

THE ROLE OF UNDUE INFLUENCE AND UNCONSCIONABILITY AS MECHANISMS AGAINST UNFAIR CONTRACTS

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Abstract

The growing recognition of undue influence in Indonesian contract law has introduced a new basis for invalidating agreements beyond traditional defects of consent. Originating from the common law tradition, the doctrine of undue influence shares conceptual similarities with the doctrine of unconscionability, particularly in addressing contractual injustice and power imbalances between parties. This article aims to examine the similarities and differences between the doctrines of undue influence and unconscionability in protecting parties against unfair contractual arrangements. This normative legal research employs a conceptual approach and relies on qualitative analysis of secondary data consisting of primary and secondary legal materials. Through a comparative examination of both doctrines, the study identifies their common objective of protecting weaker parties from exploitation arising from unequal bargaining positions and defective bargaining processes, which are ultimately reflected in the substantive terms of a contract. The analysis further demonstrates that the two doctrines differ in their primary focus of protection, available remedies, and scope of application. These distinctions have important implications for the development of Indonesian contract law and the protection of parties in unequal contractual relationships.

Keywords:

fairness of contract; unconscionability; undue influence

Abstrak

Penyalahgunaan keadaan dalam sistem hukum Indonesia merupakan doktrin yang merupakan rezim di luar KUH Perdata untuk membatalkan kontrak. Doktrin ini berasal dari *common law* yang memiliki konsep yang mirip dengan doktrin *unconscionable*, khususnya dalam mengatasi ketidakadilan kontraktual dan ketidakseimbangan posisi para pihak dalam suatu perjanjian. Artikel ini bertujuan untuk membedakan dan membandingkan penyalahgunaan keadaan dan *unconscionability* dalam melindungi pihak dari kontrak yang tidak adil. Metode penelitian yang digunakan adalah yuridis normatif. Data sekunder berupa bahan hukum primer dan sekunder dianalisis secara kualitatif dengan pendekatan konseptual. Persamaan kedua doktrin tersebut terletak pada tujuan melindungi pihak dengan posisi lemah saat proses tawar-menawar dan eksploitasi yang termanifestasikan dalam bagian pada kontrak. Sedangkan perbedaan dapat terlihat dari aspek fokus mengenai hal yang ingin dilindungi oleh doktrin, bentuk ganti kerugian atau tuntutan yang dapat diajukan, dan cakupan penggunaan doktrin kaitannya dengan jenis perjanjian.

Kata Kunci:

keadilan berkontrak; penyalahgunaan keadaan; *unconscionability*

Introduction

Contract lets the parties set the rules for their transaction and contract law make sure the promise is enforceable. Freedom of contract enables parties to formulate terms as they see fit their needs. This principle allows the parties to bring the outmost potential of their business deal when both parties at the relatively same level of bargaining position. When both parties have a significant asymmetrical position as in consumer transaction and employment contract, the weaker parties tend to be exploited by unfair terms. Exploitation may appear in form of improper high price in return for bad service and contractual provision that revoke certain rights of weak party. In many jurisdictions, contract law addresses the issue of unfair terms with the doctrine of undue influence and unconscionability.

The doctrine of unconscionability had been applied in unfair contract of adhesion. The court may refuse to enforce contract to prevent oppression and unfair surprise of a contract.¹ A contract can be deemed unconscionable procedurally and or substantively. Procedural unconscionability refer to oppression in unequal bargaining position causing absence in meaningful consent, while substantive unconscionability refer to the clause itself that over-reach and unreasonable.² California Supreme Court in *Discover Bank* case ruled that class action waiver in its arbitration agreement was substantively and procedurally unconscionable, because its prevents less powerful party from vindicating their rights in class action.³

Undue influence (*penyalahgunaan keadaan or misbruik van omstandigheden*) in Indonesian legal system is one of the basis to nullify contract due to defect of consent. It has the power to nullify unfair contract with asymmetrical bargaining position. Despite not being integrated within the civil code or other statute, this doctrine had been recognized and utilized by judges to rectify or annul unfair contract resulting from position imbalances between parties.⁴

¹ Melissa T. Loneygrass, Finding Room for Fairness in Formalism: The Sliding Scale Approach to Unconscionability, *Loyola University Chicago Law Journal*, Vol. 44, No. 1, 2012, hlm. 1.

² Richard Frankel, The Arbitration Clause as Super Contract, *Washington University Law Review*, Vol. 91, No. 1, 2014, hlm. 531.

³ Daniel B. Mitchell, Unconscionable Construction: How the Ninth Circuit Evades the FAA by Severing Arbitration Agreements as Unconscionable, *Journal of Dispute Resolution*, Vol. 2012, 2012, hlm. 303.

⁴ Wiwin Dwi Ratna Febriyanti, Abuse of Circumstances (*Misbruik van Omstandigheden*) in Developing Contract Law in Indonesia, *US-China Law Review*, Vol. 19, No. 2, 2022, hlm. 87.

The doctrine of undue influence originally generated from common law tradition. Many literatures related to this doctrine in the context of Indonesian legal system use the term “undue influence”,⁵ however this terminology might not have the same exact meaning with the original Indonesian term “*penyalahgunaan keadaan*” or “*misbruik van omstandigheden*”.⁶ For example in French law this concept is similar to economic duress as regulated in Article 1143 of French Civil Code where one party abuse the state of dependency of the co-contracting part and takes excessive benefit.⁷ In German Civil Code (BGB) similar concept is known as immoral transaction. Both laws serves to protect weaker contracting partner from exploitative contract.

The adaptation of undue influence in Indonesian legal system by judges filled some of the gaps of the problem in imperfect contract formation that could not be covered by duress and other form of defect of consent due to the absence of actual direct threat. Unconscionability is currently an unknown concept to Indonesian contract law and the terminology itself does not have an equal translated term in the national language. In other jurisdictions undue influence and unconscionability may both exist in the legal system and reflected in the written norms or developed by case law. It is interesting to identify both characteristic and hopefully find whether unconscionability can complement undue influence in protecting weaker party.

Many researches dedicated to describe and study the implementation of undue influence in court decision within Indonesian legal system. Undue influence serves as the limit to the freedom of contract in a way that it is utilize to avoid substantially

⁵ Syaiful Azam, Mulhadi Mulhadi, and Dedi Harianto, The Undue Influence Doctrine and Its Function in Consumer Financing Cases, *Jurnal Media Hukum*, Vol. 27, No. 2, 2020, hlm. 240; Dwi Fidhayanti, In Contract Law: Unpacking Undue Influence through a Judge’s Lens, *Journal of Judicial Review*, Vol. 25, No. 2, 2023, hlm. 193.

⁶ For the purpose of consistency and clarity, this paper uses the term “undue influence” phrase when addressing *penyalahgunaan keadaan* or *misbruik van omstandigheden* in the context of Indonesian legal system.

⁷ Norton Rose Fulbright, “Reform of the French Civil Code on Contract Law and the General Regime and Proof of Obligations”, <https://www.nortonrosefulbright.com/en/knowledge/publications/2a563f12/reform-of-the-french-civil-code-on-contract-law-and-the-general-regime-and-proof-of-obligations>, accessed 9 March 2025.

unfair contract.⁸ Kurniawan⁹, Murni¹⁰ and Febriyanti¹¹ studied the development of undue influence and both found that before developed under the concept of defect of consent the implementation of this doctrine started as placing undue influence as a conduct of illegal cause of contract. There are also numerous studies on the implementation of this doctrine in many type of contract such as employment contract,¹² telemarketing insurance,¹³ and bank loan.¹⁴

Comparing undue influence and unconscionability and its implementation are crucial for understanding how contract law protect weaker party from unfair contract. Both doctrine prevents exploitation of weaker party but might have different key concept and how it works in achieving contract fairness. Understanding the distinction and intersection of both doctrine is important for legal scholar and court to develop clearer framework to identify the presence of exploitation or the presence of unfair clause and later to analyze whether or not the contract is sufficient to be annulled.

The first part of this article will discuss the origin of undue influence and unconscionability along with the characteristic of both doctrine how the doctrine works. The second part will focus on identifying key differences and the common ground of both doctrine. In the end, based on the found difference and similarities the paper will attempt to discuss whether or not it is necessary to adopt unconscionability in Indonesian legal system. To address the above research questions, this legal research adopts normative method through a literature and legislations. This paper also employs comparative approach in understanding both doctrine. In describing and understanding unconscionability and undue influence,

⁸ Heris Suhendar and Mohamad Athoillah, *Pertimbangan Hakim dalam Perkara Penyalahgunaan Keadaan (Misbruik van Omstandigheden)*, Jurnal Yudisial, Vol. 16, No. 2, 2023, hlm. 250-68.

⁹ Faizal Kurniawan, Xavier Nugraha, and Luisa Srihandayani, *Implementing The Undue Influence Doctrine (Misbruik van Omstandigheden) as a Reason for Annulment of Agreement in Indonesia: An Evolution of the Law Through Court Decisions*, Talent Development & Excellence, Vol. 12, No. 1, 2020, hlm. 3035-47.

¹⁰ RA Retno Murni, *Perkembangan Doktrin Penyalahgunaan Keadaan sebagai Alasan Pembatalan Perjanjian*, Prosiding Konferensi Nasional Asosiasi Pengajar Hukum Keperdataan (APHK) VI Bandung 22-24 Oktober 2019, <https://hukumperdata.id/wp-content/uploads/2022/09/ProsidingUNISBA-aut1.pdf>, accessed 17 November 2025.

¹¹ Wiwin Dwi Ratna Febriyanti, *Abuse of Circumstances (Misbruik Van Omstandigheden) in Developing Contract Law in Indonesia*, US-China Law Review, Vol. 19, No. 2, 2022, hlm. 85-91.

¹² Nabiyla Risfa Izzati, *Penyalahgunaan Keadaan (Undue Influence) Dalam Perjanjian Kerja: Karakteristik, Mekanisme Penyelesaian, Dan Pencegahan*, Kanisius, Yogyakarta, 2021.

¹³ Utiyafina Mardhati Hazhin and Heru Saputra Lumban Gaol, *Penyalahgunaan Keadaan (Misbruik van Omstandigheden) dalam Perjanjian Asuransi Melalui Telemarketing*, Kertha Patrika, Vol. 41, No. 2, 2019, hlm. 95-111.

¹⁴ Mohamad Nur Muliatno Abbas, *Penyalahgunaan Keadaan dalam Kontrak Baku Perjanjian Kredit Bank*, Gorontalo Law Review, Vol. 3, No. 2, 2020, hlm. 188-204.

this research does not limit to single certain legal system, instead it explores multiple legal systems that adopt this doctrine. The found characteristics will be then descriptively analyzed to find the key differences and common ground.

Analysis

The Roots of Unconscionability and Undue Influence

Despite the fact that unconscionability develops in common law, its root can be traced back to Roman law tradition. Roman jurist stated that “by the law of nature it is equitable that no person becomes rich by loss and injustice to another”, therefore in a transaction with unjust price, the transaction should be rectified to its true price or just price.¹⁵ The Roman Law doctrine that allows rescission of contract with inadequate price was known as *laesio enormis*.¹⁶ In the late eighteenth century French Code and German civil code retained the original Roman law remedy to grant relief in an exchange that was oppressive or disproportionate.¹⁷ The relief itself rather than a form of compensation, the flaw in the contracting phase (fraud or mistake) was were adjusted and “corrected”.¹⁸

The history of unconscionability in Anglo-American might begin with the enactment of Statute of Fraud and equity court which decide contract cases based on doctrine of equity and fairness.¹⁹ At this point unconscionability was yet to be an independent doctrine, instead in equity court, contracts were adjusted and avoided as the result of fraud, duress, undue influence, incapacity and illegality.²⁰ Later unconscionability began to developed and before it appears in codes, the meaning of unconscionability was defined as:²¹

“A contract which no man in his senses and not under delusion, would make on the one hand, and which no lonest and fair man would accept on the other...”

¹⁵ Brian M. McCall, Demystifying Unconscionability: A Historical and Empirical Analysis, Villanova Law Review, Vol. 65, No. 4, 2020, hlm. 773.

¹⁶ Alphonse M. Squillante, Unconscionability: French, German, Anglo-American Application, Albany Law Review, Vol. 34, 1969, hlm. 297.

¹⁷ Brian M. McCall, supra no. 15, hlm. 780.

¹⁸ Id.

¹⁹ Alphonse M. Squillante, supra no. 16, hlm. 305.

²⁰ Id.

²¹ Id.

Characteristics of Unconscionability

The terminology of “unconscionability” in US appears their Uniform Commercial Code (UCC) section 2-302. The law states that if judge finds a contract unconscionable at its formation, the court may refuse to enforce the unconscionable clause or limit its application. The law did not give further detail on the characteristic nor elements of the unconscionability itself, it can be found in various court judgement. In other common law state for instance in UK, unconscionability is not mentioned in legislation, but it exists as a principle that tackle inequality of bargaining power.²²

The objective of unconscionability doctrine is to prevent oppression and unfair surprise and to counter disturbance in risk allocation caused by superior bargaining power.²³ The mention of unconscionability without defining in detail in the UCC gives room for court to apply this doctrine as well as to define and implement it case by case. The legal test for unconscionability can be divided into two kinds namely procedural unconscionability and substantive unconscionability.

1) Procedural Unconscionability

The focus of procedural unconscionability lies on the bargaining process of the contract or contract formation.²⁴ Therefore the concept is similar with defect of consent for instance fraud, mistake, duress and necessity.²⁵ Court will look for evidence of “oppression” and “unfair surprise” that indicates the transaction is lack of meaningful choice.

During the bargaining process, the demography and the background of the claimant like age, literacy and business sophistication are often being looked into. One of the example case was *Wascovich v. Personacare of Ohio* which related to arbitration agreement in contract for nursing home. The elderly Wascovich who was admitted to LakeMed nursing home fell and suffered fracture and then received surgery. There was complication that led to death of Wascovich. Richard Wascovich

²² Dharmita Prasad and Pallavi Mishra, Unconscionability of E-Contracts: A Comparative Study of India, the United Kingdom, and the United States, *The Liverpool Law Review*, Vol. 43, No. 1, 2022, hlm. 339.

²³ Melissa T. Loney, *supra* no. 1, hlm. 11

²⁴ *Id.*

²⁵ Horacio Spector, A Contractarian Approach to Unconscionability, *Chicago-Kent Law Review*, Vol. 81, No. 1, 2006, hlm. 95.

the son of the elderly claimed against Personacare for wrongful death and survival claims. In response of such claim filed motion to stay and compel arbitration.²⁶ The court concluded that the arbitration agreement was procedurally unconscionable with one of the considerations was due to the physical impairment that undermined Wiscovich's ability to sign a legal document and that Personacare did not provide evidence that shows Wiscovich having mental capacity to enter into contract.²⁷

Other than the status of the weaker party, scope of procedural unconscionability also includes problem in the technicalities of contract namely hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation.²⁸ In *Brennan v. Bally Total Fitness*, the plaintiff sign a mandatory arbitration agreement. The court found the contract procedurally unconscionable due to a high pressure tactics due to the facts that plaintiff was only given 15 minutes to read and review the contract nor had the right to consult with attorney and on top of that employees were told that failure to sign the contract leads to no promotion in the future.²⁹

2) Substantive Unconscionability

Substantive unconscionability focus on the contract's substantive provision. The aspect of contract that is looked to identify the substantive unfairness are for instance risk allocation, remedy limitation, penalty clauses, and price terms. The criteria to be an unconscionable provision is more than just "unreasonable", but it also has to be harsh or oppressive in nature as to shock the conscience.³⁰

One of the most famous cases of unconscionability is *Williams v. Walker-Thomas Furniture Co.* Mrs. Williams purchased a stereo set from Walker-Thomas with instalment. The issue of the case centered in its security clause where Walker-Thomas not only demanded the full payment of the purchased goods, but also took

²⁶ Willy E. Rice, *Unconscionable Judicial Disdain for Unsophisticated Consumers and Employees' Contractual Rights? Legal and Empirical Analyses of Courts' Mandatory Arbitration Rulings and the Systematic Erosion of Procedural and Substantive Unconscionability Defenses under the Federal Arbitration Act 1800–2015*, *Boston University Public Interest Law Journal*, Vol. 25, No. 1, 2016, hlm. 143.

²⁷ *Id.*

²⁸ Colleen McCullough, *Unconscionability as a Coherent Legal Concept*, *University of Pennsylvania Law Review*, Vol. 164, No. 3, 2016, hlm. 779.

²⁹ Geoffrey Mort, *The Courts and Contracts: Losing Patience with Unconscionable Agreements*, *New York State Bar Journal*, Vol. 94, No.5, 2022, hlm. 32.

³⁰ Melissa T. Lonegrass, *supra* no. 1, hlm. 11.

security interest over items that buyer purchased previously in Walker-Thomas, which also means Walker-Thomas would have the right to repossess goods from past transactions. Mrs. Williams defaulted and Walker-Thomas attempted to enforce the clause.³¹ The court of appeals found that the security clause was unconscionable.³²

This prong of unconscionability is related to substantive imbalance in the exchange. Unconscionable exchange may take into form of grossly unequal exchange and contradiction to public policy.³³ Unequal exchange is often linked with inadequate consideration in common law, for example a purchase price that doubles or triples of other comparable item, unreasonable interest rate or liquidated damage.³⁴ For public policy while it serves as a basis for not enforcing a contract, in deciding whether a contract is substantively unconscionable public policy is also taken into account. In *Johnson v. Sears Roebuck & Co.* case, parties disputed over a previous-balance method in a financial service. The court decided that the method was not usurious because it was permitted by Retain Instalment Sales Act and by Interest Act.³⁵

There are several patterns or approaches in the implementation of these two prongs of unconscionability, the conventional one is court will invalidate the clause only when both strong evidences of procedural and substantive unconscionability is present.³⁶ Court also requires fulfilment of certain degree or magnitude on the procedural and substantive aspect to invalidate certain clauses in conventional approach. Another approach is sliding scale where the indication of procedural and substantive unconscionability needs to be proven, but rather than requiring strong evidences from both, the two prongs are viewed and decide the unconscionability and whether the court should step in and intervene the with contract (rewrite) or not.³⁷ In the application of sliding scale judge requires fulfilment of one while being

³¹ Howard Hunter, *Modern Law of Contracts*, Revised Edition, Thomson Reuters, London, 2025.

³² Id.

³³ Jeffrey C. Fort, *Understanding Unconscionability: Defining the Principle*, *Loyola University of Chicago Law Journal*, Vol. 9, No. 4, 1978, hlm. 770.

³⁴ Id.

³⁵ Id.

³⁶ Melissa T. Lonegrass, *supra* no. 1, hlm. 11.

³⁷ Id.

relax on the other prong.

In other cases single fulfilment of substantive unconscionability alone enough to invalidate contract, though it requires an extreme case for instance excessive pricing, extreme limitation of remedies, arbitration and class action ban but still with a hint of procedural unconscionability.³⁸ On the contrary the application of procedural unconscionability alone though very few courts invalidated contract provision, many refuses to interfere the contract with just procedural defect.³⁹

Characteristic of Undue Influence

Undue influence or known as *penyalahgunaan keadaan* in Indonesian legal system is a doctrine under the concept of defect of consent in contract formation. The known grounds for avoidance of contract under defect of consent in Civil Code are mistake, fraud and duress. Civil Code applied in Indonesia was originally enacted by Dutch Government during the colonization which had similar root and concept with other continental Europeans states. In other European Civil Law states, the types of defect of consent are just mistake, fraud and duress and did not include undue influence in their Civil Codes.⁴⁰ Literatures suggested that the concept of Undue Influence as a reason for a judge to interfere with contract was derived from Common Law and began to get accepted in some Civil Law states.

Undue influence in Common Law is considered as unacceptable conducts according to Lord Nicholls which may take forms into act of improper coercion and unfair advantage taken by party with dominant position by influence without any specific act of persuasion. Those two forms of acts shows the distinction of two types of undue influence in common law known as actual undue influence and presumed undue influence.⁴¹ Actual undue influence is when a party exercised domination over the mind and will of other parties up to the point the dominated party's independence of decision was substantially undermined and this domination

³⁸ Id.

³⁹ Id.

⁴⁰ John Cartwright, Defects of Consent in Contract Law, in *Towards a European Civil Code*, Kluwer Law International, 2011.

⁴¹ Sir William Reynell Anson *et al.*, *Anson's Law of Contract*, Oxford University Press, Oxford, 2010, hlm. 359.

resulted into transaction.⁴² In actual undue influence, claimant must prove that in that particular transaction the defendant used undue influence and that influence was one factor in making the decision on that transaction.⁴³ This type of undue influence focus on the conduct of the dominating party for example a husband that puts pressure on wife to secure business by mortgaging family home by certain kind of insulting language.⁴⁴ Presumed undue influence focuses on the relationship between parties, in which such relationship is a special relationship of confidence and such confidence was abused by defendant.⁴⁵ The form of relationship can be in form of parents and child, doctor and patient, trustee and beneficiary. In this type of undue influence claimant must prove the recognized relationship and shows the trust, confidence of such relationship and followed by the questioned transaction (undervalued or manifest disadvantage).⁴⁶

In many civil law states undue influence was not a specific category as a vitiating factor under the concept of defect of consent in the Civil Code. The acceptance of this doctrine in Indonesian legal system began with the application of *Misbruik van Omstandigheden* (undue influence or abuse of circumstance) in Dutch Hoge Raad. The first application was in case of BOVAG arrest II-HR in 1957 where Hoge Raad stated that a contract may have an illegal cause due to specific influences in the stage of contract formation by a contracting partner who took advantage of circumstances by allocating unreasonable burden towards the other party.⁴⁷ Based on that statement, undue influence was seen as an illegal cause therefore the contract could not be enforced rather than a defect of consent. Later undue influence was recognized in the new Dutch Civil Code as a defect of which will cause certain juristic act voidable in Article 3:44, in which defined as:

“Abuse of circumstances is legally present when someone who knows or should have known that another person might be induced to perform a juridical act because he is under the influence of particular circumstances, like a state of emergency, dependency, thoughtlessness, an addiction, an abnormal

⁴² Id.

⁴³ Richard Stone and James Devenney, *The Modern Law of Contract*, Routledge, 2015, hlm. 363.

⁴⁴ Sir William Reynell Anson *et al.*, *supra* no, 41, hlm. 361.

⁴⁵ Id.

⁴⁶ Richard Stone and James Devenney, *supra* no. 43, hlm. 372.

⁴⁷ Sharon Clarins, “Penerapan Doktrin Penyalahgunaan Keadaan (*Misbruik van Omstandigheden*) dalam Putusan Pengadilan Indonesia”, *Dharmasisya: Jurnal Program Magister Hukum FHUI*, Vol. 2, No. 2, 2022.

mental condition or inexperience, nevertheless has stimulated this other person to perform this juridical act, although what this someone knew or should have known, should have refrained him from doing so.”

J Satrio broke down the characteristics or elements of undue influence as follows:⁴⁸

- a. Difficult circumstances experienced by one of the parties due to economic pressure or financial difficulties;
- b. Relationship towards the other party in form of subordination, economic advantage, employer-employee, parent/guardian-minor, doctor-patient;
- c. Unfair contract where a party had more burden or the other party is released from certain responsibility or risk;
- d. Disadvantages suffered by one party.

The economic disadvantage caused a party having lower bargaining position that generates reliance or dependency towards the other party. This dependency later induce consent to engage into contractual relationship despite the contract being substantially unfair.⁴⁹

Common Ground Between Unconscionability and Undue Influence

These two doctrines derived from similar root and rise from the court of equity practice in common law tradition. Both unconscionability and undue influence are doctrines that limits freedom of contract by refusing to enforce certain terms and lets the court to modify and adjust unfair and unreasonable contract.⁵⁰ It may looks like a form of paternalism in contract law that balances market practice when autonomy hurts or greatly reduce the rights of weaker party. Coming from the similar root, both doctrines have common ground on their characteristics on the aspect of: 1) Objective in protecting certain kind of party; 2) Bargaining process; 3) Exploitation in the substantive level.

Both doctrines utilized by weaker party that aggrieved by a certain transaction they entered into, the deal they made or by a certain provision of contract.

⁴⁸ J. Satrio, *Hukum Perikatan: Perikatan yang Lahir dari Perjanjian*, Buku I, Citra Aditya Bakti, Bandung, 1995, hlm. 318.

⁴⁹ Sharon Clarins, *supra* no. 47, hlm. 2146.

⁵⁰ Horacio Spector, *supra* no. 25, hlm. 95.

Unconscionability was famous for being “the law of the poor” especially after the famous *Williams v. Walker-Thomas Furniture* in 1967.⁵¹ Walker-Thomas Furniture offered household goods on credit by door-to-door sale. The demography of the market of Walker-Thomas Furniture were low-income consumers like the plaintiff Williams. The store is also located in area where the neighbourhood was predominantly African-American and over 40% of family lived in poverty.⁵² Dealing with low-income consumers, poses risk in default of payment, therefore motivates the establishment of security interest over the object of transaction and the past purchased goods.⁵³ The poor not only they have too few resources, but also tend to be charged more or receive less valuable goods or services.⁵⁴ Poverty is just one of the factors that makes a party vulnerable to exploitation, other factors like disabilities and mental state of a person are also taken into account. In the Restatement (second) of Contracts Section 208 one of the factors to determine whether a transaction is unconscionable or not is:

“...the knowledge of the stronger party that the weaker party is unable reasonably to protect interest by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement...”⁵⁵

Undue influence seeks to protect party with less dominant position at the moment of bargain from the improper conduct or the abuse of dominant party. The focus of this doctrine is on the existing relationship between parties even before entering into contract. Court often looks into whether there was a trust and confidence in the relationship and some relationships that regarded as special such as soldier and senior officer, employer and employee, children and parent, husband and wife.⁵⁶ Those special relationships apart from confidence and trust, there is a subordination or authority of one party towards the other.

Although both doctrines may works differently, one of the similarities lies on

⁵¹ Anne Fleming, *The Rise and Fall of Unconscionability as the Law of the Poor*, *Georgetown Law Journal*, Vol. 102, No. 5, 2014, hlm. 1383.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Rebecca Stone, *Unconscionability, Exploitation, and Hypocrisy*, *Journal of Political Philosophy*, Vol. 22, 2013, hlm. 27.

⁵⁵ Willy E. Rice, *supra* no. 26, hlm. 160

⁵⁶ Andrew P. Bell, *Abuse of a Relationship: Undue Influence in English Law and French Law*, *European Review of Private Law*, Vol. 15, No. 4, 2007, hlm. 555.

the function of the doctrine to protect vulnerable parties in contract. In unconscionability the contract was lack of meaningful consent due to the condition and quality of the party, while in undue influence, the consent was given due to pressure created by party that hold authority over the other party combined with the circumstances during the bargain.

Imperfect bargaining process is the highlight of procedural unconscionability. Despite the fact that disparity in bargaining position, it alone might not be enough to declare a contract unconscionable as it also requires substantial unconscionability. Factors that needed to be taken into account when assessing unconscionable bargain includes the characteristic of the weaker party and the process of contract formation or how the contract is presented. In procedural unconscionability court often look into the understandability of the contract especially in consumer contract.⁵⁷

Cases with undue influence also indicate problems in bargaining process. Despite the absence of threat unlike duress, the mind of the victim of undue influence is subdued by persuasion or manner that against free will of one's self.⁵⁸ Since the focus of undue influence is on the existing relationship of the parties, problem with bargain in undue influence lies on the inequality of bargaining power where the dominant party has significantly higher bargaining power and it is manifested on the process on contract formation.

Contract that involves parties with exactly equal bargaining power is so unlikely to be found nowadays. Unequal bargaining power from a slight difference to significant one would not be a problem unless one of the parties takes advantage by exploiting the weaker party in the terms of contract. The last common ground of both doctrine is on the aspect of exploitation which both doctrines wanted to protect the aggrieved party from.

In terms of exploitation, the doctrine of unconscionability often mention that the transaction itself is overreaching or oppressive. The magnitude of overreaching

⁵⁷ Colleen McCullough, *supra* no. 28, hlm. 809.

⁵⁸ Sylvester Chukwunekwu Udemezue and Nwamaka Adaora Iguh, A Critical Evaluation of the Appropriateness of Duress and Undue Influence as Legal Safeguards against Unconscionable Contracts, *International Journal of Comparative Law and Legal Philosophy*, Vol. 3, No. 2, 2021, hlm. 54.

and oppressive might be higher than unfairness and unreasonableness to be enough to decide that the contract is unconscionable.⁵⁹ The disputed part of the contract might lie on the overall transaction for example an exchange of goods that is significantly undervalued or about a certain provision of contract even boilerplate clauses. Boilerplate clauses might not be unconscionable if it is still reasonable within commercial setting, the problematic one is when it contains unreasonable conditions, reservations, exceptions, and waivers that eliminate for example seller's liability.⁶⁰

Exploitation in undue influence setting focuses on the "abuse" performed by dominating party as one of the requirements. According to Setiawan some factors that indicate undue influence are terms that are unreasonable and against equity and the exchange of performance is extremely unfair.⁶¹ Similar with unconscionability the exploitation might be manifested in the overall transaction and some specific terms of contract which either allocate a big burden to other parties or release or waive the right of the other parties.

Key Differences Between Unconscionability and Undue Influence

At some point these doctrines might generate the same outcome such as unenforceability of a certain clause or even the entire contract. However both doctrines still work differently, and even the fact that both have common grounds in certain parts they require different thresholds and burden of proof in the fulfilment of their elements. Based on the previously explained characteristics, the key difference lies on the focus of the doctrine and their remedies.

Table 1. Key Differences Between Unconscionability and Undue Influence

	Unconscionability	Undue Influence
Focus	Substantive unfairness of contract Oppression in bargaining	Improper conduct of the dominating party Relationship
Remedies	Invalidity of the offending clause Modify or rewrite the offending clause	Voidable clause or transaction Restitution
Scope of	Commercial contract	Private contracts (transfer of title, security)

⁵⁹ Ying Khai Liew and Debbie Yu, *The Unconscionable Bargains Doctrine in England and Australia: Cousins or Siblings?*, Melbourne University Law Review, Vol. 45, No. 1, 2021, hlm. 206.

⁶⁰ Jeffrey C. Fort, *supra* no. 33, hlm. 777.

⁶¹ Sharon Clarins, *supra* no. 47, hlm. 2149.

application	Consumer contract	right, marriage-related contract)
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Source: processed by the author, 2026.

Unconscionability seeks to protect aggrieved party from the terms of contract or the deal itself. Despite the two prongs of unconscionability which has different focuses, where procedural refers to the bargaining process and substantive refers to the terms of the contract itself, many courts require fulfilment of both for a successful claim. It has been previously mentioned that there were variations in implementing substantive and procedural unconscionability in the court practice. In sliding scale implementation judges still look for the indication of fulfilment in substantive and procedural. Partial fulfilment of just one type might occur in substantive unconscionability but unlikely for just procedural unconscionability.⁶²

Notwithstanding the fact that the general deal or the substantive part of the contract is important in both concept and also the reason the aggrieved party utilize the rule, the goal of undue influence is to correct the unfair exploitation in interpersonal transaction and freedom in acceptance or assent.⁶³ The exploitation itself is manifested into a conduct by the dominating party towards the weaker party. The conduct itself can be manifested into form of solicitation, flattery, putting in fear, and even kindness and affection.⁶⁴ Undue influence in common law has two categories namely actual and presumed undue influence. This distinction lies on the focus and proof rather than its definition and compulsory elements.⁶⁵ According to Bigwood actual undue influence the conduct is more straightforward and coercive,⁶⁶ though later this might be confused with duress. Presumed undue influence concerns with the relationship of influence which generates the vulnerability of the weaker party.⁶⁷ Confidential relationship is the key for undue influence which defined as relationship of trust and reliance where the dominating party is believed to act on best interest of the other party.⁶⁸

Relationship of trust and reliance also closely related with the fiduciary duty

⁶² Melissa T. Lonegrass, *supra* no. 1, hlm. 21.

⁶³ Rick Bigwood, *Undue Influence in the House of Lords: Principles and Proof*, *The Modern Law Review*, Vol. 65, No. 4, 2002, hlm. 435, 438.

⁶⁴ Ray D. Madoff, *Unmasking Undue Influence*, *Minnesota Law Review*, Vol. 81, No. 3, 1997, hlm. 571.

⁶⁵ Rick Bigwood, *supra* no. 63, hlm. 509.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Ray D. Madoff, *supra* no. 64, hlm. 580.

that dominating party owe to the other party. This could occur in the relationship between public notary and clients just like in case 1078/Pdt.G/2021/PN JKT.SEL where public notary colluded with the buyer. The seller was made to sign a deed in which the price stipulated in the deed was different from the deal made with buyer previously.⁶⁹ Seller was not even given time to carefully read the deed and was asked to immediately sign.⁷⁰ This is contradictory to the duty of public notary who has obligation to read the deed and explain it to both parties.

Difference on the focus also leads to difference in the burden of proof. Substantive unconscionability requires the contract with unreasonable provision and contradiction with public policy, so claimant needs to show the contract itself supported with the argument that the contract contained unequal exchange. While procedural unconscionability requires claimant to provide evidence related to the process of contract formation. Such evidence may take form of the status of the claimant at the moment of the bargaining or how the contract is presented to the claimant. For undue influence, claimant may need to show the underlying relationship between parties before the contract was made. Since undue influence focus on the abusive conduct of the dominating party, claimant shall prove the process of the contract formation.

In case of unconscionability requires both procedural and substantive to be fulfilled this may looks similiar to burden of proof in undue influence. Finding proof for abuse during the pre-contractual process might be challenging for claimant especially if the communication is made orally and privately between parties. Proofing substantive unconscionability might seems easy for claimant as long as the document of contract exist and can be accessed, but arguing that the unequal exchange or the unfairness will require a good argument, as fulfillment of substantive unconscionability shall be more than just unreasonable.

The outcome of the implementation of both doctrine may lead to similar result that is the judge may interfere with the contract declare its invalidity or rewrite

⁶⁹ Anisa Rahmiarti, "Penyalahgunaan Keadaan (Misbruik van Omstandigheden) sebagai Alasan Pembatalan Akta Jual Beli dan Akta Kuasa Jual", Undergraduate Thesis, Universitas Gadjah Mada, 2025, <https://etd.repository.ugm.ac.id/penelitian/detail/249721>, accessed 17 November 2025.

⁷⁰ Id.

certain unfair terms. However, the basic logic to arrive into that outcome or granted remedies derived from different goal and focus of both doctrines. The aim of unconscionability is to protect party from unfair terms, therefore when granted court will fix the overreaching terms by refusing to enforce certain unfair clause or adjust the price or interest to the point it become reasonable. In unconscionability the avoidance of the entire contract or transaction is unlikely.

The conduct of undue influence resulted into impaired consent by the victim. Dominating party exercises influence causing the other party to consent to transaction that he otherwise would not have made without the influence.⁷¹ Therefore the action of the weaker party did not reflect his real wish. The goal of undue influence doctrine is to restore the free will of the aggrieved party who has been made to do transaction against his will, therefore the remedies is in form of avoidance of the overall contract or termination of the transaction. However modification of contract instead of rescission might still be possible if it is the wish of plaintiff in the lawsuit.

In the context of Indonesian legal system, undue influence doctrine remains a doctrine as it is yet to be formalized into written law like the New Dutch Civil Code. The development on how this doctrine is used in court is different. Undue influence is placed under the concept of defect of consent due to its nature that hinders free will of the weaker party. One of the important elements of undue influence provided by Indonesian scholars and practiced by court is on the aspect of bargain. In this sense it has a slight similarity to procedural unconscionability. According to Van Dunne as cited by Suwandono and Yuanitasari in the bargaining process, the party with higher bargaining position must have predominance or advantage in either economy or psychology.⁷² This economic predominance might seems similar to the concept of economic duress, but in economic duress the threat is so obvious that the weaker party loses common sense thinking that he will definitely suffer losses unless he sign the contract.⁷³ In psychological predominance it requires the

⁷¹ Ray D. Madoff, supra no. 64, hlm. 578.

⁷² Agus Suwandono and Deviana Yuanitasari, *Perkembangan Penyalahgunaan Keadaan sebagai Dasar Pembatalan Perjanjian dalam Sistem Hukum Perjanjian di Indonesia*, JUSTICES: Journal of Law, Vol. 2, 2023, hlm. 3.

⁷³ Fani Martiawan Kumara Putra, *Paksaan Ekonomi dan Penyalahgunaan Keadaan Sebagai Bentuk Cacat Kehendak Dalam Perkembangan Hukum Kontrak*, Yuridika, Vol. 30 No. 2, 2015, hlm. 251.

dominating party to be aware of other party circumstances and realizing his own advantage in the relationship.⁷⁴

In the legal systems that apply both doctrine, unconscionability and undue influence each doctrine tend to work for different type of contract, although this does not apply absolutely. Unconscionability is often implemented in a contract where parties have asymmetrical bargaining position such as consumer contract. While undue influence mostly applies for private contract between private individual, for example contract for transfer of property and mortgage or security right related contract. This tendency related to the type of contract might caused by the characteristic of undue influence that require special relationship between parties and abuse by dominating party. Such complex relationship rarely exist in consumer setting where the contract is targetted for mass. Undue influence is also critisized for its narrow application that it could not touch commercial dealings and that the vulnerability of the aggrieved party has its bar set so high.⁷⁵ A literature on Australian legal system suggested that undue influence is quite possible even to be applied for algorithmic contract where the process of the negotiation and determining the terms involves machine.⁷⁶

The implementation of undue influence to avoid or annul an exploitative contract in Indonesian court is quite extensive beyond just transfer of title or land related contract. It applies in the avoidance of an unfair clause of loan contract between individual and bank in case 13/PDT.G/2011/PN END and corporate loan contract in 226/PDT.G/2011/PN MDO.⁷⁷ Izzati found implementations of undue influence in industrial relation or employment contract dispute cases.⁷⁸ There were not many example of implementation in consumer contract, which likely attributable due to the legal basis utilized for the avoidance uses illegal cause rather than defect of consent where undue influence lies. Law on Consumer protection prohibits several unfair and exonneration clause in consumer contract.

⁷⁴ Id.

⁷⁵ Hila Keren, *The Unbearable Narrowness of Undue Influence*, in *Research Handbook on The Philosophy of Contract Law*, Edward Elgar, 2025.

⁷⁶ Eliza Mik, *Algorithmic Exploitation of Consumers*, in *The Cambridge Handbook of AI and Consumer Law: Comparative Perspectives*, Cambridge University Press, Cambridge, 2024.

⁷⁷ Sharon Clarins, *supra* no. 47, hlm. 2149.

⁷⁸ Nabilyla Risfa Izzati, *supra* no. 12.

Understanding unconscionability gives us insight that party is protected from the exploitation and improper bargaining process (procedural unconscionability) and from the transaction or contract itself (substantive unconscionability). Unconscionability may cover what is unable to be protected by undue influence and can be used in commercial and consumer setting. If we compare how undue influence in common law and Indonesian legal system, common law applies this in a more narrow manner and the bar is quite higher.

Despite the insight we get from the concept of unconscionability, the author believe that currently it is not necessary yet to adopt unconscionability when undue influence is possible to be applied quite extensively. Judges has the authority to apply this and how narrow or how extensive undue influence even in consumer contract. There is actually an intersection on unconscionability with legal cause as the requirement of validity of contract and other principle of contract. Several unfair clauses (substantive unconscionability) are usually prohibited by law such as Law on Consumer Protection and Law on Employment. The unfair process in contract formation process (procedural unconscionability) in consumer context also covered by Law on Consumer Protection as it prohibit corporation to present consumer contract in a manner that is hard to find, access or read by consumer.

Conclusion

Unconscionability and undue influence doctrine are both derived and developed from the concept of equity in common law legal system. Later several civil law countries started to adopt and implement this doctrine to justify judges in interfering with unfair contract. The adoption of the doctrine can be in form of formalizing it into a written law like in Dutch Civil Code or just practiced by the court like in Indonesian Legal system. The common ground for both doctrine lies on: 1) the objective to protect party with lower bargaining position (with various different context); 2) imperfect bargaining process; and 3) existence of exploitation. While the key differences are in the aspects of focus of the doctrine where unconscionability is on the substantive fairness of contract and error in bargaining process while undue influence is on the improper influence by the dominating party.

This also leads to the different remedies for both actions since unconscionability wanted to protect party from an overreaching clause and undue influence that aim to restore the free will of the weaker party who made a deal that he otherwise would not have made without the undue influence.

Several points that need to keep in mind are first, despite some differences and common ground the court practice is not always consistent and even in different common law states the implementation of the doctrine might differ, therefore on how the doctrine developed in each countries also varies. Second, in many common law countries unconscionability is often applied in consumer contract dispute while undue influence is often use to invalidate a will or other property transfer transaction. Third, Indonesian legal system only adopt undue influence as a part of defect of consent which at some point there are some intersection and similarity with unconscionable doctrine.

With those similarities and intersection, author is yet to suggest the adoption of unconscionability in Indonesian legal system for the time being. Many legal research studies the possibility of applying undue influence in various consumer contract. Judges have the power to implement and later shape undue influence, which of course needs to be pointed by the disputing party or claimant to argue on the avoidance of contract. We shall look forward on the development of this doctrine in near and far future.

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