



## The Application of Void Contions Clauses in Business Contracts That Do Not Rule Out Article 1266 in Any Civil Law (Study at Agency Agreement PT Sriwijaya Air with PT. Denisa Mitra Wisata)

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### **Abstract**

An Agreement is the act of one or more person who bind themselves to another parties which creates a legal relationship between the two parties and gives birth to rights and obligations. Business people in the world always use agreements to get strong legal certainty. Actually in making agreements there are various forms of clauses that are poured into the agreement, one of which is to include clauses overriding article 1266 KUHPperdata in the clause cancelation terms. As we konow article 1266 KUHPperdata arrange that void condition must always be made in agreement and closing of the agreement has to asked to the judge because the positions of the parties is same on an agreement. In the agency agreement PT. Sriwijaya Air and PT. Denisa Mitra Wisata has a clauses distorted 1266 KUHPperdata on rule void agreement and then the agreement was canceled unilaterally without request for cancellation to the judge.

The research for master about: 1) What is the reason for the parties in the agency agreement PT. Sriwijaya Air and PT Denisa Mitra Wisata distorted the rule 1266 KUHPperdata? 2) How the implementation mechanism clauses void conditionon agency agreement PT. Sriwijaya Air with PT. Denisa Mitra Wisata.

The research method use is empirical juridical nemly legal research that studies and analyzes the legal behaviour of individuals or comunities in relation to law. Data source used are primary and secondary.

The result of the study indicates that the application of the clause outlining article 1266 KUHPperdata in the term of canceling the agency agreement can be applied. Because referring to the validity of an agreement is an agreement between the two parties not only in making the agreement but changing and canceling also include this rule has in 1320 KUHPperdata.

And the legal certainly of the agreement can be accounted for with azas pactasunsepanda on clause 1338 KUHPperdata. The basis for overriding article 1266KUHPperdata is that KUHPperdata is a civil code that is used as a reference for making agreements in the legal system in Indonesia, especially civil law. Therefore, the articles in the KUHPperdata are included in the agreement clauses if they wish to be set aside.

**Keywords:** *Cancelaltion; Legal Certainty; Agency Agreement*

## A. Background

The Republic of Indonesia is a country of law. The rule of law guarantees legal certainty, legal order and legal protection based on justice and truth. Law order breeds cultural order, social order and economic order. Economic chaos, social collapse and cultural collapse always begin with lawlessness.

The presence of law in society is to integrate and coordinate the interests that can collide with each other by the law being integrated in such a way that the collisions are suppressed as little as possible<sup>1</sup>. Efforts to realize these interests are through obligations and rights, so that people feel the law has been running and working after integrating and coordinating the obligations and rights of the community where the law has been established by the community.

The more the law interferes in the area of the agreement, the higher the level of human dignity is guaranteed. The history of the agreement is as old as the history of man himself<sup>2</sup>. Every agreement that has been made and then to be fulfilled cannot be separated from the role of reason in it. Processing of human reason in the agreement is essentially the implementation and application of the law itself. The law is an embodiment of the civilization, dignity and spirit of all reasonable and virtuous human beings where the law is agreed upon. Legal agreements that do not violate the law and comply with the law are legal agreements that bind the parties to the agreement.

Emile Durkheim said an agreement was not enough to be able to stand alone, but he could be done only because of the rules that govern it. The agreement is not only an agreement between two parties, but three and this third party is the community<sup>3</sup>. The agreement is possible to carry out, because the community makes its framework in the form of regulations that ratify the agreement, such as the terms of the agreement, its consequences and so on. Agreements made and implemented without heeding the regulations that ratify the agreement result in the community having a negative impact on the agreement.

Wayne Barnes argues that the subjective theory of contract is focused on meeting the wishes or desires of the parties. The parties must truly agree to the agreement that has been made between the two<sup>4</sup>. This contract theory only binds people who have been clearly defined and the subject aims at binding themselves with other parties. The engagement of the parties to the contract made and signed is absolute as long as the contract is legally valid. Termination of the engagement of the parties to the contract that has been made must be approved by the parties themselves or through legal provisions that overshadow and protect the contract.

At present many business actors in making cooperation contracts with various forms and irregularities set forth in the Agreement clauses, one of which is to include invalidation conditions by ignoring the provisions of Article 1266 of the Civil Code and other provisions related to that article.

The provisions of article 1266 of the Civil Code are (1) Canceled conditions are always considered to be included in a reciprocal agreement, when one party does not perform its obligations (2) In such case the agreement is not null and void by law, but cancellation must be sought from the Judge (3) Request this must also be done, even though the canceled conditions regarding non-fulfillment of the obligations are stated in the agreement.

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<sup>1</sup> Sutjipto Rahardjo, 2006, *Ilmu Hukum*, Citra Aditya Bakti, Bandung, p. 53.

<sup>2</sup> Munir Fuady, A, 2014, *Teori-Teori Besar (Grand Theory) Dalam Hukum*, Kencana Prenada Group, Jakarta, p. 217.

<sup>3</sup> Emile Durkheim dalam Satjipto Rahardjo, *Op. Cit.*, p. 215.

<sup>4</sup> Wayne Barnes in Salim HS and Erlies, A, 2014, Septiana Nurbani, *Buku Kedua Penerapan Teori Hukum Pada Penelitian Disertasi dan Tesis*, PT. Raja Grafindo Persada, Jakarta, p. 245.

In the interpretation of article 1266 the Civil Code contains the understanding that the termination conditions in an agreement are considered to always be included and the cancellation of the agreement must be requested from the Judge. Related to this is a business contract between PT. Sriwijaya Air with PT. Denisa Mitra Wisata agreed to waive the provisions of article 1266 of the Civil Code as outlined in the agreement clause, and then after the collaboration proceeded, the agreement was canceled unilaterally.

Moving on from the background description of the above problems, it is interesting to conduct an in-depth study, both theoretical and juridical as well as the background of writers working in private companies engaged in banking, so the authors are interested in making business contract articles that override article 1266 of the Civil Code. Related to this, this article is formulated with the title ***“THE APPLICATION OF VOID CONTIONS CLAUSES IN BUSINESS CONTRACTS THAT DO NOT RULE OUT ARTICLE 1266 IN ANY CIVIL LAW (STUDY AT AGENCY AGREEMENT PT SRIWIJAYA AIR WITH PT. DENISA MITRA WISATA)”***

### ***B. Formulation of The Problem***

Based on the above background, the formulation of the problems to be discussed in this study are as follows:

What is the reason for the parties in the Agency Agreement between PT. Sriwijaya Air with PT Denisa Mitra Wisata to rule out article 1266 of the Civil Code?

### ***C. Discussion***

#### **The reasons of the parties in the Agency Agreement between PT. Sriwijaya Air with PT Denisa Mitra Wisata to rule out article 1266 of the Civil Code**

##### **a. Chronology of the Cooperation Agreement.**

In the beginning, PT. Sriwijaya Air intends to provide convenience to users of flight services in terms of purchasing airplane tickets. In this case PT. Sriwijaya Air makes it easy by appointing agents to sell the tickets so that airplane ticket service users do not need to come directly to the Sriwijaya Air representative office to collect airplane tickets. PT. Sriwijaya Air came to a conclusion to appoint the Agent as an extension of PT. Sriwijaya Air in purchasing plane tickets through a cooperation agreement mechanism.

The airline ticket purchase system through this agent received a fairly good response from consumers who use Sriwijaya Air aircraft services because consumers no longer need to come directly to the Sriwijaya Air representative office, this is very helpful for consumers who are outside the city of Padang due to sufficient mileage far will be very helpful in terms of effectiveness.

After getting a good response from consumers in terms of the effectiveness of PT. Sriwijaya Air in collaboration with PT. Denisa Mitra Wisata for ticket sales for Sriwijaya Air through agency agreement Number 174 / B2B-AGT / DISTRICT / COM / IV / 2016. Through the cooperation agreement, PT. Sriwijaya Air determined PT. Denisa Mitra Wisata as an Agent for purchasing Sriwijaya Air plane tickets.

With the appointment above, PT. Denisa Mitra Wisata can carry out his duties as an airline ticket sales agent from the airline PT. Sriwijaya Air in accordance with the provisions contained in agency

agreement number 174 / B2B-AGT / District / COM / IV / 2016 concerning the Agency Agreement of PT. Sriwijaya Air.

Then after the collaboration proceeded, the agreement was canceled unilaterally by PT Sriwijaya Air to PT Denisa Mitra Wisata because PT Denisa Mitra Wisata could not meet the sales target for 3 (three) consecutive months.

b. The reason for PT. Sriwijaya Air and PT Denisa Mitra Wisata to **rule out** article 1266 of the Civil Code in the Agency Agreement.

Waiver of article 1266 of the Civil Code was carried out by PT. Sriwijaya Air based on the results of an interview with Mr. Romi Indra as Sales Supervisor on March 17, 2019 at the PT Sriwijaya Air District Representative Office on Jalan Juanda No. 50 Ulak Karang, Lolong, Padang, stated that the process of canceling the agreement through the court was expensive and a long process. from PK, Cassation to reconsideration. And in terms of overriding article 1266 of the Civil Code and other provisions relating to that article in the Agency Agreement of PT. Sriwijaya Air, the cancellation conditions have been stated explicitly in the agreement clause so both parties must submit to the contents of the agreement. Related to override the provisions of article 1266 of the Civil Code which regulates that the cancellation of the agreement must be requested from the Judge no longer needed, because the terms of the cancellation of an agreement have been stated explicitly in the clause of the Sriwijaya Air Agency Agreement.

In addition, the Article 1266 Civil Code Override is carried out by PT. Denisa Mitra Wisata based on the results of an interview with Mr. Benni as Director that overriding Article 1266 of the Civil Code is a form of carrying out an agreement that has been agreed with PT. Sriwijaya Air as stated in the Agency Agreement PT. Sriwijaya Air Number 174AGT / DISTRICT / COM / IV / 2016.

Article 1266 of the Civil Code "(1) Conditions of void are deemed to always be included in a reciprocal agreement, when one party does not perform its obligations (2) In such case the agreement is not null and void by law, but cancellation must be sought from the Judge (3) this request must also be done, even though the cancellation conditions regarding non-fulfillment of obligations are stated in the agreement.

In accordance with the Legal Certainty Theory overriding Article 1266 of the Civil Code is based on the principle of *pacta sunt servanda* (Legal Certainty). As stated in article 1338 paragraph 1 "Every agreement made legally becomes a law for those who make it". The meaning applies as a law for those who make it shows that the law itself recognizes and places the parties in the contract in line with the legislator invite.

With the promise that there is a willingness for the parties to achieve each other, there is a willingness to bind themselves to each other. The contractual obligation becomes a source for the parties to freely determine the will with all the legal consequences. respectively. These parties will be the basis of the contract.

The occurrence of legal actions is determined based on the agreement. The existence of a consensus of the parties, the agreement raises the binding power of the agreement as the law (*pacta sunt servanda*). What is stated by someone in a relationship becomes law for them. This principle is the binding force of the agreement. This is not a moral obligation, but also a legal obligation whose implementation must be obeyed<sup>5</sup>.

<sup>5</sup> Ridwan Khairandy, *Itikad Baik dalam Kebebasan Berkontrak*, Op.cit, p 28-29.

So it can be concluded that this is reflected in the open system in Article 1338 paragraph (1) of the Civil Code which confirms that the agreement made legally applies as a law for the parties.

In accordance with the theory of agreement in article 1320. For agreement to be valid, four conditions are required. Agree to those who bind themselves, the ability to make agreements, a certain thing, a halal cause.

The description of article 1320 of the Civil Code regarding the agreement of the parties is agreed not only to make an agreement but also to amend and terminate or cancel the agreement. In this case, through the cancellation clause that overrides article 1266 of the Civil Code, it means the parties agree to cancel the agreement without due process.

According to Y. Sogar Simamora, the term “*termination conditions*” is the most appropriate because in a conditional engagement, an agreement has occurred as well as its implementation so that the situation of not fulfilling the conditions in the contract implementation stage does not refer to the canceled conditions in making the contract specified in Article 1320 of the Civil Code. Then in a reciprocal contract if one defaults, the termination is a condition that applies by itself because of the law.

Thus, what broke the engagement was because of a default.

According to Mara Ioan and Hristache Trofin, this is because reciprocity can be interpreted as the same source for contracts and the interdependence of the parties contained in the engagement between the contracting parties governing the legal consequences of the actions for the engagement of the other party<sup>6</sup>.

According to L.J. van Apeldoorn, there is a certain analogy between contract and law. To a certain extent, the contracting parties act as legislators (private legislators). Contractors have limited effectivity on the parties that make them, in addition to the contracts the parties intend to carry out concrete actions<sup>7</sup>.

This is the basis for the parties to agree on the waiver of Article 1266 of the Civil Code and where the exclusion of Article 1266 of the Civil Code that has been agreed is considered as the statutory regulation. Article 1266 of the Civil Code is a *naturalia* element if seen from its nature because the rules are deemed to exist without the need for special agreement by the parties. Part of this agreement is regulating which means that the parties are free to arrange it themselves even the provisions are not compulsive, free to deviate. Conversely, if the parties do not arrange it themselves in the agreement, the statutory provisions regarding the agreement will apply<sup>8</sup>. In addition, Article 1266 of the Civil Code is also a complementary law (*aanvullend recht*), so in principle the parties can exclude the labor force of the material and the retroactive force<sup>9</sup>.

According to Solene Rowan, the provisions regarding contracts that can only be canceled by the court can only be overridden by the proper use of the invalidation clause. This clause is implemented in a way that does not require the injured party to ask the court to issue a contract termination decision. He can terminate immediately<sup>10</sup>.

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<sup>6</sup> Mara Ioan *et al*, *Op.cit*, p. 112.

<sup>7</sup> L.J. van Apeldoorn, *Op.cit*, p. 155-156.

<sup>8</sup> Herlien Budiono, *Ajaran Umum Hukum Perjanjian dan Penerapannya di Bidang Kenotariatan*, *Op.cit*, p. 101.

<sup>9</sup> Gr. Van der Burght, *Op.cit*, p. 145.

<sup>10</sup> Solene Rowan, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance*, (Oxford: Oxford University Press, 2012), p. 84.

Then, to limit the need for court authority, the clause requirement cancellation can expand the right of termination. They do so by granting that the right can be exercised against a default that is not believed to be a serious default. This also includes the injured party being able to terminate the contract even though this default is relatively minor. In comparison with French law where the interpretation of the clause in terms of broad cancellation, the French court requesting that right be exercised in good faith<sup>11</sup>.

However, the exclusion of Article 1266 of the Civil Code and Article 1267 of the Civil Code is only binding if the creditor who has the right to request that the contract be canceled is not in default. If the creditor himself defaults then he himself has lost the right to file a cancellation known as *exceptio non adimpleti contractus*. The doctrine of *exceptio non adimpleti contractus* is related to the provisions of Article 1266 of the Civil Code in which the party in a reciprocal contract has not breached the right to sue the other party to fulfill its obligations, he has the right to refuse with *exceptio non adimpleti contractus*<sup>12</sup>.

The creditor's bad faith disrupts the workability of the terms clause void if he hides behind it when he is partially or wholly blamed for default or more broadly when he does not facilitate the execution of the contract. The court's assessment of the reasonableness of termination is something that is secretly enforced in this case, in addition to reviewing the legal conditions needed for termination<sup>13</sup>.

Although in a contract it has been explicitly agreed to waive the authority of the court in deciding the default action and the court's authority to cancel the contract as a result of the action of the default, if in its implementation the party declared in default rejects the accusation and cannot accept unilateral cancellation by the partner contract then the exclusion of Article 1266 of the Civil Code in the contract agreed upon by law does not apply. The District Court still has the authority to examine and decide on any dispute that arises in the contract because based on the law is to examine and decide not to merely confirm the content of the agreement of the contracting parties<sup>14</sup>. This is why Yves-Marie Lathier believes the omnipresent court with the phrase "*sent out by the door, it comes back through the window*"<sup>15</sup>.

Waiver Article 1266 of the Civil Code will only be effective if the contracting parties agree to the waiver of Article 1266 of the Civil Code voluntarily, conscientiously, and consequently subject to the consequences of the waiver of Article 1266 of the Civil Code and does not bring problems from the cancellation of the contract to the court so as not to cause rejection when cancellation or termination of the contract by other parties in the contract, especially until filing a lawsuit to the court. As long as those who feel aggrieved submit a lawsuit to the court, the fact that the agreement on the waiver of Article 1266 of the Civil Code has become ineffective in prohibiting the court from examining and deciding cases<sup>16</sup>.

Termination in the form of a cancellation (*rescission*) is defined as having legal consequences then (*ex nunc*) of the continuity of the contract can be analyzed in two perspectives<sup>17</sup>:

- a. Same with contract termination standards unless this is applied to continue the contract;
- b. Termination is used in honor of the release from continuing the contract by means of a unilateral statement by one of the parties guaranteed by law or clause.

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<sup>11</sup> *Ibid*, p 84-85.

<sup>12</sup> Herlien Budiono, *Kumpulan Tulisan Hukum Perdata di Bidang Kenotariatan: BukuKedua, Op.cit*, p. 232-233.

<sup>13</sup> Yves-Marie Laithier, *Op.cit*, p. 120.

<sup>14</sup> Ricardo Simanjuntak, *Op.cit*, p. 234-235.

<sup>15</sup> Yves-Marie Laithier, *Op.cit*, p. 120.

<sup>16</sup> Ricardo Simanjuntak, *Op.cit*, p. 239.

<sup>17</sup> Octavian Cazac, *Op.cit*, p. 89.

Therefore, the termination of the contract with the cancellation clause that overrides Article 1266 of the Civil Code has legal consequences later (*ex nunc*). J. Satrio argues that at the termination of the *ex nunc*, all existing agreements before the termination remain binding but for the next period since the cancellation, he did not give birth to any new agreements<sup>18</sup>.

So it can be said that the regulation of Article 1266 is regulating because the regulation of Book III of the Civil Code is regulating (*aanvullend*) as well as Article 1266 and Article 1267 of the Civil Code is a *naturalia* element of a business contract where the *naturalia* element is not an obligatory element in a business contract even though it is regulated in law. Thus, the existence of Article 1266 and Article 1267 of the Civil Code is not an obligatory element in a business contract so that the parties may waive Article 1266 and Article 1267 of the Civil Code based on the principle of *pacta sunt servanda* covered in Article 1338 paragraph (1) of the Civil Code and for the cancellation of the agreement unilaterally if in the future there is a claim from one of the parties, they can still take the court to ensure the legal certainty of the cancellation. Because the position of the parties is equal as principle of balance.

In this sense the birth of legal norms is based on horizontal relations of parties. In this context equality and agreement become important. As balance is the implementation of the principle of good faith, the principle of honest transactions and the principle of justice. Balance in law is based on the reality of a large disparity in society, therefore we need a regulatory system that can protect those who have unprofitable position.

It can be concluded that the basis of ruling out article 1266 of the Civil Code is the BW or the Civil Code which is a Civil Code or a reference for making an agreement. In the Indonesian legal system specifically the Civil Law. Therefore, the articles in the Civil Code are explicitly stated in the agreement clause if it is to be set aside and legally the application of the cancellation clause that overrides article 1266 is permitted and for legal certainty the cancellation of an agreement if one party wants to dispute the cancellation can still bring to court.

## Conclusion

Based on the description above, the authors draw conclusions, as follows:

The reasons for the parties to disregard Article 1266 of the Civil Code in the clause on the cancellation of the Agency Agreement are due to the following matters:

- a. PT. Sriwijaya Air stated that the cancellation requirement for Article 1266 of the Civil Code had been explicitly stated in the agreement clause and in terms of the effectiveness of the cancellation of the agreement through the court, it took a long time and was expensive and PT. Denisa Mitra Wisata stated that overriding Article 1266 of the Civil Code due to ignorance of the Law and assessing in terms of effectiveness considers the court process to be expensive and a long time.
- b. Leaving aside article 1266 of the Civil Code as outlined in the clause the terms are canceled in the Agency Agreement between PT Sriwijaya Air and PT. Denisa Mitra Mitra Its application can be applied in business contracts because based on article 1320 of the Civil Code regarding the validity of an agreement has been fulfilled, And *Pacta Sunt Servanda* in accordance with article 1338 of the Civil Code which confirms that every agreement made legally applies as a law for those who make it. However, for the certainty of the law if in the future one of the parties wants to bring a lawsuit to court, it is still permissible.

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<sup>18</sup> J. Satrio, *Hukum Perikatan Tentang Hapusnya Perikatan: Bagian I*, (Bandung: PT Citra Aditya Bakti, 1996), p. 4.

## References

### A. Books

Herlien Budiono, 2009, *Ajaran Umum Hukum Perjanjiandan Penerapannya di Bidang Kenotariatan*, PT. Citra Aditya Bakti, Bandung

Munir Fuady, A, 2014, *Teori-Teori Besar (Grand Theory) Dalam Hukum*, Kencana Prenada Group, Jakarta

Salim HS dan Erlies Septiana Nurbaini, A, 2015, Septiana Nurbani, *Buku Kedua Penerapan Teori Hukum Pada Penelitian Disertasi dan Tesis*, PT. Raja Grafindo Persada, Jakarta

Sudjpto Rahardjo, 2006, *Ilmu Hukum*, Citra Aditya Bakti, Bandung

### B. Legislations

1. Kitab Undang –Undang Hukum Perdata
2. Undang Undang No 40 Tahun 2017 Tentang Perseroan Terbatas
3. Peraturan Perusahaan
4. Perjanjian Kerjasama PT Sriwijaya dengan PT. Denisa Mitra Wisata

### C. Websites

<https://www.wordpress.com/bh4kt1/pasal1266>

<http://Hukumonline.com/klinik/detail//arti-putusan-deklarator>

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