, the creditor also able to demand the fulfillment of performances; fulfillment and payment of compensation; dissolution, termination or cancellation of agreement, dissolution and payment of complementary compensation (6). Furthermore, the injured party can give a legal notice for the creditor to fulfilling the performances (6). Given the notice mean that one has declared as doing the unlawful act due to his negligence injured the other party.

On the other hand, tort is an alternative way to seek justice based on the article 1365 civil code: "Every unlawful act that cause damages into another person obliges the wrongdoer to compensate the damage". This provision requires the existence of unlawful act, negligence, loss and a causal relationship between loss and action. Historically, the meaning of tort has become wider since 1911 with the award of Hoge Raad in the Lidanbaum-Cohen case. In the term of "unlawful act", the act is not only interpreted as violation against regulation (7), but also against subjective rights, the perpetrator's legal obligations, decency and public order or propriety, violating the cautious attitude in society. The case showed that a

contract containing provision to disclose employer secret was an act against the law, even though not violate the written law it violated the other people subjective right and legal obligation as well as violate decency which categorized as tort (8).

The purpose of tort is to ask for accountability for the victim's loss. Therefore, there is a transfer of burden of risk from the victim to the perpetrator (9). The liability covers to the mistake and negligence as stated in Article 1366 Civil Code. In addition, liability is also imposed on actions taken by the person under his control such as parent liability upon child negligence (article 1367 Indonesia Civil Code)

The concept of tort as mention in Article 1365 of Civil Code basically adheres to the principle of liability based on fault. Hence, liability requires fault as a main element of tort. "The law started with the intentional wrong"(10) as Justice Holmes once said. In addition. Tort also required some elements such as:

a. Action

M.A. Moegni Djojodirdjo argued that the action is include active and passive in which both are qualified as tort when caused harm and negative impact to other people. Therefore, naturally the two are attached to the action against the law. A person who because of his actions intentionally causes harm to others, is qualified as doing tort in active way. On the other hand, someone because of his silence (even though he knows that he must do something to prevent harm) causes harm to other, qualified as doing tort in passive context. The passiveness is violation to the obligation in which cause harm to others. To conclude, tort can be seen from two aspects, positive and negative aspects (11). The former happens when perpetrator does something, while the latter takes place when the perpetrator ignores a duty.

b. Action against the law

With the broader interpretation, the concept of tort includes not only an act that violates the law but also some aspects that has already mentioned before in which will be discussed here. First of all is action against subjective right arises from the authority granted by the rule of law such as personal rights like the right to freedom, the right to honor and good name, as well as property rights. Secondly, action against legal obligations (“*rechtsplicht*”) of the perpetrator which can be define as action contrary to obligation based on written or unwritten legal norms like norms of decency and caution in association. In the case of *Cohen vs Lindanboem*, Cohen's act of persuading a former *Lindebaum* employee to reveal company secrets was an example of a violation of moral norms

c. Fault

Fault is one of the tort elements that explicitly requires in the context of 1365 Civil Code. A fault can be accounted of liability if it is done intentionally. In addition, liability would also appear because of negligence. Hand in hand it must no justification or forgiving reasons such as *overmacht* and self-defense (12). Therefore, someone cannot be held responsible if the unlawful act he commit occurs due to *overmacht*, emergency, personalize of personal rights, employment orders, or misunderstanding that can be forgiven (13).

d. Damage

Damage (*schade*) is a decrease in assets due to violation of norms committed by the wrongdoer (14). Only the real loss that occurs from of violation of the norm can be claimed by the tort in the form of material or immaterial losses. Therefore, there is a causal relationship between the unlawful act and the loss. Violation of norms can be referred to as a condition *sine qua non* for losses, hence violation of norms is the cause of losses. The assessment of damage should take into account to the severity of the

insult, rank, position, ability of the plaintiff and defendant, as well as the circumstances (Article 1372 Civil Code)

e. The causal relation between action and damage

Cause produces a certain result, in which draw causal relationship that cannot be separated from one to another. The act that causes the loss is an act that can be held accountable in tort. Two theories are related to this element, which are the theory of *conditio sine qua non* and the theory of *adaequate verorzaking*.

The former shows that a problem which is a condition caused by the effect is the cause of an effect. Hence, there is a relation between the underlying event and the loss. On the other hand, the latter focuses on the balance between cause and effect based on proper experience that an action has a consequence (15).

The four elements need to take into account when the judge examine a tort case. Therefore, evidence representing those elements will be asses by the judge to decide positive or negative award.

To conclude, claim of damage is commonality between breach of contract and tort, nevertheless breach of contract is violation of creditor right, hence it is part of tort since tort also mean infringement of personal right. It is said that breach of contract is species from tort, in reverse tort is the genus (16). Hence, there is close relation between breach of contract and tort, and in some cases both are unseparated, although the discussion of distinguishing both of them also has been long happened. However, the dichotomy between the two in certain cases are refutable, since unlawful act also lies on breach of contract.

The Decision Making

Having important role in the case settlement process, Judge has three main task that goes continuously during judicial process. First, acknowledging whether an event is true or not (17), it is an attempt to see whether a fact presented by the parties actually happened with

the evidence brought by the parties. Taking into account of Article 163 of Civil Procedural Code that stated the party that assert must prove the fact, the Judge will determine the burden of proof. Based on this regulation, declaring some fact or an event attached an obligation to present evidence, this duty is also applied to the party who rebut the fact. Therefore, the plaintiff supposed to be the one who has the first obligation to prove since he is the party who submit the claim. On the other hand, the defendant who denies the claim of the plaintiff also requires to prove his rebuttal through strong evidence (preponderance of evidence). Based on the evidence presented by the plaintiff and the defendant, the judge will confirm (or not) an event or a right that has been argued by the parties. It is at this stage that the judge carries out the task of confirming the event/right, recognizing the truth of the event through the discovery of legal facts. As an example, the judge will assess whether it is true that between the plaintiff and the defendant there is indeed a binding agreement, whether the defendant has committed a detrimental act and so on.

Secondly, the judge will qualify the event and determine the legal relationship. Sorting out which is the legal event and determine the legal relationship (18). Is the incident a tort or a breach of contract? At this stage, the judge will also classify the regulations related to the legal event.

At the last stage, the judge will make a constitution, which is to determine the law and also write down his legal reasoning. Legal reasoning is an activity to find a legal basis for a legal event and then relate it to the existing regulations (19). It is the activity of logical thinking in understanding principles, rules, facts, data, and legal propositions (18). The method of juridical thinking can be divided into systematic (axiomatic) and problematic (topical) (19). The former is carried out through syllogism, which is drawing conclusion from the major premise that stated from a regulation.

For example, take into account of article 1234 civil code that regulate an agreement as major premise can be relate to the fact of a sale and purchase agreement between two parties as minor premise in which both can be conclude and form juridical thinking.

On the other hand, the problematic method is carried out if the major premise is not found, hence the judge will determine the most acceptable way of think which is usually through sociological jurisprudence reasoning (19). Having used by the judge in the making of decision, legal reasoning divided into two forms which are inductive and deductive. The former is taken by drawing conclusion from several similar cases which is based on the similarities between the cases that being compared resulting a probability / possibility. Nevertheless, there are factors that determines the high and low of the probability. For example, the number of facts, analogy (similarity) and disparity. The greater the number of facts, the higher the probability of the conclusion (20). On the other hand, deductive reasoning has the same concept as the systematic syllogistic method of reasoning, where conclusion drawn based on the major premise and also the minor premise. General provision is included in a concrete case.

The decision making is a process that requires logical and rational reasoning so that the decision will be fair and impartial. On the other hand, legal reasoning is a way for judge to form fair and acceptable decision. Furthermore, it also can be used by other legal experts such as advocates or academicians to formulate a logical legal reasoning.

The legal reasoning to reveal the relation between tort and breach of contract

The relationship between tort and breach of contract will be more visible in legal cases. Three decisions will be analyzed in this paper to show developments and changes in the judge's interpretation of the relationship between the two.

To begin, the judges clearly differentiated between both of lawsuits. This is proven by the decision of the Bulukumba District Court in 2011 with decision number 25/PDT.G/2011/PN.BLK. In this case, the legal relationship between the plaintiff (Rabaning) and the defendant (Bando) is established on the basis of an agreement to work on the land for profit sharing (local term: “tesang”) which is the object of the dispute. It was the land inherited from generation to generation from the plaintiff's grandmother (Saripana Binti Pattana which was later passed down to her son Toe who was later handed down to the plaintiff as Toe's biological son).

The plaintiff argues that instead handling the crop, defendant took control to the land and that's when the breach of contract and tort took place. Therefore, he asks for the judge to declare three things, which are the object is Saripana's inheritance, the relationship between the defendant and the plaintiff as a profit-sharing relationship and the defendant to be in default as well as doing an act against the law for controlling the land. Therefore, the land needs to be returned. On the other hand, the defendant denied the argument presented by the plaintiff on the grounds that there was never a legal relationship between the plaintiff and the object of the dispute, therefore the defendant requested that the judge reject the lawsuit.

In spite of that, both plaintiff and defendant did not provide a legal basis for the contractual term or the legal event that occurred, although it was based on the plaintiff's claim which postulated that the relationship between the plaintiff and the defendant was established as a result of a profit-sharing agreement, as well as the existence tort committed by the defendant because his action for possessing the land (tort and breach of contract claimed to be happened in the same time)

Nevertheless, without giving comprehensive legal basis, the judges in their consideration simply stated that combining

breach of contract and tort resulted to an unclear lawsuit. Hence, the court declare that the lawsuit was inadmissible (“Niet Onvankelijk Verklaard” verdict)

Take into account to the procedural rule, a lawsuit which has unclear or wrong legal basis, resulted to the inadmissible (“niet onvankelijk verklaard”) claim due to the formally unqualify. It categorized as negative award since the judge does not examine the substance of the case. It is very unfortunate since the trial has taken a lot of time and money, but at the end it only becomes formalistic bind.

Still, in 2019, there was a difference in the judge's interpretation in a similar case which combined a breach of contract with tort in 2019. The decision issued by the Gresik District Court Number 22/Pdt.G/2019/PN.GSK, it appears that at first the legal relationship between the plaintiff (Moh Thohir) and the defendant (H Muslikan) was established because of an agreement to buy and to sell of a land.

The plaintiff argues that the status of the land which was originally freehold title (Petok D) which is proofed with the document of “Petok D” and land tax turned out to be the land which the part of it was belongs to the state. Even though receiving Rp. 1,000,000,000 (one billion rupiah) from the plaintiff, the defendant taken away the land document from the notary. Therefore, the plaintiff suffered a loss as a result of the unlawful act carried out by the defendant for losing one billion. furthermore, he also claimed that the tort has occurred based on article 1365 and 1366 Civil Law. Both articles are the legal basis of tort, whereby the former focused on unlawful acts that cause harm to other people, while the latter put negligence that can cause injury to the other people.

The plaintiff in his petition asked for the cancellation of the sale and purchase agreement, stated that the defendant's action was against the law, asked for material and immaterial compensation of 2 billion, a request for security confiscation on the object of

dispute, and asking for the defendant to pay force money (dwangsom) for the delay in the carrying out the verdict each day, as well as the petition on immediate execution.

On the other hand, giving response to the plaintiff lawsuit, defendant claimed that the lawsuit was lacking party and also unclear. There should be five more parties included in the lawsuit because there were five more people who received a share of the Rp. 1,000,000,000 (one billion rupiah). In addition, the defendant argued that he did not receive the money, since it had been distributed to the others.

Nevertheless, the judge decided that the exception was not proven. On the other hand, the purchase agreement and tort were acknowledged to exist on the event. The judge interpreted that the defendant's actions that did not convey the actual land area as well as the status of the state land to the Plaintiff at the beginning of the agreement was an act against the law that brought losses. The judge also decided to cancel the agreement after taking into account to the articles of 1321, 1328 and 1266 Civil Code. Article 1321 of the Civil Code states that an agreement is invalid if based on the error, coercion or fraud while Article 1328 of the Civil Code explained that fraud is the reason for the cancellation of the agreement. Article 1266 of the Civil Code stated that the conditions for the agreement are listed in the agreement, but if one party does not fulfill its obligations, then the cancellation can be asked to the court. Based on this, the court has the authority to decide the cancellation of the agreement. Therefore, the judge canceled the agreement because it was proven that the defendant had taken action against the law

Considering the plaintiff demands, the judges granted Rp. 1,000,000,000 (one billion rupiah) as compensation fee. On the other hand, they rejected compensation for the immaterial loss as well as for the force money with the reason it could not be applied to the execution of payment of a sum of money. Seizure and request for immediate execution also rejected

since it did not meet the requirements of article 180 section (1) of civil procedural law, Supreme Court Regulation No 3 Year 2000 and No 4 Year 2001.

The legal relationship that occurs between the Plaintiff and Defendant clearly rise from the existence of a reciprocal agreement (the sale and purchase agreement). Based on the agreement, the seller has obligation to submit goods in accordance with what has been agreed and has the right to get payments for the object of sale and purchase. On the other hand, the buyer has obligation to pay the object and be entitled to the agreed object. Since, not fulfilling the obligation, resulted to the breach of contract. Furthermore, defendant action's clearly meet with the article 1321 Civil Code since the agreement was made base on fraud, hence it resulted to the cancellation. In addition, his action of deceiving plaintiff was an act against the law.

Based on by M.A. Moegni Djojodirdjo, which distinguishes actions against the law into active actions and passive actions that can cause harm to others. It can be interpreted that the action of the defendant who did not provide accurate information regarding the land and status of the object of the dispute was an act against the law in a passive context. Furthermore, the defendant's actions violated his legal obligations. Article 1338 clearly states that every agreement must be carried out in good faith, so the fraud committed by the defendant eliminates his good faith in the agreement implementation. Therefore, the defendant's actions violated Article 1338 Civil Code.

The defendant passive action is a fault which caused harm to the plaintiff. There is deliberate intention of the defendant to commit fraud, he consciously cheated which brought harm to the plaintiff. Thus, there is a causal relationship between the actions taken by the defendant and the losses suffered by the plaintiff. Although the judge did not explain clearly in his considerations regarding the

unlawful act committed by the defendant, the elements of an unlawful act have been fulfilled in the action taken by the defendant, so it is not wrong if the judge states that the defendant has committed an unlawful act even though the case it is initially based on the agreement.

Using systematic syllogism, the judges formulate conclusion taking article 1321, 1328 and 1266 Civil Code as major premises to make conclusion. On the other hand, the minor premise is the existence of fraud committed by the defendant when making a sale and purchase agreement. Based on this reasoning method, it can be concluded that the defendant's fraudulent actions made the agreement invalid so that the court had the authority to cancel the agreement.

On the other case, judges no longer questioned the plaintiff's mistake in filing a claim on the basis of default even though the fact it is tort or vice versa. The decision of the Jombang District Court Number 12/Pdt.G/2017/PN.JBG granted the plaintiff's claim that the defendant had committed an unlawful act even though the legal relationship between the defendant and the plaintiff arose as a result of a cooperation agreement in housing management.

The plaintiff was the owner of the land and the capital, while the defendant was the head of the land manager. Both are bound by the cooperation agreement. The plaintiff argued that the defendant had never reported the progress of work that should have been carried out by the defendant in accordance with the agreement. In addition, he was not transparent in the company's financial management even though the plaintiff had repeatedly asked the defendant. In his argument, the plaintiff based on the provisions of Article 1365 of the Civil Code and stated that the defendant's action was an action that brought the defendant's loss because it caused a bottleneck in the process of selling and building the house. Furthermore, he did not receive the fee from the land management. Therefore, the plaintiff demands

the judge declare that the defendant's actions are against the law, declare the cancellation of the agreement, return the housing management, punish the defendant to surrender everything he has obtained during the management of the housing, punish the defendant or anyone who has the right thereof to hand over the housing to the defendant.

On the other hand, the defendant never attended the trial even though they had been properly and legally summoned by the judges. Therefore, it was trial without rebuttal. In addition, based on the evidentiary process, the judge acknowledged all the plaintiff claim, on the agreement and also the defendant fault for not fulfilling the agreement to provide transparency on the company management and financial report which eventually caused the plaintiff loss.

According to the judge, the defendant action of not being transparent and difficult in the company management included as a tort and also breach of contract. It is interesting that on their consideration, the judge used Supreme Court Decision No.2686 K/Pdt/1985 and Supreme Court Decision No.2157 K/Pdt/2012 as their legal basis. The former emphasized that a lawsuit can't be categorized as unclear because of the plaintiff statement for tort even if the real event was breach of contract. The latter added that a lawsuit was not unacceptable even though the plaintiff claimed for tort although it was initially started with the debt agreement and the defendant was breach of contract.

Based on the previous decisions as well as the principle of simple, fast and low cost (efficient principle), the judge decided that the tort lawsuit based on a breach of contract is an acceptable claim and is not considered vague. Unlawful acts are considered by the judge by looking at the provisions of 1365 of the Civil Code and also by referring to Yahya Harahap's opinion which states that unlawful acts are born as a result of the actions of people who violate the law which can be in the form of criminal

offenses, civil errors, acts that overlap criminal offenses. The judge admitted that there was a civil error committed by the defendant due to his dishonesty which causing harm to the plaintiff. On this basis, the judge stated that the defendant had committed an unlawful act.

Take to the account of article 1320 Civil Code, a contract needed to fulfill four conditions in order to acknowledge by the law: (i) consent between the parties, (ii) capacity to carry out an obligation, (iii) specific object, and (iv) legal cause. The last requirement is not fulfilled by this agreement, hence the judge decided to declare the agreement null and void. The court believes that the defendant's dishonesty in managing the company negates the lawful cause as a prerequisite for the agreement. Therefore, defendant was declare doing unlawful act as well as cancel the agreement between plaintiff and defendant.

What best from the second decision is that the judges considering the former decisions and also the legal principle. The former has been acknowledged as one of the important source of law aside from regulation promulgate by the state. It is created by the judge (judge made law) which in Indonesia called by "yurisprudensi". It is resulted from the "rechtsvinding" method and followed by the other decision which has the characteristic of general rule that similar to the statute(21). Therefore, this judicial decision is valid and executable.

In addition, legal principle has the higher position compare to the regulation since it is a guidance and also the spirit of a rule. It is always implicitly or explicitly stated in a regulation. Take to the account of it's fundamental role, a judge is bound to the legal principle when making a decision. In which can be seen by the Jombang District's Decision that implemented the principle of efficient. By implementing the principle considered to be using hermeneutic method to understanding the real meaning of a regulation. As a text interpretation, hermeneutic focusing on the utilization of text in the recent situation(22).

The efficient principle has stated on the article 2 verse (4) of Judicial Power Law No 48 year 2009. Therefore, it is only right that the court process a lawsuit efficiency in terms of the time and cost. That way, the regulation has found its way to be realized by the judicial award

In terms of logical thinking, the judge uses systematic syllogism. General rule was taken from article 1320 of Civil Code, while the minor premise was taken from the defendant action of disclosing the company management. The action affected to the agreement which finally lost the essence of legal validity.

There are factors that can be taken as parameter between the three judicial decisions: (i) the legal basis, (ii) the legal reasoning, (iii) whether the lawsuit was rejected or accepted by the judge, (iv) the judge acknowledgement on the relationship between tort and breach of contract. Using the induction reasoning, differentiation and similarity can be found between the decisions. While the decision of District court of Bulukumba did not to use legal basis, the others did and become the judge's legal reasoning. Judges on the Gresik District Court used some articles from Civil Code as their legal basis which are article of 1321, 1328, 1266, and 1365. On the other hand, the judges on the decision decided by the Jombang District Court used articles 1320 and 1365 Civil Code. Systematical reasoning used in the both decisions with the result of accepting the plaintiff claims. On the other hand, District Court of Bulukumba's decision did not use any reasoning since there was no legal basis founded in the award. In addition, it declared that the claim was inadmissible due to the unclear lawsuit for combining two different issues (breach of contract and tort).

To conclude, there was disparity on the judicial decision regarding to the issue of cumulation of tort and breach of contract. Legal reasoning become the main key to find the contractual term between both issues.

CONCLUSION

Contextually, there are relationship between tort and breach of contract. Evidently, some of cases show that an event actually related to the both issues. Nevertheless, the decisions show disparity in which resulted to the confusion to its relation. On one decision the judge acknowledge the relationship between the two therefore the panel accepted the claim. On the other decision, the judge declare that combining both issues resulted to the lawsuit become inadmissible. It worth to note that through legal reasoning done by the judge, the relation between both issues resurfaced and proofed.

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