



# LEGAL FORCEMENT CANCELLATION CLAUSE OF THE AGREEMENT MADE ON THE BASIS PRINCIPLE OF FREEDOM OF CONTRACT

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## ABSTRACT

*Agreement cancellation clauses that waive Articles 1266 and 1267 of the Civil Code are generally carried out in business agreements. The basis for considering the inclusion of an agreement cancellation clause refers to the principle of freedom of contract wherein in making the agreement the parties are free to include the things that were agreed upon. Based on these conditions, the legal issues discussed in this study are (1) What is the legal force of the clause on the cancellation of agreements made on the basis of freedom of contract?; and (2) What are the legal consequences of the waiver of Article 1266 and Article 1267 of the Civil Code on debtors? The research method used is normative legal research. The results of this study indicate that (1) The legal force of the cancellation clause of the agreement made on the basis of freedom of contract is binding for the parties if the parties trust each other and agree regarding the binding power of the agreement cancellation clause. The binding force of the cancellation clause of the agreement is effective if the party claiming the cancellation itself is not in default or does not have bad faith. In addition, the other party did not submit an exceptio non adimpleti contractus (defence to a default claim); and (2) The legal consequences of the waiver of Article 1266 and Article 1267 of the Civil Code for a debtor who is negligent in carrying out the agreement resulting in default, the creditor can cancel the agreement and the creditor has the right to claim compensation caused by the debtor.*

**KEYWORDS:** *Cancellation of Agreements, Clauses, Principles of Freedom of Contract.*

## INTRODUCTIONS

According to the provisions of Article 1338 of the Civil Code (hereinafter referred to as the Civil Code) which states that agreements made by the parties basically apply as laws for those who make them (Hasanuddin Rahman, 2007). Therefore the agreement raises the achievements of the parties to the agreement.

One example of an achievement that arises because of an agreement is the payment of debt. Debt is an obligation that arises from a contractual basis, so this obligation is referred to as a contractual obligation (Alexander Veremyev, 2013). In accordance with the principle of *pacta sunt servanda*, namely the principle which states that the parties to the agreement are bound and must carry out their achievements or obligations. However, there is always the possibility that one of the parties does not fulfill the obligations specified in the agreement. If the debtor does not carry out/fulfill his obligations, a default occurs. Events of default are often associated with cancellation conditions.

Cancellation conditions as stated in Articles 1266 and 1267 of the Civil Code are considered to always be included in reciprocal agreements, when one party does not fulfill its obligations. In such case the agreement is not null and void, but the cancellation must be asked to the judge. The request must also be made, even though the terms of cancellation regarding non-fulfillment of obligations are stated in the agreement. If the cancellation conditions are not stated in the agreement, the judge is free to, according to the defendant's request, provide a period of time to fulfill his obligations again, with a period of no more than one month.

In agreements made by business people, clauses for the cancellation of the agreement are often found which regulates that the parties have agreed to deviate from Articles 1266 and Article 1267 of the Civil Code. For example, the cancellation clause of an agreement made by business people states that both parties agree with each other that in connection with the cancellation of this agreement, the parties expressly waive the provisions in Article 1266 and Article 1267 of the Civil Code.

The fact is that almost all agreements made by business actors in Indonesia in general, the parties agree to set aside Articles 1266 and Article 1267 of the Civil Code which are included in the agreement cancellation clause. As a legal consequence of the



inclusion of this clause, when a default occurs, the agreement does not need to be requested for cancellation from the judge, but by itself it is cancelled. In this case the default is a void condition. Article 1265 of the Civil Code states that if a condition is cancelled, then the condition terminates the agreement and brings everything back to its original state, as if there had never been an agreement. In an agreement with cancellation conditions, the agreement has already spawned an agreement, only the engagement will be canceled if an event mentioned in the agreement occurs as a conditional clause (Suharnoko, 2008). Thus the giver of the agreement who has received the promised performance must pay for the achievement.

Regarding the waiver of Articles 1266 and 1267 of the Civil Code, there are two conflicting opinions, namely: first, the opinion which states that Articles 1266 and 1267 of the Civil Code are coercive rules (*dwingend recht*), so that the parties cannot deviate, and secondly, the opinion which states that Articles 1266 and 1267 of the Civil Code are rules that are complementary (*aanvullend recht*), so that they can be deviated by the parties. (Agus Yudha Harmoko, 2001)

The reasons for many parties to set aside Articles 1266 and 1267 of the Civil Code in the cancellation clause of the agreement are often the interpretation that the Contract Law adheres to an open system. The articles in it are only a complement. So, the parties may enter into other provisions, as long as they do not violate the principles of decency, custom or law (Article 1339 of the Civil Code). For those who agree with deviance, usually, they argue that the agreement applies as a law for the parties (Article 1338 of the Civil Code). In addition, another reason for the inclusion of an agreement cancellation clause is based on the principle of freedom of contract. The principle of freedom of contract as implied in Article 1338 paragraph (1) of the Civil Code is a principle related to the form and content of agreements. The meaning of freedom of contract is that each person is free to determine with whom he will enter into an agreement, free to determine the form and content of the agreement and free to make a choice of law. Based on this principle of contractual freedom, the parties feel free to determine the contents of the agreement, including the cancellation clause of the agreement in the agreement they made. (Raharjo Handri, 2009)

Based on the description above, the legal issues that deserve to be studied in this regard, as stated above, are two opinions on Articles 1266 and 1267 of the Civil Code. The first opinion states that the provisions contained in Articles 1266 and 1267 of the Civil Code are interpreted as rules that are coercive (*dwingend recht*) and therefore the parties must not deviate through the agreement clause. The judge's decision in this case is constitutive, meaning that the breakup and termination of the agreement is caused by the judge's decision, not declarative in nature (the agreement is broken due to default, while the judge's decision simply states that the agreement has been broken). Meanwhile, the second opinion states that Articles 1266 and 1267 of the Civil Code are complementary regulations (*aanvullend recht*) so that they can be set aside by the parties making the agreement.

Departing from the existence of a conflict norm between the provisions in Article 1266 and Article 1267 of the Civil Code with the principle of freedom of contract as stipulated in Article 1338 of the Civil Code which gives freedom to the parties to determine the contents of the agreement including a cancellation clause of the agreement that contradicts Articles 1266 and Article 1267 of the Civil Code which states that the cancellation of the agreement can only be done through a judge's decision cannot be done based on the will of the parties even though it has been stated in the agreement.

Based on the background of the problems described above, the formulation of the problem in this research can be put forward in the research questions are (1) How is the legal force of the agreement cancellation clause made on the basis principle of freedom of contract? and (2) What are the legal consequences of the waiver of Article 1266 and Article 1267 of the Civil Code on debtors?

## Research Methodology

The research method used in this research is normative legal research. Normative legal research is research conducted by examining the laws and regulations that apply or apply to a particular legal issue. Normative legal research examines law from an internal perspective with the object of research being legal norms (I Made Pasek Diantha, 2017). Normative research is often referred to as doctrinal research, namely research whose object of study is documents of laws and regulations and library materials (Peter Mahmud Marzuki, 2011). Normative legal research is also called research that is focused on examining the application of rules or norms in positive law (Johnny Ibrahim, 2012). According to I Made Pasek Diantha, normative legal research has a role in defending the critical aspects of his legal science as a normative science. (I Made Pasek Diantha, 2017)

## DISCUSSION

### Power of Law Cancellation Clause of Agreement Made on The Basis Of Freedom of Contract

Basically, agreements made for business purposes contain void clauses, namely the parties agree to cancel and terminate the agreement when the conditions stated in the cancellation terms are met. In this sub-chapter, examples of cancellation clauses from agreements in the business world are first presented, after which they are analyzed in the final section. To explain the cancellation clause of the agreement as a condition for this cancellation, researchers have collected several agreements in the business world. Agreements in the business world put forward always include a clause for canceling the agreement by setting aside Articles 1266 and Article 1267 of the Civil Code. The reasons for including clauses for canceling agreements with the waiver of Article 1266 and Article 1267 of the Civil Code from each agreement are described as follows:

In the agreement cancellation clause by setting aside Article 1266 and Article 1267 of the Civil Code in this agreement so that agreements involving fraudulent contractors, KKN and forgery can be canceled first, to avoid further losses, without having to wait



for a judge's decision. Meanwhile, acts of KKN, fraud and forgery which are classified as criminal acts are further processed in the Criminal Court. So, in this agreement, the cancellation of the agreement is not canceled by the judge in accordance with the provisions of Articles 1266 and 1267 of the Civil Code, but is canceled according to the clause on the cancellation of the agreement as stated in the agreement.

Inclusion of an agreement cancellation clause with the exclusion of Article 1266 and Article 1267 of the Civil Code in the cancellation terms of the Construction Agreement between PT. Jaya Ancol Development Tbk. with PT. Jaya Real Property Tbk. regarding the Development and Development of the West Ancol Area with the practical reason of terminating the agreement when one of the parties defaults, without having to wait for a judge's decision. This is done so that the development project for the West Ancol area can be continued by other contractors without having to go through a court of law, which of course will take a long time and be complicated.

Likewise in the Ship Repair Agreement at PT. Sinbat Procast Teknindo's waiver of Article 1266 and Article 1267 of the Civil Code is also mentioned in the cancellation clause of the agreement. This is because the termination or cancellation of the contract is only done with the consent of both parties regardless of the intervention of the court. Contract cancellation can be done by one of the parties if the other party defaults. It is also clearly stated in the clause on the cancellation of the agreement that one of the consequences of default is the cancellation of the agreement and this cancellation without going through the courts. This is based on the principle *exceptio non adimpleti contractus*, which states that a contract can be terminated by one of the parties (without court intervention) if the other party defaults.

The reason underlying the inclusion of the clause canceling the agreement by setting aside Article 1266 and Article 1267 of the Civil Code is that the parties uphold the principle of freedom of contract and consider that the agreement applies as a law for the parties who make it (*Pacta Sunt Servanda*).

The reason the parties are free to determine the contents of the agreement based on the principle of freedom of contract and the agreement applies as a law for the parties who make it (the principle of *Pacta Sunt Servanda*) is also stated in the Cooperation Agreement Between PT. Putra Raditama with PT. Riamas Housing Propertindo City regarding Cilegon City Hotel Management; Cooperation Agreement between PT. Unirental Daya Pratama with Djoesman Badu regarding Coal Mining Cooperation; The Cooperation Agreement between the Regent of Sampang and PT. Surabaya Inn Bestari regarding Management of Camplong Tourist Attractions; and Lease Agreement, with the example of Lease Agreement between PT. Indonesian Railways with PT. Hosseldy Rabel regarding the Perumka Land Lease, to include a cancellation clause of the agreement by setting aside Article 1266 and Article 1267 of the Civil Code, besides that the parties to the agreements also want certainty to terminate or cancel the agreement, without going through a convoluted and time-consuming court process long.

As previously stated in relation to Article 1266 of the Civil Code, there are two contradictory opinions, namely: first, the opinion which states that Article 1266 of the Civil Code is a mandatory rule (*dwingend recht*), so it cannot be deviated by the parties, and secondly, the opinion stating that Article 1266 of the Civil Code is a rule that is complementary (*aanvullend recht*), so that it can be deviated by the parties. (Agus Yudha Harmoko, 2001)

According to Gunawan Widjaja and Kartini Muljadi, the formulation of Article 1266 of the Civil Code was made to protect the interests of one of the parties in a reciprocal agreement. In such an engagement, each party is bound to carry out the achievements of one another. It can happen that the achievements made by one of the parties in a reciprocal engagement are carried out prior to the achievements of the other party or in other words, these reciprocal achievements may not be carried out simultaneously. For this reason, in order to protect the interests of parties with good intentions in a reciprocal agreement, the Civil Code for the sake of law stipulates that null and void conditions must always be deemed to exist. (Gunawan Widjaja dan Kartini Muljadi, 2003)

The legislators have given the arrangement for the cancellation of the agreement tacitly which rests almost entirely on fiction because most of the parties who will enter into an agreement simply do not know there is an opportunity to rely on conditions like that when the legislators have used legal fiction by arranging the cancellation of the agreement secretly. (Gr. Van der Burght, 2012)

This is in accordance with the characteristics of the *naturalia* element because the *naturalia* element is an element that is attached to the agreement where an element that is not specifically agreed upon in the agreement, is secretly considered to exist in the agreement because it is already an element attached to the agreement (Sudikno Mertokusumo, 2010). The natural element of this business agreement is regulatory, which means that the parties are free to regulate it themselves, even if the provisions are not coercive, free to deviate from them. Conversely, if the parties do not regulate it themselves in the agreement, the statutory provisions regarding the agreement will apply (Herlien Budiono, 2011). Furthermore, Article 1266 of the Civil Code is also classified as a complementary law (*aanvullend recht*), so that in principle the parties can exclude material working power and retroactive power. (Gr. Van der Burght, 2012)

The parties agreed to the cancellation clause of the agreement with the waiver of Article 1266 of the Civil Code and Article 1267 of the Civil Code where the waiver of Article 1266 of the Civil Code and Article 1267 of the Civil Code that has been agreed upon is considered law for the parties and may not be interfered with by a third party, namely the judge. The agreement applies as a law for the parties who make it (*pacta sunt servanda* principle) as long as it does not violate the terms of the validity of the agreement as regulated in Article 1320 of the Civil Code. As a consequence of the *pacta sunt servanda* principle, the judge may not interfere with the contents of the agreement made by the parties. (O.C. Kaligis, 2009)



In practice, the view is accepted that if the parties agree to waiver of Article 1266 of the Civil Code and Article 1267 of the Civil Code, then cancellation without the need for the mediation of a judge's decision because the cancellation will be canceled without the mediation of a judge in the event of default. Because there is still an opportunity for the parties to set aside Article 1266 paragraphs (2), (3) and (4) of the Civil Code, the parties must expressly state that the rights owned by the parties based on the provisions of the article have been expressly released (Herlien Budiono, 2010). According to Herlien Budiono, the parties who commit themselves to waive Article 1266 of the Civil Code and Article 1267 of the Civil Code made in the agreement should obey and fulfill what they have agreed on (Herlien Budiono, 2006). Furthermore, trust between the parties is an important element in the binding force of the agreement cancellation clause which overrides Articles 1266 and 1267 of the Civil Code where the binding power of the agreement must be sought in the trust raised by the opposing party. (Elly Erawati dan Herlien Budiono, 2010)

According to Solene Rowan, provisions regarding agreements that can only be canceled by a court can only be overridden by the use of a proper agreement cancellation clause. This clause is implemented in a way that does not require the aggrieved party to ask the court to give a decision to terminate the agreement. He can end (terminate) as soon as possible (Solene Rowan, 2012) As a comparison with French law where the interpretation of the agreement cancellation clause is broad, the French court asked for this right to be exercised in good faith. (Solene Rowan, 2012)

The legal force of the waiver of Article 1266 of the Civil Code and Article 1267 of the Civil Code is effective if the party claiming the cancellation itself is not in default or has no bad intentions (Nili Cohen dan Ewan McKendrick, 2005). In addition, the other party does not submit *exceptio non adimpleti contractus* (Herlien Budiono, 2010). According to Sutan Remy Sjahdeini, the cancellation clause of this agreement is an important clause for protecting the interests of business actors such as banks because business actors in this case will be very reluctant to provide credit if the cancellation of the agreement can only occur based on a court decision or through a long and lengthy litigation process (Sutan Remy Sjahdeini, 2009). The cancellation clause of the agreement is actually more practical. (Dwi Agus Prianto, 2010)

Daniel Friedmann believes that termination is done to avoid bad bargains (Jack Beatson dan Daniel Friedmann, 1995). According to P.S. Atiyah and Stephen A. Smith, the cancellation clause of this agreement is vulnerable since the parties can and often do request the right to cancel even the most trivial thing to cancel and termination of the agreement can be established normally without proving guilt. (P.S. Atiyah dan Stephen A. Smith, 2006)

### **Legal Consequences of Waiver of Article 1266 and Article 1267 of The Civil Code on Debtors**

Wirjono Prodjodikoro said that default is the absence of an achievement in contract law, meaning something that must be implemented as the contents of an agreement. Perhaps in Indonesian can be used the term "implementation of promises for achievement and non-performance of promises for default" (Wirjono Prodjodikoro, 1999). R. Subekti stated that "default" is negligence or negligence which can be of 4 types, namely: (R. Subekti, 1979)

- a. Not doing what he promised to do.
- b. Carry out what has been promised, but not as promised.
- c. Did what was promised but too late.
- d. Doing an act that according to the agreement cannot be done.

Mariam Darus Badruzaman said that if the debtor "because of his mistake" does not carry out what was agreed upon, then the debtor is in default or default. The word because the mistake is very important, because the debtor does not carry out the promised performance is not at all because of his fault (R. Subekti, 1979) According to J Satrio, default is a situation where the debtor does not fulfill his promise or does not fulfill it as he should and all of this can be blamed on him (J. Satrio, 2005). Yahya Harahap defines default as the implementation of obligations that are not timely or done improperly. (M. Yahya Harahap, 2006)

The existence of a default creates an obligation for the debtor to provide or pay compensation (*schadevergoeding*), or with a default by one party, the other party can demand cancellation of the agreement. This results in if one of the parties does not fulfill or does not carry out the contents of the agreement that they have agreed on or that they have made, then those who have violated the contents of the agreement have committed a breach of contract. From the description above, it can be seen the intent of the default, namely the notion that says that a person is said to have committed a default if "does not provide achievement at all, is late in providing achievement, performs not according to the provisions stipulated in the agreement".

The time factor in an agreement is very important, because it can be said that in general in an agreement both parties want the terms of the agreement to be carried out as quickly as possible because the determination of the time for the implementation of the agreement is very important to know when the time has come for those who are obliged to keep their promises or carry out an agreement that has been agreed upon. Thus that in every performance agreement is something that must be fulfilled by the debtor in every agreement. Achievement is the content of an agreement, if the debtor does not fulfill the achievements as specified in the agreement, it is said to be in default.

The occurrence of default can cancel the agreement. This is regulated in Article 1266 of the Civil Code which stipulates "Cancel conditions are considered to always be included in reciprocal agreements, when one party does not fulfill its obligations". In such case the agreement is not null and void, but the cancellation must be requested to the judge. This request must also be made,





even though the terms of cancellation regarding non-fulfillment of obligations are stated in the agreement. If the cancellation conditions are not stated in the agreement, the Judge is at liberty to, according to the circumstances, at the request of the defendant, provide a period of time to still fulfill his obligations, which period however cannot exceed one month.

Article 1266 of the Civil Code explains that legally default is always considered a void condition in an agreement so that a party who feels disadvantaged because the other party defaults can demand cancellation of the agreement through the court, either because the default is stated as a condition void in the agreement or not included in the agreement. If the cancellation conditions are not included in the agreement, the judge can give the default party the opportunity to continue to fulfill the agreement by giving a grace period of not more than one month. (Ahmadi Miru dan Sakka Pati, 2008)

Since when can a debtor be said to have deliberately or negligently failed to fulfill his achievements, this really needs to be questioned, because such default has consequences or legal consequences for the debtor. In order to find out since when the debtor was in a state of default, it is necessary to pay attention to whether or not the grace period for fulfilling the achievement was determined in the agreed agreement. In the agreement to give something or to do something, the parties determine and may also not determine the deadline for the implementation of the achievement by the debtor (Abdulkadir Muhammad, 2010). In the event that the grace period for the fulfillment of achievements is not specified, it is deemed necessary to warn the debtor to fulfill these achievements.

Everything about default has been regulated in the Civil Code, as already stated that all kinds of losses that occur due to default can be subject to compensation. Compensation can be in the form of costs incurred, losses suffered and interest agreed by the parties. All default arrangements and settlement methods have been regulated clearly and in detail, it only remains to be resolved by the authorized law enforcers. For example, in the application of default cases in the field of fiduciary and consumer financing, all kinds of rules can be found in the governing laws. In a reciprocal (bilateral) agreement, the default of one party gives the other party the right to cancel or terminate the agreement through a judge's decision. This can be seen in Article 1266 of the Civil Code.

Article 1266 of the Civil Code stipulates "Terms of cancellation are considered always included in reciprocal agreements, when one party does not fulfill its obligations". Based on this, the agreement is not null and void, but the cancellation must be asked to the judge. This request must also be made, even though the terms of cancellation regarding non-fulfillment of obligations are stated in the agreement (Yulia Vera Momuat, 2014). It is undeniable that the formulation of Article 1266 paragraph (1) of the Civil Code contains contradictions and gives the impression that because the debtor is in default, the agreement is automatically canceled due to law, even though the cancellation of the agreement must be requested to the judge, Article 1266 paragraph (2). In fact, this article is intended to provide protection to creditors against losses as a result of defaults on debtors, where the intent becomes clearer when we read Article 1266 paragraph (3) where the article states that if the cancellation conditions are expressly stated in the agreement, but a cancellation request must be made or the cancellation must be demanded. In fact, Article 1266 paragraph (4) stipulates that at the request of the defendant, the judge, taking into account the circumstances, is free to determine the time period as long as it does not exceed 1 month. (J. Satrio, 2005)

A loss can be blamed on the debtor, if there is an element of intent or negligence in the event. The debtor can be said to be intentional if the intention and will of the loss occurs, while the debtor is said to have committed negligence, if the debtor should have known or should have suspected that the result of his actions or attitude caused a loss to the creditor. It is necessary to suspect or know that the debtor is a normal person, so that he can predict all possible losses, thus it can be said that the error (*schuld*) is related to the problem of "being able to avoid" by acting or behaving differently and "can predict" a loss will occur. (J. Satrio, 1999)

## CONCLUSION

Based on the discussion that has been described above, it can be concluded the following matters

1. The legal force of the agreement cancellation clause made on the basis of freedom of contract is binding for the parties if the parties trust each other and agree on the binding force of the agreement cancellation clause which overrides Article 1266 and Article 1267 of the Civil Code. The binding force of the cancellation clause of the agreement is effective if the party claiming the cancellation itself is not in default or does not have bad faith. In addition, the other party did not submit an *exceptio non adimpleti contractus* (defence to a default claim).
2. Due to the legal consequences of the waiver of Article 1266 and Article 1267 of the Civil Code for debtors who are negligent in carrying out the agreement, causing a default, the creditor can cancel the agreement and the creditor has the right to claim compensation caused by the debtor.

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