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The Urgency of Amending Article 251 Of the KUHD Related to the Principle of the Utmost Good Faith in Insurance Agreements

(Critical Note on the Decision of the Constitutional Court Case Number 83/PUU-XXII/2024)

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Abstract

This paper critically examines the Constitutional Court Decision Number 83/PUU-XXII/2024, which reviews the constitutionality of Article 251 of the Indonesian Commercial Code (KUHD) concerning the principle of utmost good faith in insurance contracts. The article stipulates that coverage becomes void if the insured conceals any facts, even if done in good faith. The urgency of this writing lies in the necessity to interpret Article 251 of the KUHD systematically and teleologically, particularly within the context of legal protection for both insurers and insured parties. This research employs a normative juridical approach with a prescriptive analysis of legal norms and the implications of the Court's decision. The findings indicate that the phrase "renders the insurance void" in Article 251 of the KUHD should not be construed as void by law (nietig van rechtswege) but rather voidable (vernietigbaar), as it concerns the subjective element of mutual consent. The Court's decision has significant implications for restructuring insurance contract norms to ensure fair and proportional protection for all parties involved.

***Keywords**: insurance contract, utmost good faith, constitutional review, Article 251 of the KUHD.*

A. INTRODUCTION

This paper aims to conduct a critical review of the Constitutional Court Decision Number 83/PUU-XXII/2024 related to "*Judicial Review of Article 251 of the*

Commercial Code (KUHD) against the 1945 Constitution of the Republic of Indonesia (UUD NRI)". The results of this review are expected to stimulate discussions, debates, and scientific discourse that are objective, concise, and constructive, transcending beyond building narrative-descriptive diction to provide answers to the problem.

A legal product, particularly a Constitutional Court decision, guarantees justice and certainty for all parties seeking justice. Wisdom in capturing legal problems and providing the best solution is an elegant step, representing the quality of scientific reasoning and the wisdom of people instructed under a mandate, especially for legal decisions laden with complexity.

For academics, criticizing a legal product, especially in scientific forums or publications, serves as a means to advance their work. The dynamic, actual, and prospective development of legal science always reaches into the future. An academic study to analyze and critique the Constitutional Court Decision from an academic-scientific perspective is urgent and crucial, considering that the decision has the potential to cause legal problems in its implementation, despite being final and binding.

Observing the substantive core of the verdict, judges declared the following statement: "2. *the norms of Article 251 of the Commercial Code (Staatsblad 1847 Number 23) are contrary to the 1945 Constitution of the Republic of Indonesia and have no binding legal force conditionally to the extent that they are not interpreted as "including those relating to the cancellation of coverage must be based on the agreement of the insurer and the insured or based on a court decision.*" Every new legal product, especially the decision of the Constitutional

Court, always attracts jurists and legal scholars. Some have delved further into and criticized this issue from various facets and perspectives of disciplines, branches, and even the *mazhab* of legal science that correlate with the final result of building legal arguments. This study, therefore, departs from the perspective of contract law, particularly from the tiered discipline of legal science, encompassing legal philosophy, legal theory, legal dogmatics, and legal application.

Realizing the complexity of the problems around the insurance business with practical-empirical dynamics in the community and the implications of the Constitutional Court Decision No. 83/PUU-XXII/2024, this paper is limited to examining the following aspects:

- The meaning and operation of "The Utmost Good Faith" in Article 251 of the KUHD;
- The meaning and action of "*Cancel*" in the phrase "*...renders the insurance void*" in the provisions of Article 251 of the KUHD.

B. RESULTS AND DISCUSSION

The meaning and applicability of Article 251 of the KUHD from the perspective of contract law

Insurance agreements are basically inseparable from the arrangement of agreements in general, as stipulated in Book III of the BW, although they are in accordance with the provisions of Book III of the BW. The specificity of the insurance agreement is also more specifically regulated in the KUHD.

Article 1313 of the BW provides a formulation of "contract or agreement": "*An agreement is an act by which one or more persons bind* *themselves to one or more other persons*." The causal-functional relationship between contracts gives birth to obligations, where obligatory agreements (which create obligations) are the main means for parties to independently regulate the legal relations between them.

The meaning of "agreement" as a legal act gives birth to "engagement" as a legal relationship in the field of property between two people (or more), where one party (debtor) is obliged to perform what is written in a contract, while the other party (creditor) is entitled to that performed contract." This has consequences for the validity and binding force of the agreement on the parties (legal consequences - liability).

When connected with the meaning and relationship between agreements and obligations, insurance is an agreement (legal act) that raises an obligation (legal relationship). This is contextual to the provisions of Article 246 of the KUHD (Hartono 1995):

"*Insurance or coverage is an agreement by which an insurer binds himself to an insured by receiving a premium, to provide compensation to him because of a loss, damage, or loss of expected profits, which he might suffer due to an unspecified event*."

Moving on from the formulation of Article 246 of the KUHD, the elements of the insurance agreement involve the following:

- reciprocal nature of the agreement;
- a conditional agreement;
- a premium;
- interests;

- compensation; and
- uncertain events.

The above elements are cumulative to be qualified as an insurance agreement. Likewise, if examined more carefully, based on the formulation of Article 246 of the KUHD, the principles in the insurance agreement include the principle of *insurable interest*, the principle of *indemnity*, the principle of *utmost good faith, the* principle of *unpredictable future risk,* and the principle of *subrogation.*

Testing the validity of the insurance agreement basically requires a set of legal rules:

a. The validity of the contract - in Article 1320 of the BW,
b. The principles of Contract Law:
    - The principle of *freedom of contract* - Article 1338 (1) of the BW
    - The principle of *consensualism* – Article 1320, condition 1 of the BW
    - The principle *of privity of contract* - Articles 1340 jis. 1315, 1338 (1) of the BW
    - The principle of *pacta sunt servanda* - Article 1338 (1) of the BW
    - The principle of *good faith* - Article 1338 (3) of the BW
c. Special Principles and conditions related to insurance agreements contained in the KUHD consist of, among others:
    - The principle of Interest (*insurable interest*) - Article 250 of the KUHD
    - The principle of *indemnity* - Article 252 *jo.* 253 of the KUHD
    - The principle of *utmost good faith* - Article 251 of the KUHD
    - The principle of *unpredictable future risk* - Article 246 of the KUHD

- *Subrogation* Principle - Article 284 of the KUHD

The special principles mentioned above are the consequences arising from the insurance agreement.

Testing the validity of insurance agreements in principle can be performed by using the reviewing instrument of Article 1320 of the BW. The following four conditions must be met for the validity of a contract:

1. **Agreement made by those who bind themselves (*de toestemming van degenen die zich verbinden*)**;

   "Agreement means that the parties mutually express their respective wills to conclude that an agreement or the statement of one party "matches" or corresponds to the statement of the other party. This agreement is formed by two elements, namely the elements of offer and acceptance"(Hernoko 2019).

2. **Capacity to enter into an agreement (*de bekwaamheid om eene verbintenis aan te gaan*)**;

   "The capacity (bekwaamheid - capacity) referred to in Article 1320 of the BW condition 2 is the capacity to perform legal acts. Capacity to perform legal acts is defined as the possibility to perform legal acts independently that bind oneself without being able to be contested"(Hernoko 2019).

3. **A certain thing (*een bepaald onderwerp*);**

   "As for what is meant by a certain thing or object (een bepaald onderwerp) in Article 1320 of the BW condition 3, is the achievement that is the subject of the contract/agreement concerned. This is to ensure the nature and extent of the statements that become the obligations of the parties.

Statements that cannot determine the nature and extent of the parties' obligations are not binding (null and void)"(Hernoko 2019).

4. **A lawful or permissible cause (*eene geoorloofde oorzaak*).**

"The notion of causa or cause (oorzaak) as referred to in Article 1320 of the BW, condition 4, must be connected in the context of Articles 1335 and 1337 of the BW. Although the law does not provide an explanation of what is meant by cause or causa, this term refers to the existence of a relationship of purpose (causa finalis), regarding the purpose of the parties to close the contract/agreement or the intention of the parties to achieve at the time of closing the contract/agreement"(Hernoko 2019).

In connection with those four conditions set out in Article 1320 of the BW, further explanation regarding the consequences of failing to fulfill each of these conditions is given in the following:

- First, the terms of agreement and capability are subjective elements because they relate to the person or subject with whom the agreement is made.
- Second, the requirements of a specific object and a permissible cause are objective elements.

An agreement that does not fulfill subjective and objective legal requirements as stipulated in Article 1320 the BW will have the following consequences (Niewenhuis 1985):

i. Non-existence; if there is no agreement, then no agreement arises.
ii. *Vernietigbaar* or "can be canceled"; if the agreement is born due to a defect of will (*wilsgebreke*) or due to incompetence (*onbekwaamheid*) (Article 1320 of the BW conditions 1 and 2), this matter is related to the subjective

element, resulting in the agreement being cancelable.

iii. *Nietig van rechts wege* or null and void; if there is an agreement that does not meet the requirements of a specific object or does not have a causa or the cause is not allowed (requirements of Article 1320 of the BW conditions 3 and 4), this matter is related to the subjective element, resulting in the agreement being null and void.

Article 251 of the KUHD as the Basis of Agreement in Insurance Agreement

This study emphasizes the crucial point of the emergence of an insurance agreement, its legal consequences for the parties, and the consequences of a defect of will. An insurance agreement has unique characteristics when compared to other types of agreements. One of these specificities is stipulated in Article 251 of the KUHD:

"*Any false or untrue notice, or any concealment of circumstances known to the insured, even if made in good faith, of such a nature that the contract would not have been entered into, or would not have been entered into on the same terms, had the insurer known the true state of affairs, this situation renders the insurance void*."

The ratio legis of Article 251 of the KUHD is inseparable from the consideration of protection for the insurer, enabling it to provide compensation to the insured in the event of an unexpected occurrence, which becomes the object/interest in the insurance agreement. Article 251 of the KUHD gives special emphasis on the obligations that apply to the insured:

i. The insured must notify/inform/convey everything related to themselves, conditions, or interests that are the basis for the birth of an agreement **honestly**

and truthfully (*the utmost good faith*) - *An obligation to act honestly and truthfully applies*;

ii. The honesty and truthfulness of the notice/information **is highly desirable and therefore very decisive** for the insurer to accept or not accept the offer of coverage (insurance) submitted by the insured (*a very decisive prerequisite for the birth of an agreement applies)*;

iii. Even if it is done in good faith, because of its nature, the honesty and truthfulness of the notice/information has a very decisive nature for the insurer and, therefore, is agreed so that the insurance agreement is born (*a causality relationship between the notice/information and the insurance agreement applies);*

iv. If there is no honesty and truthfulness in the notice/information, and if the insurer knows the circumstances that the agreement would not have been made, or would not have been made on the same terms (*a causal relationship between the notice/information-agreement-insurance agreement applies);*

v. As a legal result of not fulfilling the requirements of honesty and truthfulness of the notification/information, the insurance agreement is canceled. The legal effect of ***nullity*** **is not *null* and void (*nietig van rechtswege*),** but rather means **"can be canceled" (*vernietigbaar*)**. The meaning of **"can be canceled" (*vernietigbaar*)** in the formulation of Article 251 of the KUHD is related to the requirements for the formation of the will - an agreement which is a subjective element (Article 1320, condition 1 of the BW) (*a legal effect of "can be canceled" (vernietigbaar) applies - a subjective element)*.

According to the legislator, the regulation of the validity of the agreement as stipulated in Article 1320 of the BW, including the cancelability of the agreement if there is a defect of will (see Article 1321 of the BW - subjective element), is still considered insufficient to protect the parties in the insurance agreement, especially to the insurer. Therefore, the regulation of the substance of Article 251 of the KUHD serves as a "*starting point*" to identify several matters. However, the essence of the protection itself remains focused on the interests of the parties, i.e., the insured and the insurer, through the proportional exchange of interests between them.

Regarding the formulation of Article 251 of the KUHD associated with the provisions of Article 1320 of the BW, condition 1 concerning agreement, it is necessary to note the following matters:

i. **The formulation of contractual relationships**

   This formulation generally begins with a negotiation process between the parties. Negotiation is an inherent part of their rhythm and performance, involving parties **reaching an agreement to** exchange something through a bargaining process on matters that arise in the actual situation, including disagreements and conflicts that potentially develop. Similarly, in the insurance agreement agreed upon by the parties, there is an exchange of interests that underlies its existence: the nature of this exchange is based on the doctrine of contract fairness (Hernoko 2021).

ii. **Article 251 of the KUHD relates to the provisions of Article 1320 of the BW, condition 1 - Agreement**

An agreement, as one of the conditions for the validity of a contract, implying that the parties mutually express their respective wills to conclude an agreement or the statement of one party, matches or corresponds to the statement of the other party (thought-matching);

iii. **An agreement formed by the elements of offer and acceptance**

An offer (*aanbod; offerte; offer*) is defined as a statement of will containing a proposal to enter into a legally binding agreement. This proposal includes the essential agreement to be concluded. Whereas, *acceptance* (*aanvarding; acceptatie; acceptance*) is a statement of agreement from the other party offered.

iv. **The expression of will as the basis of contractual engagement**

A contractual engagement is distinguished based on two elements—the will and the statement. Will and statement (*wils en verklaring*) are vital in an agreement. In a normal situation, the will and the statement are mutually compatible; however, this does not rule out the possibility that a discrepancy may arise between the will and the statement.

The Meaning of Utmost Good Faith in Article 251 of the KUHD Associated with the Pre-Contractual Phase

When referring to the formulation of Article 251 of the KUHD, which is framed by other articles within the framework of a contract law system (see Articles 1320, 1338 (3), and 1339 of the BW), the insurance agreement must also take into account other legal signs. In other words, the parties in making an insurance agreement need to pay attention to the following matters (Hernoko 2021):

- The parties must fulfill the conditions for the validity of the agreement;
- To achieve the parties' objectives, the agreement must have a cause;
- The agreement does not contain a false or prohibited cause;
- The agreement must not violate propriety, custom, decency, and public order;
- The agreement must be performed in good faith.

The Utmost Good Faith in the formulation of Article 251 of the KUHD is explicitly addressed and related to the Pre-Contractual Phase, in which the formation of an agreement (offer >< acceptance) must be based on the good faith of the parties, i.e., with the emphasis on the insured. As explained earlier, the insured has an obligation to disclose matters related to themselves, their conditions, or interests that form the basis of the agreement **honestly and accurately.** The insured is the one who knows best about everything related to themselves, their condition, or their interests. On the basis of honest and true information from the insured, the principle of indemnity arises to anticipate the risk of loss of interest suffered by the insured. The assessment of the amount of *indemnity* is highly dependent on honest and accurate information, ensuring that the principle of balance and proportionality between the premium paid by the insured and the indemnity cover provided by the insurer is maintained.

The transfer of risk of loss from the insured to the insurer basically puts the burden that must be borne by the insurer in proportion to the premium paid and the interests covered if the event occurs, which was not foreseen. Therefore, it is prohibited, unfair (improper and inappropriate), and not in good faith if, on the basis of dishonest and incorrect information, a person obtains wealth exceeding the risks arising in the future. This conduct constitutes a form of "*unjust enrichment*" (*ongerechtvaardigde verrijking*), which is qualified as an unlawful act. Thus, the inclusion of the obligation to act in *utmost good faith* in Article 251 of the KUHD refers to an effort of prevention at the beginning of the formation of the parties' will (pre-contractual phase) and to maintain the process of exchanging the rights and obligations of the parties fairly.

Of course, the obligation to act in good faith in an insurance agreement, as referred to in Article 251 of the KUHD, ***'is not solely imposed on the insured, but also on the insurer'***. Every reciprocal agreement, in this case, an insurance agreement, imposes proportional rights and obligations on the parties. Thus, when the insured is burdened with the obligation to act in good faith, the insurer is also burdened with the same obligation in carrying out its business and is prohibited from harming other parties (the insured). This notion is in line with the view of Gleeson CJ and Crennan J stating, "*That utmost good faith "may require an insurer to act with due regard to the legitimate interests of an insured, as well as to its own interests" and "may require an insurer to act, consistently with commercial standards of decency and fairness, with due regard to the interests of the insured*". On the basis of the principle of *utmost good faith, the* insurer is also obliged to consider the interests of the insured in accordance with standards of service, decency, and fairness.

The Meaning of Good Faith in Article 1338 (3) of the BW basically Associated with All Phases of the Contract.

The principle of utmost good faith, as outlined in Article 251 of the KUHD, is related to Articles 1320, 1321, 1323, 1328, and 1338 of the BW. Good faith in Article 1338 paragraph (3) of the BW means, '*the agreement must be implemented properly'*. Good faith must not only exist at the time of executing the agreement, but also at the time of making or signing it.

Article 1338(3) of the BW states, "*Agreements must be performed in good faith*." However, no firm and clear definition is provided to clearly define good *faith* (*te goeder trouw; good faith*). Article 1338 (3) of the BW stipulates that agreements must be executed in good faith (*contractus bonafidei* - a contract based on good faith), meaning that the agreement is carried out in accordance with decency and justice. **P.L. Werry** translates "*redelijkheid en billijkheid*" with the terms "virtue and propriety." Some use the term "reasonableness and fairness" or "propriety and justice" (Subekti 1982). According to **J.M. van Dunne** (Dunne 1993)**,** the power to apply good *faith* (*goede trouw; good faith*) covers the entire contract/agreement process, including three phases of the contract journey: (i) *pre-contractuele phase, (ii) contractuele phase, and (iii) post-contractuele phase.* Thus, good faith in Article 1338(3) of the BW has a dynamic nature, encompassing the entire contractual process that underlies the relationship between the parties, from the pre-contractual to the contractual and post-contractual stages.

The functioning power of Article 1338, paragraph (3) of the BW is generally connected with Article 1339 of the BW, stating "*An agreement is not* *only binding on what is expressly stipulated in it, but also everything that by its nature is required by justice, custom, or law*." (the justice referred to here is good faith). Meanwhile, the notion of good faith in Article 1338 (3) of the BW, which means carrying out the agreement in good faith, is dynamic. That is, in carrying out this act, a human being must hold the value of honesty. It is essential that humans, as social individuals, avoid harming others or using unreasonable language when both parties are involved in an agreement. Both parties should always be mindful of these matters and refrain from using the other party's negligence to their own advantage (Dunne 1993).

In connection with the function of good faith in Article 1338 (3) of the BW, according to several scholars, including **P.L. Werry, Arthur S. Hartkamp,** and **Marianne M.M. Tillem**, there are three main functions of good faith (Khairandy 2003):

i. The function that teaches that contracts/agreements must be interpreted in good faith (good faith as a general legal principle), meaning that contracts/agreements must be interpreted properly and fairly.
ii. The function of adding or completing (*aanvullende werking van de geode trouw*), meaning that good faith can add to the content or wording of the agreement if there are rights and obligations arising between the parties not expressly stated in the contract/agreement.
iii. Limiting or negating function (*beperkende en derogerende werking van de geode trouw*), meaning that this function can only be applied if there are very important reasons (*alleen in spreekende gevallen*).

In reality, good faith often overlaps with *reasonableness* and *equity* (*redelijkheid en billijkheid*). In good faith lies reasonableness, and in the notion of reasonableness lies good faith. Therefore, in court practice, good faith and propriety are understood as *complementary* principles.

Thus, there is an interrelationship between the meaning of good faith in Article 251 of the KUHD (The utmost good faith), which is a filter in the pre-contractual phase, and the meaning of good faith in Article 1338 (3) of the BW, which covers the entire contractual phase, in the pre-contractual, contractual, and post-contractual implementation. Good faith in Article 1338 (3) of the BW has check and balance functions in assessing the operation of good *faith* in insurance agreements, especially Article 251 of the KUHD (The utmost good faith).

III. The Meaning and Operability of Article 251 of the KUHD's Phrase "*...renders the insurance void*" and its Relationship with the Waiver of Article 1266 of the BW

The formulation of the phrase in Article 251 of the KUHD *"...,* ***renders the insurance void***" is further explained in this section. As previously mentioned, the word "***void***" in Article 251 of the KUHD is not and cannot be interpreted as ***null*** and **void by law (*nietig van rechtswege*),** but it refers to **"revocable" (*vernietigbaar*)**. The meaning of **"revocable" (*vernietigbaar*)** in the formulation of Article 251 of the KUHD is appropriate and suitable because it is related to the requirement for the formation of the will—an agreement serving as a subjective element (Article 1320, condition 1 of the BW). There is a causal relationship between the notification/information, agreement, and insurance agreement, and if this condition is not met, a lawsuit for cancellation (***vernietigbaar***) can be filed.

The Constitutional Court's Decision states that the norms of Article 251 of the KUHD petitioned by the Applicant are conditionally unconstitutional, "*The norms of Article 251 of the Commercial Code (Staatsblad 1847 Number 23) are contrary to the 1945 Constitution of the Republic of Indonesia and have no binding legal force conditionally to the extent that they are not interpreted, "**including those relating to the cancellation of coverage must be based on an agreement between the insurer and the insured based on a court decision**".* This issue is related to the substance of Article 1266 of the BW, regarding one of the insurance agreement clauses, including "***unilateral cancellation***".

The override of the 'Cancellation Condition' of Article 1266 of the BW in the Insurance Agreement Clause is prevalent in other business practices, whether in the form of standard contracts. This means that the inclusion of a "unilateral cancellation" clause appears to be a "*bestandig gebruik beding*" and, therefore, has immediate effect with unilateral interpretations that can develop into opinion bias. Unfortunately, it is often interpreted textually and grammatically from the perspective of the parties. As a result of 'perspectives, perceptions, and opinions' that are not accompanied by 'consistency, coherency, and logical sequency' legal arguments, the 'based on law and based on rule' argumentation eventually dies and falls into the biased and vague '*based on fact*'.

To provide a comprehensive understanding of the functioning power of the '*unilateral cancellation'* clause related to the Constitutional Court Decision above, it is necessary to fundamentally examine the provisions of Article 1266 of the BW before two fundamental questions can be asked:

(i) Is the use of the term 'void condition' in the translation of Article 1266 of the BW appropriate?

(ii) Is a waiver of Article 1266 of the BW possible?

The use of the term 'void condition' in Article 1266 of the BW as a translation of the term '*ontbindende voorwaarde*' does not seem appropriate. Articles 1265 and 1266 of the BW use the term '*ontbindende voorwaarde*', which means 'breaking condition'. While the substance of Article 1267 of the BW, stating ..., *of derzelver ontbinding te vorderen*, ..., is inaccurate when translated ..., *or demand the cancellation of the agreement* ... The correct and consistent term is ..., *or demand the termination of the agreement.* .... In addition, when viewed from a systematic perspective, Article 1266 of the BW is provided in Part V on Conditional Agreements (Articles 1253 - 1267 of the BW). The term *'void'* in Part V is more appropriate to translate the word '*nietig*' (see Articles 1254 and 1256 of the BW). The term '*ontbindende voorwaarde*' is more accurately translated *as 'breaking condition'*, with the following argumentation:

a. If it is consistent with the meaning of '*verbintenis*' or engagement, it means that with the fulfillment of the legal requirements of the agreement, it will give birth to an engagement that has binding power (*binden-binding*) for the parties;

   'Ontbinding' (derived from the word "*binden*" - to *bind*) means '*not binding'* or more accurately "*breaking - termination*", meaning breaking the binding force of the agreement that the parties have entered into. This

breaking of the bond is related to a breach of the performance of a contractual obligation agreement. Does it mean that if the engagement has been terminated, it loses its binding force?

b. The term '*cancellation*' is more relevant to be used in conjunction with *null* and *void* (*nietig van rechtswege)* and *revocable (vernietigbaar*), which are related to the process of the birth of the agreement (the phase of agreement formation), namely in the event of non-fulfillment of the legal requirements of the agreement;
c. The term '*termination*' is more appropriate when it relates to the execution of an agreement which, for some reason, must be terminated (the phase of execution of the agreement; default occurs);
d. The court has several times decided cases with the substance of waiving Article 1266 of the BW;
e. Therefore, the term '*void condition*' in the translation of Article 1266 of the BW should be read as '*breaking condition'*.

Two conflicting opinions arise:

- *First*, the opinion that Article 1266 of the BW is a *dwingend recht* that cannot be deviated from by the parties, and the opinion that Article 1266 of the BW is a *dwingend recht* that cannot be deviated from by the parties.
- *Second*, the opinion that Article 1266 of the BW is a complementary rule (*aanvullend recht*), so that it can be deviated from by the parties.

Opinions stating that Article 1266 of the BW is a compelling rule (*dwingend recht*)

This view stems from the formulation of Article 1266 of the BW, stating:

(1) The voidable condition is typically included in reciprocal agreements when one party fails to fulfill its obligations.

(2) In such cases, the agreement is not null and void, but the <u>annulment must be requested by the Court</u>. (underlined by the author)

(3) This request must also be made, even if a nullity condition regarding non-fulfillment of the obligation is stated in the agreement.

The formulation of Article 1266 of the BW determines three conditions for successful termination of the agreement:

- There must be mutual consent;
- For this reason, in general, before the creditor demands termination of the agreement, the debtor must be declared negligent (*statement of negligence, in mora stelling, ingebrekestelling*);
- The judge's verdict.

By emphasizing the formulation ... *termination must be requested to the Court ..., the* word 'must' in the provisions of Article 1266 of the BW is interpreted as a rule that is compelling (*dwingend recht*) and, therefore, cannot be deviated from by the parties through (clauses of) their agreement, unless the parties expressly choose dispute resolution through the Arbitration Institution, (see Article 3 *jo.* 11 of Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Resolution).

The judge's decision in this case is constitutive, meaning that the termination of the agreement is caused by the judge's decision, rather than declarative (the agreement breaks up because of default, while the judge's decision merely states that the agreement has been breached). The opinion stating that the judge's decision is constitutive is based on:

- Historical reasons: according to Article 1266 of the BW, the termination of an agreement occurs due to a judge's decision;
- Article 1266 paragraph 2 of the BW states unequivocally that default does not, by law, cancel the agreement.
- The judge is authorized to grant a *terme de grace* (*grace* period for the debtor to fulfill the performance to the creditor), and this means that the agreement has not been broken.
- It is still possible for creditors to demand fulfillment.

Opinion stating that Article 1266 of the BW **is a complementary rule (*aanvullend recht*)**

This opinion is based on the following arguments:

- Article 1266 of the BW, provided in the systematics of Book III with its characteristics "regulating – adding*"* (*regelend recht - aanvullend recht*);
- The parties may determine that the termination of the agreement does not require the assistance of a judge, provided that this must be positively stated in the agreement;
- The practice of drafting commercial agreements typically includes a waiver clause of Article 1266 of the BW (heteronomous factor), so that this is considered a 'commonly agreed condition' (*bestandig gebruikelijk beding*)

and is an autonomous factor agreed by the parties. Thus, the position of this clause is considered to have a functioning power that more firmly binds the parties than the functioning power of Article 1266 of the BW;

- The waiver of Article 1266 of the BW is also part of the efficiency of resolving cases that have the potential to accumulate in court. This can be observed empirically. The majority of civil cases in court are related to tort claims. If all default claims must be resolved in court, one can imagine the length of the chain of case settlement processes and, ultimately, it is contrary to access to justice and simple, fast, and low-cost principles.

Based on the two opinions that have developed regarding the waiver clause of Article 1266 of the BW, when linked to the interests of the parties, it appears that the second opinion is closer to its practical value (Article 1266 of the BW is deemed to regulate). It must be recognized that businesspeople prefer the best alternative for their agreements, including when they face obstacles in implementing the agreement. The waiver clause of Article 1266 of the BW is considered a shortcut that aligns with the efficient demands and legal certainty of business actors when obstacles arise to the implementation of the agreement, in this case, default. Thus, the functioning power of the waiver under Article 1266 of the BW is not related to the cancellation of the agreement in the sense of violating objective elements that render it *null* and void (*nietig van rechtswege*).

The waiver clause *of* Article 1266 of the BW should be accepted as part of the will and commitment of the parties in determining the burden of obligation in the implementation of the agreement (*sanctity of contract - pacta sunt servanda*). Therefore, enforcement of violations of the clause must be accepted as a proportional dispute resolution effort. This is also part of an effort to reduce the burden on the court in examining and adjudicating default cases, which often dominate civil disputes in court. Even in theory and practice, if certain parties object to the waiver of Article 1266 of the BW, the following options, among others, are always available to enforce and protect their interests / contractual rights:

- A lawsuit to court;
- Simple Lawsuit;
- Financial Services Sector Alternative Dispute Resolution Institution (LAPS SJK);
- Consumer Dispute Settlement Body.

Thus, although the agreement contains a waiver of Article 1266 of the BW, the widest possible option is always open in dispute resolution efforts to protect the interests / contractual rights of the injured party, in accordance with simple, fast, and low-cost principles

C. CONCLUSION

The Constitutional Court Decision Number 83/PUU-XXII/2024 has juridical consequences as well as a fundamental and significant practical dimension, especially in terms of two aspects: consideration (*ratio decidendi*) from the perspective of legal science, especially contract law, and aspects of legal application in the pattern of legal relations and legal protection for the parties.

a. The meaning of *Utmost Good Faith* in insurance agreements needs to be understood comprehensively, including the meaning and functioning power of the word 'void' in the provisions of Article 251 of the KUHD, not just textual-grammatical but also systematic and teleological, to realize a *fair* exchange of interests of the parties (*fair-proportional*).

b. The implication of the Constitutional Court Decision Number 83/PUU-XXII/2024 for relevant stakeholders is to organize comprehensive rules of the game, maintain and realize a *fair* exchange of interests of the parties (fair and proportional), i.e. the government (regulatory, supervisory, and law enforcement functions), insurance business actors (insurers-insurance companies), and the user community (insured-consumers), to realize a conducive business climate (*win-win solution*).

REFERENCES

Dunne, J. M. van. 1993. *Verbintenissenrecht, (Deel 1, Contractenrecht, 1e Gedeelte)*. Kluwer-Deventer.

Hartono, Sri Rejeki. 1995. *Hukum Asuransi Dan Perusahaan Asuransi*. Cet.2. Jakarta: Sinar Grafika.

Hernoko, Agus Yudha. 2019. *Hukum Perjanjian: Asas Proposionalitas Dalam Kontrak Komersial*. Jakarta: Kencana.

Hernoko, Agus Yudha. 2021. "Asas Proporsionalitas Sebagai Instrumen Pengujian Hubungan Para Pihak Yang Terkendala Pemenuhan Prestasinya Sebagai Akibat Pandemi Covid-19." in *PEMBAHARUAN HUKUM DI ERA DISRUPSI (Kumpulan gagasan Guru Besar Ilmu Hukum Indonesia)*. Surakarta: UNS Press.

Khairandy, Ridwan. 2003. *Iktad Baik Dalam Kebebasan Berkontrak*. Jakarta: Universitas Indonesia.

Niewenhuis, J. .. 1985. *Pokok-Pokok Hukum Perikatan (Hoofdstukken Verbintennissenrecht), (Terjemahan Djasadin Saragih)*. Surabaya.

Prodjodikoro, Wirjono, Hukum Asuransi di Indoensia, Cet. 11, Intermasa, Jakarta, 2022

Simanjuntak, Emmy Pangaribuan, Hukum Pertanggungan dan Perkembangannya,Seksi Hukum Dagang Fakultas Hukum Universitas Gadjah Mada,Yogyakarta, 1990

Subekti. 1982. *Pokok-Pokok Hukum Perdata*. Jakarta: Intermasa.

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