



THE RECONSTRUCTION IN THE TERMS OF CANCELLATION OF CIVIL CODE ARTICLE 1266 AND 1267 BASED ON THE VALUE OF JUSTICE

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Abstract

In the agreement, the parties are in misappropriation will give disadvantageous to another party (debtor and creditor). Cancellation of the agreement due to breach of contract is the right of the injured party pursuant to Article 1266 and 1267 of the Civil Code. However, the terms void under Article does not reflect justice, given punishment one of the parties may be due to circumstances force and some achievements have been implemented.

Keywords: Cancellation; Civil Code and Justice

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1. Introduction

In the modern society, a transaction which is binding on the parties set forth in a written agreement, with the aim that if at any time there are things that are not expected to occur or one in misappropriation (breach of contract), then the aggrieved party can demand the fulfillment of a feat. The issue of the contract is not related to the physical form or in written form, but in general, if the person calling will contract directly refer to a written document In the agreement, the two parties agreed to make regulations or rules or the rights and obligations clicking their belt to be obeyed and executed. The deal is to give rise to legal consequences, rights and obligations, and if the agreement was violated, no legal consequences, the violate legal consequences or sanctions imposed.

According to the provisions of Article 1338 Book of Civil Law (Civil Code) stating that the agreement made by the parties basically valid as law for those who make it. Therefore, the agreement raises the achievements against the parties to the agreement. Achievement is an obligation that must be fulfilled and implemented by one party to the other party is in agreement. Achievement will always be there, either in the agreement that are unilateral agreement, it means achievement or obligation only on one party without a contra or obligations that are required of other parties. Achievements that were able in a reciprocal agreement or bilateral (or reciprocal agreement), in which the shape of this agreement each party that promised to have achievements or financial obligations of each party.

In accordance with the principle of *pacta sunt servanda*, which became clearer principle to the effect that the parties to the agreement are bound and must do achievement or its obligations. Nevertheless, there is always the possibility of one party does not fulfill the obligations that are specified in the

agreement. If the debtor does not do all his responsibility then there was a misappropriation. Events of misappropriation is often times associated with the terms of Cancellation. In civil law, a condition usually associated with the agreement null or conditional engagement. An engagement is said, if the engagement is hung on the events that are still to come and is not necessarily the case, either procrastinate birth of engagement until such an event occurs, as well as to cancel the engagement by the occurrence or non-occurrence of such events. The Conditional of Engagement is 2 (two) types, namely (1) the engagement with a tough requirement, namely the engagement of birth only when the events in question took place and the engagement was born on the second occurrence of the event; and (2) the terms of the engagement with a void, which is an engagement that is born precisely expired or canceled if the events in question occurred.

Terms void that is intended in this study is a requirement void contained in Article 1266 of the Civil Code, as follows: "Conditions are considered null and always listed in a reciprocal agreement, suppose one of the parties does not meet its obligations. In such case no agreement is null and void, but the cancellation is requested to the court ". While the wording of Article 1267 of the Civil Code, "Parties to which engagement is not met, could choose, forcing the other party to meet the approval, if it still can be done, or demanding the cancellation of approval, with reimbursement, all rugian and flowers. The request was also to be done even though the terms are not in agreement void. If the condition is not canceled in the agreement, the judge free to grant the defendant, provide a period of time to meet its obligations back, with a period should not exceed one month ".

Article 1266 1267 of the Civil Code provides intervention clearly that most of the courts in the event of termination of an appointments. This article basically says

that the reason one party does not carry out its obligations, then the other party may cancel the agreement, but the cancellation was done should not be granted but must go through the courts. Therefore, it is not surprising that in practice there is often a rule that override the article which means that the pact can be decided by one of the parties (without the intervention of the court). So the terms of cancellation here expresses a condition of the cancellation of a contract, if one party in misappropriation or not meet its obligations. Terms void on this Article specially set up in the event of misappropriation, not the other provides an obligation (inevitably). However the parties arrange a reciprocal agreement, but if it is associated with the cancellation of the agreement as a result of misappropriation, such agreement will be subject to Article 1266 and 1267 of the Civil Code. The obligation that we can not negotiate these power seen with the use of the word "considered". Its means that there is no clause regarding the cancellation of the agreement in Article 1266 and 1267 of the Civil Code.

In practice, especially in the treaties that created the business side, frequently encountered conditions that the parties have agreed to deviate from Article 1266 of the Civil Code. For example, in one chapter of an agreement made by business people said that both sides agreed with each other that in connection with the cancellation of this agreement, the parties to expressly waive the provisions of Article 1266 and 1267 of the Civil Code, as long as these provisions require uttered a court decision on termination / canceled its agreement. Some concrete examples of agreements made by prac oners, among other businesses made between PT. Farez Pratama and PT. Pelindo IV (Persero) with the contract number: 03 / LP.004 / 04 / SMD-2017 on ship repair contracts and procurement in the agreement stated that the agreement may be modified or terminated before the term of the agreement expires on mutual agreement by

and between the parties with the provisions of the terms that have been agreed together. On the termination of such agreement the parties agree to waive the provisions of Article 1266 and 1267 of the Civil Code of the arrangement along requirement all court decision for the cancellation of an agreement. In fact almost all the agreements made entrepreneurs in Indonesia in general, the parties agreed to the pulled-aside Article 1266 and 1267 of the Civil Code. As a result of the law and the inclusion of a clause stretcher, then in the event of misappropriation, the cancellation does not have to be requested from the judge, but by itself has been canceled. Article 1265 of the Civil Code states that if a null condition be met, then the terms of the engagement stop clicking and bring everything back to its original state, as if there never was an engagement. In terms of the engagement with the void, had given birth to the engagement agreement, only the tie will be void in the case of events mentioned in the agreement as a conditional clause. So, giver of agreements that have received accomplishment in agreements have to pay towards their achievement. On the other hand, some legal experts and practitioners in particular law judge found in misappropriation does not automatically result in the cancellation of the agreement, but must request the cancellation prior to the judge. This is supported by the reasoning that if the employer misappropriations construction project, pursuant to Article 1266 paragraph (4) of the Civil Code, the judge has the authority to give an opportunity to the employer to comply with the agreement of construction project within a maximum period of one month. In this case, the judge has to weigh the votes negligence debtors compared to losses if the contract is canceled. When linked with protection against those whose position is weaker than the other party, estab-limitation treaty unilaterally without going through the court process can be me-disadvantaged

weaker party Party weaker generally only able to accept all the conditions offered by the other party (the agreement raw). This condition is certainly not in accordance with the principle of the principle of freedom of contract (Article 1339 of the Civil Code), which is a limitation of the principle of freedom to make contract (Article 1338 of the Civil Code). Although regarded as a condition of misappropriation, causing the agreement expires, the expiry of the agreement were not for the broke of the law, but must go through the terms of cancellation by the judge. This is clearly seen in Article 1266 (2) of the Civil Code in which case no such agreement is null and void, but cancellation must be requested from the court. In fact, Article 1266 paragraph (3) also confirms that the agreement was still not null and void, but can be canceled, even in the agreement as a condition of misappropriation listed about canceled. Steering late subsection (4) added if the misappropriation as a condition avoid in agreement. Judges have a policy based on consideration of the circumstances giving a maximum period of 1 (one) month for the misappropriating party to meet its obligations. In this latter context, even according to the judge is entitled also to consider and assess the size of the misappropriating contractor's negligence than due to the cancellation it which would override the contractor. In other words, when a judge must decide the lawsuit because the agreement as a condition of misappropriation null and void, must pay attention to the various principles of contract law common principles of good faith. Unilateral cancellation of the agreement is usually done by the stronger position because the other party is in misappropriation. It was felt unfair for the other parties, especially those who are in misappropriation has executed an agreement even though in the end can not make achievements for some reason.

2. Research Methods

This study uses empirical juridical approach, which is a method of legal research that serves to see the law in the real sense and examine how the workings of law in society. The nature of research is descriptive analysis, which reveals the laws and regulations relating to the legal theory which is the object of research, as well as in the implementation of law in the society with regard to the object of research. The data source of this research focused on primary data obtained through interviews and observations, as well as secondary data obtained through library research.

3. Results and Discussion

An agreement or contract not only in terms of the law, namely for legal certainty, but more are expected is the fulfillment of obligations undertaken by the parties. The fulfillment of the obligation to provide consequences legally and economically on the desired destination together. By law, the fulfillment of the obligation is the implementation and cons accomplishment achievement of mutually agreed upon signing the contract. Economically, the fulfillment of the obligations would create a business relationship going well and in accordance with the target cost and benefit analysis (cost and benefit analysis). In a reciprocal agreement, the parties should do respective obligations or meet achievement. Reciprocal pact, the agreement could cause the principal obligation for both parties to do so. If one party does not do so, then the pitch was said to have tort (breach of contract). Unfollows the rule one party detriment of the other, so that the injured party has the right to cancel the agreement.

Subekti argued that the words misappropriations in the Dutch meaning "poor performance". In addition, the misappropriations often paired words in the word negligent, broken promises, or in

violation of the agreement, if only debtors doing something that should not be done. I Ketut Oka Setiawan argued that if a debtor misappropriations, the result is The cancellation of this agreement is a right granted by Article 1266 of the Civil Code which provides for each agreement always deemed to have been made on the condition that the negligence of the parties will result in cancellation of the agreement, but the cancellation which must be requested to the judge. According to Subekti that negligence is not a debtor that caused the cancellation, but the judge's decision to cancel the agreement that the judge's decision is constitutif and declaratoir. Furthermore Subekti explained that the judge backs possess a power discretioner, meaning that it is authorized to assess the debtor misappropriations. If the thought too small, the judge is authorized to refuse the cancellation of the agreement, although the indemnities have been granted. In the above case the contracting parties can be held provided that estab-batalan canceled should not judge, so that by itself when the agreement will remove the broken promise.

In the court decision has been perceived there are several factors or considerations that makes the decision oneself is not appropriate decision between the two sides. Because of an agreement made under an agreement between two parties who agree to make an agreement so if there is a problem should be resolved by consultation between the two sides, and there is no mutual harmed, but if the matter is brought to court, then there is likely possibility verdict the judge would harm one of the parties to make an agreement. An example is the District Court of Samarinda, Tenggarong. According to Article 1266 of the Civil Code by reason of one party does not perform its obligations, the other party to the contract can cancel the contract in question, but the cancellation should not be done just like that, it must be done through a lawyer-justice. Given the lack of

specific procedures for the cancellation of a contract by the court, the cancellation must be traveled through procedures lawsuit usual, very lengthy, complicated and laborious intervention of the court in the event of termination of the contract, which was originally addressed to the weaker party in a contract that, ultimately detrimental to all parties. Therefore, it is not surprising that in practice there is often a provision in the contract rule out the application of Article 1266 of the Civil Code. There are two opinions in terms of waiver of Section 1266 and 1267 of the Civil Code on the agreements made by the business. The first opinion stating that the verdict is constitutively by: In terms of propriety, may waiver of Article 1266 and 1267 of the Civil Code can be accepted if the substance of the agreement has provided a guarantee for the balance of the parties. But the fact is, it is not rare to find an agreement biased and tends to harm either party if you develop a risk. In business practice still found an appointments that include a standard clause on the limitation of liability of either party if develop a risk.

Against such, the waiver of Article 1266 and 1267 of the Civil Code should be examined in more depth. The reason a lot of parties to waive Article 1266 and 1267 of the Civil Code is often a legal treaty interpretation that embrace open systems. Clauses in it is complementary. So the parties decide otherwise permissible in terms of contract, as long as it does not violate the general provisions, customs and laws (Article 1339 of the Civil Code). For those who agree with irregularities, many options to override Article 1266 and 1267 of the Civil Code is often a legal treaty interpretation that embrace open systems. Clauses in it only a completed. Thus, the parties may conduct other provisions, provided it does not violate the principle of decency (Article 1339 Civil Code). For those who agree with irregularities, usually, they put forward the proposition that the agreement serves as a law for the

parties (Article 1338 of the Civil Code). However, they often forget that to be able to do perverts's, the agreement must have really made legally, like what was mentioned by Article 1320 of the Civil Code.

The second provision that article was not wrong. For though tort regarded as canceled se-requisite to cause the agreement expires, the expiry of the agreement were not for the sake of the law, but must go through the terms of cancellation by the judge. This is clearly seen in Article 1266 (2) of the Civil Code in which case no such agreement is null and void, but the revocation must be requested from the court. In fact, Article 1266 paragraph (3) also confirms that the agreement was still not null and void, but can be canceled, even in the agreement as a condition of misappropriation listed about canceled. Then paragraph (4) added if the misappropriation as a condition void unwritten in agreement. Judges have a policy based on consideration of the circumstances giving a maximum period of 1 (one) month for the misappropriating party to meet its obligations. In this last kontesk, even according to the judge is entitled also to consider and assess the size of the misappropriating party's negligence in comparison with the consequent cancellation of the agreement that will override the misappropriation party. In other words, when a judge must decide the lawsuit because the agreement as a condition of misappropriation null and void, must pay attention to the various principles of contract law common principles of good faith. even according to the judge is entitled also to consider and assess the size of the misappropriating party's negligence in comparison with the consequent cancellation of the agreement that will override the misappropriation party. In other words, when a judge must decide the lawsuit because the agreement as a condition of misappropriation null and void, must pay attention to the various

principles of contract law common principles of good faith. even according to the judge is entitled also to consider and assess the size of the misappropriating party's negligence in comparison with the consequent cancellation of the agreement that will override the misappropriation party. In other words, when a judge must decide the lawsuit because the agreement as a condition of misappropriation null and void, must pay attention to the various principles of contract law common principles of good faith.

The issue of jurisdiction on two opinions on Article 1266 and 1267 of the Civil Code states that the contained in Article 1266 and 1267 of the Civil Code is interpreted as a coercive rule (dwingend recht) and hence should not be follows the parties through the (clause) their agreement. A waiver of Article 1266 of the Civil Code are also often over-specified in the agreement. Waiver of this Article backs possess meaning that if the parties do not have to penetrate the court procedure, but it can be decided directly by the parties to decide directly without going through a court agreement. This is based on the principle of freedom of contract, where the parties are free to determine the contents of the agreement he had made a clause included in the case of termination of the agreement itself. A good contract there is always a clause on the manner and consequences of termination of the contract.

The principle of freedom of contract as the basis for a waiver of Article 1266 and 1267 of the Civil Code. In the world of business and business interests, we generally see the provision that the parties have made an agreement always agree pulled aside Article 1266 and 1267 of the Civil Code. Furthermore, Article 1266 paragraph (1) of the Civil Code explains that the requirement is considered void is always included in the reciprocal agreement, if either party does not fulfill its obligations. In this case, such consent is null and void, but estab-batalan must be

requested to the court. There are several reasons that support the release clause of Article 1266 of the Civil Code provisions in the agreement, such as Article 1338 paragraph (1) of the Civil Code, any agreement made legally valid as a law. The inclusion of a clause that release provisions of Article 1266 of the Civil Code should be adhered to by the parties. In addition, the road taken by the court will require huge costs and a long time, so it is not effective for businesses, thus, pursuant to Article 1266 of the Civil Code, arguing one party does not carry out the obligations of the other party to the contract it may cancel the contract in question but the cancellation should not be done just like that, it must be done through the courts.

4. Conclusion

At the engagement born of a reciprocal contract, tort from the first party entitles the other party to ask for the cancellation of the contract by the judge. The cancellation of this agreement is a right granted by Article 1266 of the Civil Code. Terms repeal of Article 1266 and 1267 of the Civil Code is not fair given the misappropriating party should do agreement, then the event of misappropriation. Of course, the cancellation of the agreement would be detrimental to the parties in misappropriation as well. Arrangements were made by agreement between the two parties when the matter was taken to court, then there is likely to be detrimental to the possibility of the judge's ruling party. Not rare agreement of biased and tends to harm either party if you develop a risk, for example in business practices still found a deal that included a standard clause on the limitation of liability of either party if you develop a risk. Of course, consideration and assessment of the size of the misappropriating party's negligence needs to be measured in-compare with the consequent cancellation of the agreement

that will befall the misappropriating party; Implementation weaknesses void terms of Article 1266 and 1267 of the Civil Code, among others the path through the courts will require huge costs and a long time, so it is not effective for businesses; Reconstruction requirement repeal of Article 1266 and 1267 of the Civil Code based on values of justice, in the implementation of the cancellation of the agreement does not have to be requested from the court, simply by agreement of both parties. When judging contract unilaterally happens, for example in the case of a construction contract can be done by appointing another contractor will and by choice alone to resolve such chartering. The contractor is obliged to submit to the first party of all records, drawings, calculations and other particulars relating to this agreement. Meanwhile, to guarantee the implementation and advances will be returned to the second party (contractor), with the proviso must take into account the achievements that have been carried out by both parties.

5. Bibliography

- Pitlo, *Het System van Het Nederlandse Privaaterecht*, transliteration by D. Saragih, 2003, Alumni, Bandung.
- Achmad Busro, 2011, *Legal Engagement Based on Book III of the Civil Code*, First Edition, Pohon Cahaya, Yogyakarta.
- Ade Maman Suherman, 2005, *Legal Aspects in the Global Economy*, Revised Edition, Second Printing, Ghalia Indonesia, Bogor.
- Agus Yuda Harmoko, 2001, *Indonesian Contract Law*, Widya Utama, Yogyakarta.
- Hasanuddin Rahman, 2007, *Contract Drafting: The Arts of Designing Skills Business Contracts*, Citra Aditya Bakti, Bandung.
- Herlien Boediono, 2009, *Treaty of Law and Practice*, Citra Aditya Bakti, Bandung.

- I Ketut Oka Setiawan, 2017, Legal Engagement, Second Edition, Sinar Grafika, Jakarta.
- Johannes Ibrahim and Lindawaty Sewu, 2004, Business Law in Modern Human Perception, First Edition, Refika Aditama, Bandung.
- Handayani, I.G.K.R., Martanto, R., Karjoko, L., Kadir Jaelani, A., Mukhlisin, "Application of advance data protection system as an efforts to improve Indonesia digital economy", *International Journal of Advanced Science and Technology*, Volume 29, Number 4, (2020) pp. 1774-1778.
- Jaelani, A.K., Handayani, I.G.A.K.R., Karjoko, L., "The Political Law Of The Constitutional Court In Canceling The Concept Of The Four Pillars As An Pancasila As The State Foundation", *Talent Development and Excellence*, Volume 12, Number 2 (2020), pp. 1314-1321.
- Jaelani, A.K., Handayani, I.G.A.K.R., Karjoko, L., "Development of Halal Tourism Destinations in the Era of Regional Autonomy in West Nusa Tenggara Province", *International Journal of Innovation, Creativity and Change*, Volume 12, Number 12, (2020), pp. 765-774.
- Handayani, I.G.A.K.R. Karjoko, L., Prasetio, Sudarwanto, A.S., "Dilemma In The Implementation Of Business Judgment Rule In Commercial Transactions Of State-Owned Enterprises" *Talent Development and Excellence*, Volume 12, Number 2 (2020), pp. 1541-1549
- Karjoko, L., Winarno, D.W., Rosidah, Z.N., Handayani, I.G.A.K.R., "Spatial Planning Dysfunction In East Kalimantan To Support Green Economy", *International Journal of Innovation, Creativity and Change*, Volume 11, Number 8, (2020), pp. 259-269.
- Mariam Darus Badruzaman, 2001, The Law Compilation of Engagement, Citra Aditya Bakti, Bandung.
- Periksa Setiawan, 2007, Principal of Law Engagement, Fourth Edition, Jakarta.
- Raharjo Handri, 2009, Contract Law in Indonesia, Reader Yustisia, Yogyakarta.
- Salim HS, 2015, Contract Law, Eleventh Edition, Sinar Grafika, Jakarta.
- Sudikno Mertokusumo, 1991, To Know the Law, As An Introduction, Liberty, Yogyakarta.
- Suharnoko, 2008, Contract Law, Theory and Case Analysis, First Edition, Fifth Printing, Kencana, Jakarta.
- Y. Sogar Simamora, 2017, Contract Law, Principles of Contract Law Procurement of Government Goods and Services In Indonesia, First Edition, LaksBang Pressindo, Surabaya