



Volume 34 No 2, May 2019

DOI: 10.20473/ydk.v34i2.13588

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Yuridika (ISSN: 0215-840X | e-ISSN: 2528-3103)

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FAKULTAS HUKUM UNIVERSITAS AIRLANGGA

Article history: Submitted 22 September 2018; Accepted 14 March 2019; Available Online 1 May 2019

## Liability of the Parties of Condotel Management Contract

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### Abstract

The increase of economic growth in Indonesia can not ignore the increasing growth of business in property by the Indonesia people. Investors does not only focus on doing business on land and landed house, but also the emergence of apartment and condominium answers the necessity towards the scarcity of land. Various form of property investment is offered, one of which is investment in the form of condotel. Condotel or condominium hotel is a new form of business in Indonesia without any specific regulation which regulates it. First, the definition of condotel is a form of high-rise building which can be owned separately and consist of joint land, joint property, and joint parts which is functioned as a hotel. These function as a hotel that needs condotel management contract to alter a regular apartment into a condotel. Condotel management contract is an innominate contract therefore it needed a further study to analyze its clauses, such as management obligation, profit sharing, duration, and discharge of contract. The characteristics of condotel management contract includes irrevocable power of attorney and obligation of building care and maintenance as well as legal relationship between the owner of condotel unit and the third parties. Understanding the characteristics of condotel management contract will determine the person liable for damages caused. This research uses normative method of research and uses statute as well as conceptual approach.

**Keywords:** Management; Profit Sharing; Apartment; Power of attorney.

### Introduction

Indonesian economic growth depends on the increase of finance from each business sector including the amount of investment in the field of property. Property business sector flourish in the form of land and landed house, which answers the demand of the decreasing number of land availability in Indonesia. These decreasing number availabilities of land and increasing number of demand for shelter which encourage the emergence of high-rise building including apartments and condominiums. The emergence of apartments and

condominiums also provide huge source of income in the form of mid to long term investments.

Investments in high-rise building in Indonesia however provide a few problems in the regulation concerning Law No. 5 Year 1960 on Land Law (herein after referred as UUPA) and Law No. 20 Year 2011 on Flats (herein after referred as Law on apartment). The problem arises because most flats and apartments in Indonesia is built on top of *hak guna bangunan or hak pakai*, which have time limits over their rights. To solve this problem and get the most benefit from flats which has been invested by investors, undertakings use condotel business model to benefit investors and the undertaking itself.

Condotels or condominium hotels are a type of multi-story building which can be owned separately including joint rights such as apartments, however it is functioned specifically as a hotel. Companies realize that apartments which are not inhabited by its owners can be used for renting to other people who needs the room. Thus, condotel business model attracts both to hotel operators as well as apartment owners so that both will benefit from it. The next problem is to determine the legality of condotels according to Indonesian laws.

Until now, there are no specific regulation which regulates about condotels. The only existing regulation about condotel is in the form of local regulation in Bali. Article 1 No. 5 of Denpasar City Mayor Regulation No. 42 Year 2007 provides the definition of condominium hotel which is:

*“Bangunan gedung bertingkat yang dibangun dalam suatu lingkungan yang terbagi dalam bagian-bagian yang distrukturkan secara fungsional dalam arah horizontal maupun vertikal yang merupakan satuan-satuan yang masing-masing dapat dimiliki dan digunakan secara terpisah, yang dilengkapi dengan bagian bersama, benda bersama, tanah bersama, dan difungsikan sebagai hotel”.*

From the definition provided according to Denpasar Local Regulation, it can be assumed that since there is no regulation before it which defines a condominium hotel, therefore the legislator chooses a superior law to be its basis which is Law on apartment. The definition is taken directly from the definition of flats according to Article 1 No. 1 of Law on apartment:

*“Rumah susun adalah bangunan gedung bertingkat yang dibangun dalam suatu lingkungan yang terbagi dalam bagian-bagian yang distrukturkan secara fungsional dalam arah horizontal maupun vertikal yang merupakan satuan-satuan yang masing-masing dapat dimiliki dan digunakan secara terpisah, yang dilengkapi dengan bagian bersama, benda bersama, tanah bersama”.*

Condotels borrow some elements from definition of flats such as a multi-story building which can be owned separately and consist of joint property, however it also has its differences. Its main difference is on the way it is functioned. Although they share the same elements, condotels are functioned specifically to be hotels.<sup>1</sup> In the differences between nomenclature in Indonesia many multi-story building are called in various names, such as apartments, condominium and condotels, but the main point is that all of them has the same elements as regulated in Law on apartment, thus all types of multi-story building which can be owned separately are regulated by the same law. *Condotels such as the others, also comply with Law on apartment.*

A condotel is basically still a condominium before it is functioned as a hotel. In order for it to be functioned as a hotel, a contract is needed between the owner of the condominium unit and the condotel management. The contract between the owner of the condotel unit and condotel management to function the condotel into a hotel is condotel management contract. A contract between condotel owners and condotel management will benefit both parties, since in creating a hotel, the condotel management do not need to pay any expenses to build a building, and the condotel owners will gain benefit in the form of long term investment which will be paid by the condotel management as long as the contract is in effect.

The problem in creating a contract on condotel management is the contractual relationship created by the contract. Condotel management contract is a type of contract which is foreign to Indonesian law. The contract has elements of agency

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<sup>1</sup> Wibowo Tunardy, 'Istilah Rumah Susun, Apartemen Dan Kondominium' (jurnalhukum 2015) <<http://www.jurnalhukum.com/istilah-rumah-susun-apartemen-dan-kondominium>> accessed 10 October 2016.

contract as well as rent contract. Both power of attorney and rent contract is a type of contract which are regulated specifically in Indonesian Civil Code. These types of contracts which are regulated in Indonesian Civil Code are called nominate contracts because they are already have default rules in Indonesian Civil Code even though regulation on contract law is not binding. Condotel management contract is not regulated specifically in Indonesian Civil Code, thus it is called an innominate contract. Innominate contracts are contracts which emerge, grow, live and develop in society.<sup>2</sup>

The lack of specific regulation in the law means that there are no default rules to regulate the contract in case the parties did not express the clause in the contract. However, even though there are no specific rules in Indonesian Civil Code concerning innominate contract, it does not mean that innominate contracts do not comply with Indonesian Civil Code, both nominate and innominate contracts still follow regulations under book III of Indonesian Civil Code.<sup>3</sup> Indonesian Civil Code acts as a general rule concerning contracts, for specific innominate contracts, they follow specific rules. Innominate contracts follow the principle of *lex speciali derogate legi generali*, therefore if there are no specific rules which regulates a contract specifically, then general rules apply which is rules in Indonesian Civil Code.<sup>4</sup> As regulated under Article 1319 of Indonesian Civil Code, all contracts shall follow the general principle as stated under book III of Indonesian Civil Code, even innominate contracts. Some innominate contracts have their own specific regulations, such as franchise contracts, construction contracts, and agency contracts just to name a few. Condotel management contract however does not have a specific law, thus general law and principles of contract law shall apply to it. The general principles of contract law that color the Condotel management contract are freedom of contract, *pacta sunt servanda*, consensualism, privity of contract, good faith, and others. These principles apply in every stage of contract forming.

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<sup>2</sup> Salim H.S., *Hukum Kontrak: Teori Dan Teknik Penyusunan Kontrak* (Sinar Grafika 2015).[47].

<sup>3</sup> *ibid.*

<sup>4</sup> Salim H.S., *Perkembangan Hukum Kontrak Innominat Di Indonesia* (Sinar Grafika 2004).[6].

Furthermore, good faith principle applies not only in contractual stage but also in pre-contractual stage.<sup>5</sup>

Even though condotel management contract is innominate contracts, it still has elements from other type of nominate contracts. Elements from agency contract and rent contract are visible in the clauses of condotel management contract. Condotel management contract have elements which defines it including clauses such as the right of condotel management to conduct management towards the condotel, time limit of the contract, profit sharing clause, and the discharge of contract. All of those specific clauses are in condotel management contract and act as a specificity towards other types of contracts.

Just like agency contract, condotel management contract give some of the owners right to manage and to conduct legal activity. Legal activity conducted by the condotel management including renting the unit to third parties. In order to rent a property, the renter should be the owner of the property itself in order to conduct legal action. Which is why a condotel management can only rent the condotel unit to a tenant if the condotel management obtain the power to conduct legal action on behalf of the owner. This legal relationship of the condotel management to act on behalf of the condotel owner is based on agency contract where the owner acts as a principal and the condotel management as the agent.

On the other hand, condotel management contract also has time limit or term, which is uncommon in agency contract. In agency contract the contract set into force when the agent conducts his/her obligation. In condotel management contract however, the fulfillment of the obligation of the condotel management to successfully rent a unit does not discharge the contract. The contract applies for a certain term which the condotel management can rent as many time as the can until the end of the term. This clause is one of the characteristics of rent contract as stated under Article 1548 of Indonesian Civil Code stated the definition of rent

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<sup>5</sup> Antari Innaka, [at., al], 'Penerapan Asas Itikad Baik Tahap Prakontraktual Pada Perjanjian Jual Beli Perumahan' (2012) 24 *Mimbar Hukum* <<https://jurnal.ugm.ac.id/jmh/article/view/16122/10668>>.[377].

contract in which one of the main elements of rent contract is the existence of certain time period.

There are also other specific clause in condotel management contract which does not originate from neither agency contract or rent contract, such as profit sharing clause. Regular agency contract will provide the full benefit from the condotel to the principal, while rent contract will provide the renter with annual rent fee. The difference in payment method in condotel management contract also made it a specificity than other contracts.

The differences of characteristics of condotel management contract both from nominate contracts and innominate contracts will affect the legal relationship created by the contract itself. Legal relationship produced by agency contract will be different with legal relationship produced by rent contract. The legal relationship produced by a contract will help to determine the liability of the parties who have legal relationships. In agency contract, when a tenant rent a room of the condotel, the legal relationship which is created is between the principal and the third party. However, in practice the condotel management has the authority to take reservation and conduct legal activity with any third parties concerning its function as the manager of the condotel.<sup>6</sup>

The legal relationship with third party brings about problem concerning the principle of privity of contract. Basically, every contract follows the basic contract law principle of privity of contract, where only parties of the contract are bound by the rights and obligation which are stipulated in the contract.<sup>7</sup> Several principles of contract law are clearer than privity of contracts.<sup>8</sup> Based on this principle, the contracting parties themselves have the rights and obligations emerge from the agreement, third parties are not affected by it. In Indonesian Civil Code, privity of

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<sup>6</sup> Dwi Iriani, 'Kebijakan Pemerintah Kota Malang Dalam Pemberian Izin Pembangunan Apartemen Kepada Pengembang Di Wilayah Kelurahan Penanggungan' (Universitas Negeri Malang 2013).[6].

<sup>7</sup> Catherine Elliot and Frances Quinn, *Contract Law* (7th ed, Pearson Education Limited 2009).[274].

<sup>8</sup> Jan M. Smits, 'The Expanding Circle of Contract Law' (2016) <<http://dx.doi.org/10.2139/ssrn.2831584>>.

contract is regulated under Article 1340. In condotel management contract, only the parties who sign the contract are bound to it. Third parties are not bound to condotel management contract but they can be involved in the legal relationship made by condotel management contract but based on different contracts.

The problem of condotel management contract does not only on the principle of privity of contract, but also on determining its liability. To determine the liability, a contract must create legal relationships. Legal relationship based on the condotel management contract must first be determine based on the existing contract law. Since condotel management contract is an innominate contract, there are no rules and regulation which regulates condotel management contract, thus there are no default rules to determine the legal relationship as well as liability.

Condotel management contract came into force even though there are no rules and regulation because there are a need for condotel management. Business actors and undertakings main purpose is to gain as many profit as possible. To obtain that goal, therefore condotel management contract came into existence. As stated that condotel management contract is an innominate contract, therefore the clauses made by the parties who made the contract does not follow certain rules. The basis of the creation of innominate contract as well as condotel management contract is based on Article 1338 of Indonesian Civil Code. Article 1338 of Indonesian Civil Code regulates on freedom of contract, the principle of freedom of contract gives freedom for the parties to determine the substance and form of the contract which they made, they can also deviate from the default rules (*aanvulendrecht*).<sup>9</sup>

The application of freedom of contract and the nature of innominate contract made condotel management contract to become difficult to determine to whom shall bear the liability in case of damages. According to regulation on rent contract, the tenant, or the one who rent the building from the renter has the liability to pay expenses in case there are damages suffered to the building or to the renter. In agency contract however, the principal shall be held liable for any actions conducted by the

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<sup>9</sup> Sutan Remy Sjahdeini, *Kebebasan Berkontrak Dan Perlindungan Yang Seimbang Bagi Para Pihak Dalam Perjanjian Kredit Bank Indonesia* (Institut Bankir Indonesia 1993).[47].

agent. Any damages suffered by the agent who conduct his/her activity based on the power given to them according to the agency contract should be deemed that the agent is conducting his/her power on behalf of the principal. In agency contract, the agent cannot be deemed liable unless it is proven that the agent has conducted *ultra vires* or conducting beyond its power.

To understand the differences in comprehending the liability caused by different contracts, this research shall first determine the characteristics of condotel management contract. The characteristics include the form of the contract, the way the contract came into force, the rights and obligation of the parties in the contract, and the discharge of contract. These characteristics will show and determine which legal effort should be taken in case there are damages, either to the parties of the contract or third parties. Thus, it will come into the conclusion of the liability of the parties of the contract. Based on the background of the problem as stated previously, the legal issue discussed in this article is: The characteristics of condotel management contract based on contract law.

This research is a legal research, therefore the method that can be conducted in order to achieve the desired result is using legal research. In legal research the purpose is to search for cohesive truth, thus the method of research in legal research is using normative method in order to obtain the cohesive truth. The reason why cohesive truth is needed in order to conduct legal research is because legal research is because legal research produces prescriptive conclusion.<sup>10</sup> Different with other type of research such as social research, legal research end result is a prescription towards the problem that is being researched. In this research, the problem is to determine the liability of the parties according to condotel management contract. The research method is used to analyze the problems using norms of contract law and other regulation, then to make a conclusion which will help the readers to answer the problems.

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<sup>10</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (7th ed, Prenamedia Group 2011).[41].



### **Characteristics of Condotel Management Contract**

Contracts have been important to the society ever since mankind was born. Civilization are in need of contracts even when contract law has not been established. This can be seen from J.J. Rousseau who studied that men created contracts within their society in order to live within a single rule, this contract is known as social contract.<sup>11</sup> Contracts made by the society act as law upon them that binds every people who made the contracts and the contract itself is made though contract of the society upon a certain rule that apply towards their society.

Although contracts which will be elaborated further in this research is more close to legal aspect rather than social aspect as suggested by J.J. Rousseau, the same principle still applies. Contracts are made from the agreement of the parties, and after the contract is concluded the parties who are bound to it shall honor the contract as if it was law to them. The emergence of codification of civil law brought by civil law countries provide legal basis for default rules in applying contract laws. However, before the existence of codification law, contract law exists based on common laws.

Countries in common law system uses basic principle which are commonly used in previous cases and which applies in society to determine the form of the contract which is drafted. The basic principles of contract law which are used by the common law system is based on the idea of fairness and justice to achieve a contract which benefit equally to both parties of the contracts. That is why contract law in common law system does not emerge from legislation, but form economic necessity.<sup>12</sup> Contract law in common law system uses basic principles in substantive contract law matters based on judicial precedent from courts to determine contract law.<sup>13</sup>

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<sup>11</sup> J.J. Rousseau, *Du Contract Social (Perjanjian Sosial)* (translated by Vincent Bero), 7th ed, Visimedia 2009).[24-25].

<sup>12</sup> Michelle Backstrom, Pip Trowse and Leanne Wiseman, *Contracts* (4th ed, LexisNexis 2012).[5].

<sup>13</sup> N. Andrews, *Arbitration and Contract Law, Ius Gentium: Comparative Persepctive on Law and Justice 54* (Cambridge University Press 2016).[165].

This is different with contract law according to civil law system. In civil law system, contract law recognizes obligation law. Subekti defines obligation as “*Suatu perikatan adalah suatu perhubungan hukum antara dua orang atau dua pihak, berdasarkan mana pihak yang satu berhak menuntut sesuatu hal dari pihak yang lain, dan pihak yang lain berkewajiban untuk memenuhi tuntutan itu.*”<sup>14</sup> Obligation according to Black’s Law Dictionary defined as “Civil Law. A legal relationship in which one person, the obligor, is bound to render a performance in favor of another, the obligee.”<sup>15</sup> With the existence of obligation law, therefore any contract which creates an obligation Indonesian Civil Code.

The existence of obligation law in civil law system means that contracts which created obligation legal relation should be elaborated. Nieuwenhuis divided the form of contracts as the following:<sup>16</sup>

1. *Obligatoir* contract, which is the form of contract which creates obligation. With *obligatoir* contract, the parties create themselves according to their own choice one or more obligation;
2. Property contract (*zakwlijke ov.*), contract where the parties state, lend, or change property rights;
3. Conduct of marriage as part of family law contract (*familierechtelijke ov.*);
4. Proof contract (*bewijsov*), where the parties determine how certain facts among them are proven.

From the elaboration by Nieuwenhuis about the types of contract, it could be concluded that condotel management contract is a form of *obligatoir* contract. The contract creates legal relationship based on obligation law where the parties in the contract have the obligation to conduct certain performance to fulfill the obligation based on the contract. These obligation is what will determine the form of the contract based on the known nominate contract that exist.

Condotel management contract because of legal relationship that it created produces an obligational relationship therefore it can be considered as *obligatoir*

<sup>14</sup> Subekti, *Hukum Perjanjian* (Intermasa 2014).[1].

<sup>15</sup> Bryan A Garner, *Black’s Law Dictionary* (10th ed, Thompson Reuters 2014).[1242].

<sup>16</sup> J.H. Nieuwenhuis, *Pokok-Pokok Hukum Perikatan* (translated by Djasadin Saragih), Universitas Airlangga 1985).[1].

relation.<sup>17</sup> The obligation relationship of condotel management contract is created on the basis that it gives the right and power to the condotel management to conduct certain acts which benefits the condotel owners. The elements which are present in the condotel management contract fulfills the elements of power of attorney based on Article 1792 of Indonesian Civil Code. Article 1792 of Indonesian Civil Code defines power of attorney as “...*perjanjian dimana suatu pihak memberi kekuasaan kepada pihak lain yang menerimanya, dan bertindak atas namanya untuk melakukan suatu urusan (zaak).*” The essential elements of power of attorney is that a principal provides authority to another party to conduct an affair (*zaak*) on behalf of the principal.

**Tabel 1.**

Table on the Differences Between Condotel Management Contract and Power of Attorney Contract

	Condotel Management Contract	Power of Attorney Contract
Form	Innominate contract	Nominate contract
Parties	Based on the contract of both parties (reciprocal contract)	Agency contract is an unilateral contract, where the principal give the power to the agent unilaterally
Object of the contract	Specific to: <ul style="list-style-type: none"> <li>- receive reservation</li> <li>- conduct marketing</li> <li>- manage any repair and maintenance of the <i>condotel</i></li> </ul>	Specific or general affair
Payment or cost	In the form of commission or profit sharing policy	Without any payment or with commission
Term	Limited to the time limit of the rights of land where the <i>condotel</i> was built	Not regulated
Discharge of contract	Using irrevocable contract	Can be discharged unilaterally by the principal or if the agent or the principal die or bankrupt

The condotel owner acts as the principal of the condotel management contract, where the condotel owner gives the right to the condotel management to rent the room to another party and to manage and change the appearance of the condotel. The obligation which is given by the condotel owner to the condotel management

<sup>17</sup> Subekti. (n 14).*Loc Cit.*

is the affairs which is mentioned by the definition of power of attorney based on Article 1792 of Indonesian Civil Code. However, condotel management contract is not solely based on power of attorney. Since there are elements from condotel management contract that is not fully adopted from power of attorney contract based on Article 1792 of Indonesian Civil Code, there are specific characteristics of condotel management contract which because it is based on innominate contract. Differences between condotel management contract and power of attorney contract can be shown on the table 1.

After knowing the form of the contract which condotel management contract is based on, the next important aspect to determine in a contract is the validity of the contract. As stated previously, even though condotel management contract is an innominate contract, it still follows the basic principle of contract law as stated on book III of Indonesian Civil Code. Therefore, to determine the validity of condotel management contract, it should fulfill the regulation on validity of contract as stated under Article 1320 of Indonesian Civil Code. If it is proven not meeting the validity requirements, the parties may apply for the annulment of the contracts.<sup>18</sup>

The validity of contract is regulated under Indonesian Civil Code and apply to all contracts whether nominate or innominate. It is based on article 1314 of Indonesian Civil Code which gives legal basis for the validity of contract to apply in all contracts, even for innominate contracts such as condotel management contract. Article 1320 states the four requirements of validity of contract, which are:

1. meeting of minds;
2. capacity to make a contract;
3. certain object; and
4. cause which is permitted.

In order for a contract to be valid, it must meet all four of the requirements of validity of contract as stated under Article 1320 of Indonesian Civil Code. The first requirement of validity of contract is about meeting of minds. Meeting of minds

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<sup>18</sup> Erni Agustin and Faizal Kurniawan, 'Consumer Protection in Electronic Contracts: The Case of Indonesia' (2017) 2 Journal of Nusantara Studies <<https://journal.unisza.edu.my/jonus/index.php/jonus/article/view/84/114>>.[162].

based on Article 1320 of Indonesian Civil Code is defined as “*de toesteming can degenen die zich verbinden*”<sup>19</sup> meaning that meeting of mind can be achieved when the party has given permission to enter into a contractual relationship with the other party. Meeting of minds can only be achieved when there are offer and acceptance from the parties of the contract.

The main point of meeting of mind is the statement of will by the parties of the contract. The statement of will does not only shown from mere words, but also the action which shows an act of offer and acceptance.<sup>20</sup> When a party such as the parties in condotel management contract want to bound themselves in a contract, the need to provide real action in order to show intent of an offer or acceptance. The most basic way to show an act of offer and acceptance is to provide terms and conditions about the rights and obligation that will have to be fulfilled by the parties.<sup>21</sup> In condotel management contract this act of offer and acceptance can be seen from the rights and obligation offered before the signing of the contract and from the transfer of ownership right from the developer to the condotel owner. Any deviation from the meeting of mind will cause defect of will. Defect of will such as duress, fraud, mistake and abuse of circumstances or undue influence will cause the contract to have no legal binding power towards the parties and the contract itself will be voidable.<sup>22</sup>

The next requirement of the validity of contract according to Article 1320 of Indonesian Civil Code is concerning the capacity of the parties. Capacity is important because it also determines the parties who are bound by the contract. Basically, the capacity of a person is regulated under Article 1330 of Indonesian

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<sup>19</sup> Agus Yudha Hermoko, *Hukum Perjanjian Asas Proporsionalitas Dalam Kontrak Komersial* (Kencana 2010).[158]. Cited from Engelbecht, *De Wetboeken, Wetten En Verodeningen, Benevens de Grondwet van de Republiek Indonesie* (Ichtiar Baru-Van Hoeve 1992).[325-326].

<sup>20</sup> J.H. Nieuwenhuis, *Pokok-Pokok Hukum Perikatan* (translated by Djasadin Saragih ed, 1985).[2].

<sup>21</sup> Brian A. Blum, *Contracts: Example & Explanations* (4th ed, Aspen Publishers 2007).[58].

<sup>22</sup> Henry P. Panggabean, *Penyalahgunaan Keadaan (Misbruik van Omstandigheden) Sebagai Alasan (Baru) Untuk Pembatalan Perjanjian (Berbagai Perkembangan Hukum Di Belanda)* (Liberty 2001).[42]. Cited from Van Dunne, *Diktat Kursus Hukum Perikatan* (translated by Sudikno Mertokusumo ed, 1987).[9].

Civil Code, which stated people who does not have capacity to conduct legal action are: a) minors; b) people under guardianship; and c) women. The regulation as stated under article 1330 of Indonesian Civil Code regulate about the type of people who are not capable to conduct legal action. However, as the change of time, there are some changes towards the regulation concerning the capacity of the parties as stated in Article 1330 of Indonesian Civil Code. First is the age of minor does not follow the determination of minor according to Article 330 of Indonesian Civil Code but had been changed according to Law No. 1 Year 1974 on Marriages, Law No. 30 year 2004 as amended to Law No. 2 Year 2014 on Public Notary Profession, Agrarian and Spatial Planning Minister/Head of National Land Agency Circular No. 4/SE/I/2015 as well as Supreme Court Circular (SEMA) No. 7 Year 2012. Changes also come from the change that women are now able to conduct legal research as equals to their male counterpart according to Supreme Court Circular No. 3/1963.

Aside from those deemed incapable to conduct legal act as stated under Article 1330 of Indonesian Civil Code, capacity also meant the legal capacity of the parties of the contract to conclude a contract. In condotel management contract, there are two main parties who are bound in legal relationship according to the contract. The parties are the condotel unit owners and the condotel management. Condotel unit owners are the owners of each separate units of the condotel who have right of ownership of the condotel unit (SHMSRS). The other party of the contract is the condotel manager. Each party should follow the laws and regulation to be capable to bind themselves in a contract.

To be an owner of the condotel unit, the owner should be able to be a subject of holder of right over land based on UUPA. Because condotel is a form of flat, therefore based on Article 17 of Law on Apartment there can only be three types of right over land that a condotel may be built, which is: a) Right of Ownership; b) Building Rights Title or Right of Usage over state's land; and c) Building Rights Title or Right of Usage over Land Management Right. To be the owner of a condotel unit, the party of the contract must be able to own this type of land before being able to have ownership over a condotel unit by SHMSRS. The condotel unit owner will

act as the principal in a condotel management contract, because the condotel owner gives the condotel management the right to manage and to accept reservation from third parties. In return, the condotel management will act as the agent who in doing its responsibility, act on behalf of the principal which is the condotel owner.

Likewise, a condotel management should follow the laws and regulation concerning the status of a condotel management. Based on Article 54 paragraph (1) of Law on Apartments, a management shall be in the form of a legal entity which have been given permission by the local government (governor or mayor). As a legal entity, therefore the parties who will sign the condotel management and act on behalf of the legal entity shall comply with the laws regarding the capacity of the legal entity itself. Condotel management which is in the form of limited liability company should be represented by the director as stated under Law No. 40 Year 2007 on Limited Liability Company, and also does other legal entity such as cooperative, foundation, and other legal entity which is recognized by Indonesian Law.

The next requirement of Article 1320 of Indonesian Civil Code is about certain object. Since condotel management contract is a form of agency contract, therefore the certain object of the contract will be the affair (*zaak*) as stated under Article 1792 of Indonesian Civil Code. The affair mentioned in condotel management contract refers to the obligation of the agent based on the power which is given to the condotel management by the condotel owner based on the condotel management contract. These obligation of the condotel management include the obligation of management, obligation for the maintenance and repair of the condotel building, and obligation to provide the rights of profit sharing to the condotel owner.

Based on the obligation which is included as the affair of the condotel management contract, the main obligation for the condotel management is to manage the condotel. To determine the scope of the affairs of the condotel management contract is based on Article 1338 of Indonesian Civil Code on freedom of contract. Based on the freedom of contract, the parties can determine by themselves what is included in the obligation of condotel management should include. However, the main elements that should be

agreed upon in the obligation of condotel management include:<sup>23</sup>

- a. Take reservations;
- b. Conduct marketing;
- c. Arranges the maintenance, repair, and replacement of the hotel and its furniture, fixtures and equipment, which expenses should be approved and paid for by the condotel owners.

Concerning the obligation of the condotel management to arrange repairs, maintenance and replacement of the condotel building and its facilities are the essential elements of the performance that should be fulfilled by the condotel management. The condotel owners will never know the facilities or building which needs repair and maintenance because the condotel owners are not residing in the condotel itself. Only the condotel management who knows what facilities needs to be repaired and maintained because the condotel building is managed by the condotel management itself. However, the act of the condotel management either to manage the condotel or conduct repairs and maintenance is limited to *dader van beheren* which means that the condotel management only act daily activities to manage the condotel. The obligation of *dader van beschikking* which include the ownership of the asset is not purely the action of the condotel management but also needs approval by the condotel owners.<sup>24</sup>

In return for the obligations which are conducted by the condotel management, the condotel management is entitled to payment from the profit gained from the condotel services. Payment in condotel management contract is different from either agency contract and rent contract, because in condotel management contract the condotel management gain and manage the profit earned from their conduct. In agency contract, because the agent act on behalf of the principal, therefore the principal shall get all benefits from the action which are conducted by the agent. In condotel management contract, the condotel owners are entitled to shared profit determined by return on investment (ROI). These difference of payment methods

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<sup>23</sup> Stuart M. Saft, 'Structuring Condominium Hotels' [2013] New York Law Journal <<https://www.hklaw.com/files/Uploads/Documents/Articles/Saft031113.pdf>>.[2].

<sup>24</sup> Rudhi Prasetya, *Teori Dan Praktik Perseroan Terbatas* (Sinar Grafika 2013).[20].



to the principal or condotel owners proved that condotel management contract is not a pure agency contract, but included specificity as an innominate contract. Profit sharing in condotel management contract exist because in United States, condotel management contract is also considered as investment contract. Based on the case of Securities and Exchange Commission v. W.J. Howey Co. United States Supreme Court has stated that profit sharing in condotel management contract is included as investment contract.<sup>25</sup>

The fourth requirement of Article 1320 of Indonesian Civil Code is permitted cause. Causes in a contract is important to determine that all clauses in a contract, even though protected by the basic principle of freedom of contract, but it is also limited to laws and regulations as well as public policy. The first two of the requirements of Article 1320 of Indonesian Civil Code is considered as subjective requirements because it is based on the subject of the contract. When a subjective requirement is not fulfilled, the consequences is the contract will be voidable. Otherwise, if the third or fourth requirement of Article 1320 of Indonesian Civil Code is not fulfilled, then the consequences will be the contract will be null and void. It should be differentiated between voidable and null and void. Voidable means that the contract will still be valid if there are no effort to claim to the court of voiding the contract. In null and void, the contract is deemed to never has existed and the parties will give back what is owed as if the contract has never been made.

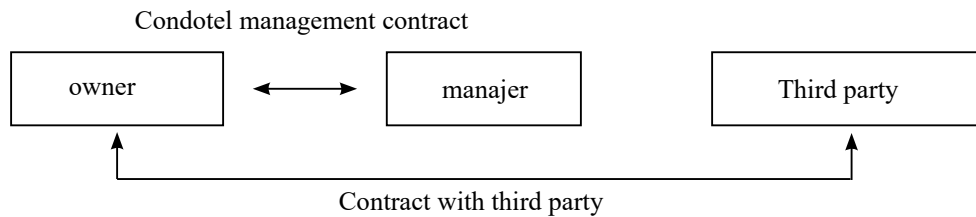
Condotel management contract which have fulfilled the requirement of validity of contract will create legal relationship within the parties of the contract. Legal relationship created by the condotel management contract is similar to legal relationship created by agency contract. Because condotel management act on behalf of the condotel owners, the management act as the agent and the condotel owners act as the principals. There are two legal relationship which will be created in the practice of condotel management contract, which is the relationship between the condotel

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<sup>25</sup> Andrew A. Lance and David C. Lee, 'Condominium Hotels and Securities Laws' [2006] New York Law Journal <<http://www.gibsondunn.com/fstore/pubs/Lance - Trends in Real Estate - NYLJ - 11-27-06.pdf>>.[1].

owner and the condotel management based on the condotel management contract itself and relationship between the condotel owner and third parties who made legal action with the condotel management, including tenants of the condotel. The legal relationship of condotel management contract can be seen in the diagram below.

**Diagram 1.** Legal Relationship on Condotel Management Contract:



Based on the legal relationship as shown previously, therefore liability based on condotel management contract is solely between the owner and the condotel management. When the parties of the condotel management does not fulfill their obligation as stipulated under the contract, therefore they can be considered have done breach of contract. Breach of contract according to Indonesian Civil Code is failing to fulfill the performance which is agreed upon as stated under Article 1234 of Indonesian Civil Code. Towards breach of contract, Article 1267 of Indonesian Civil Code give the option to demand compensation to the court on the basis of breach. Compensation in Article 1267 of Indonesian Civil Code can be demanded with the fulfillment of the contract or the discharge of the contract. However, a demand to discharge of contract will cause problems in condotel business relationships.

Basically, in a condotel business, all of the owners of a building have to agree that the building will be used for the purpose of a condotel, thus all of the condotel unit owners will give power through condotel management contract to the condotel management. In creating so, condotel management contract uses irrevocable power of attorney, which ignores the discharge of agency contract as regulated under Article 1813 and 1814 of Indonesian Civil Code. Thus, the condotel owners cannot annul the contract unilaterally and the death or bankruptcy of a party will not discharge the contract. The contract will be discharge when there is a contract between both parties to discharge the contract. The reason why there is a need for irrevocable power of attorney in a condotel management contract is because the

clause aims to protect any third party from damages which will be caused from a discharge or contract. Third parties include the tenants who are reserving the room and other owners in the same condotel building. If the condotel owner can discharge the contract unilaterally, therefore the other owners will gain a decrease in income because there are unit of the condotel which are not used effectively as a hotel, thus reducing the profit gained by the condotel business.

Because of the clause on irrevocable power of attorney it is impossible to demand a discharge of contract based on Article 1267 of Indonesian Civil Code, and also the result is that Article 1266 of Indonesian Civil Code will also be ignored. The only way to demand a discharge of contract to the court is by claiming a class action against the condotel management. Class action can be invoked when the owners found that the action of the condotel management is unbeneficial towards all of the condotel owners. The claim can be submitted by Association of Owners and Residents of Flats (Apartments) as the representation of all condotel unit owners based on Law on Apartments.

The claim can be accepted by the court if only all of the condotel unit owners have gain their right of ownership over the building. The status of owner in condotel management contract is important to determine the legal standing in court. If the condotel owners have not gain their right based on Right of Ownership over the Apartment Unit, therefore the owners can be disqualified from the trial proceeding by *gemis aanhoedanigheid* or disqualification exception which means that the one who claim into court is not the rightful person.<sup>26</sup> The ownership over a condotel unit can be obtained after the owner have signed deed of sale and purchase in front of a Land Deed Official (PPAT) based on Article 44 paragraph (1) Law on Apartments. Before conducting a sale and purchase contract, the developer of a condotel also usually conducts a pre-project selling scheme. However, the developer shall comply to the requirements stipulated in Article 42 and 43 of the Law on Apartments before conducting sale and purchase contract, especially if they apply pre-project selling,

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<sup>26</sup> M. Yahya Harahap, *Hukum Acara Perdata: Gugatan, Persidangan, Penyitaan, Pembuktian, Dan Putusan Pengadilan* (Sinar Grafika 2014).[438].

otherwise the contract shall be null and void. Since the requirements in those articles are the cause of the contract, when the parties apply pre-project selling scheme.<sup>27</sup>

### **Conclusion**

That the condotel management contract is a form of innominate contract which uses elements of power of attorney contract, rent contract and investment contract. The specificity of a condotel management contract is shown in the rights and obligation of the contract which included the obligation to manage the condotel as well as doing maintenance. The contract also includes profit sharing as a part of investment contract which is implemented in condotel management contract as well as the clause on irrevocable power of attorney which protects the interest of third parties. Legal effort that could be done in case of damages must be based on the legal relationship that is created in condotel management contract. The principle of privity of contract apply between the parties of the contract based on the condotel management contract, but the third party may also create legal relationship based on the power of attorney contract legal relationship. Because of the irrevocable contract clause, therefore the discharge of contract cannot be claimed directly by the claimant, but through class action demanded by all of the unit owners.

There is a need for a certain regulation which applies nationally about condotel including its contracts. The regulation shall specify the status of ownership of the condotel as well as the specificity of the condotel management contract which includes the rights and obligation of the parties, the discharge of contract, as well as the protection of third parties in condotel management contract. That the owners of condotel units who want to bind themselves in condotel management contract must first be the owners of the unit based on Law on Apartments. Which means that the owners must first signed Sale and Purchase Deed in order to gain legal certainty over the rights of ownership of the condotel units.

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<sup>27</sup> Lintang Yudhantaka, 'Keabsahan Kontrak Jual Beli Rumah Susun Dengan Sistem Pre-Project Selling' (2017) 32 *Yuridika* <[https://e-journal.unair.ac.id/YDK/article/view/4793/pdf\\_1](https://e-journal.unair.ac.id/YDK/article/view/4793/pdf_1)>. [101].

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