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## Legality of Marine Cargo Insurance Claim With Different Sailing Date on Policy (Analysis of Decisions Number 589/PDT.G/2012/PN.JKT.SEL)

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### Abstract

Sailing dates in marine cargo insurance often change for various reasons. It is unavoidable that from the time the ship sail on a date that is not under the policy, uncertain events occur, which cause losses. On the other hand, insurance recognizes the principle of utmost good faith, which obliges the insured to disclose material facts about the insured object correctly, completely, and honestly as regulated in Article 251 WvK. It creates a blurring of norms because that rule make the parties debating whether the ship's sailing date is a material fact or not. This research uses normative legal research methods with a statute approach, conceptual approach, and case approach. This research purposed to analyze changes in sailing date as material facts and the consequences of not disclosing these changes by the insured to the insurer and the insurer to the reinsurer by analyzing Decision Number 589/Pdt.G/2012/PN.Jkt.Sel. The results of this study indicate that the change in sailing date is a material fact that must be disclosed by the insured to the insurer. When the insured does not disclose material facts, it can make a contract voidable and the insurer can be free from the obligation to pay claims. In addition, the Judge's decision in Decision Number 589/Pdt.G/2012/PN.Jkt.Sel was wrong because the Judge did not analyze the meaning and concept of material facts in marine cargo insurance as regulated in Article 251 WvK and did not consider the provisions in the policy referring to the Marine Insurance Act 1906.

**Keywords:** Material Facts; Utmost Good Faith; Marine Cargo Insurance; Voidable Contracts; Analysis of Decision.

### Introduction

Indonesia is a maritime country with 2/3 geographical conditions dominated by the sea.<sup>1</sup> It is not surprising that the existence of sea transportation never

<sup>1</sup> Yudi Listiyono, Lukman Yudho Prakoso and Dohar Sianturi, 'Membangun Kekuatan Laut Indonesia Dipandang Dari Pengawal Laut Dan Deterrence Effect Indonesia' (2019) 5 Jurnal Strategi Pertahanan Laut.[74].

disappears from time to time. Evidence of the development of sea transportation activities can be seen from the number of fleets, the movement of passengers or goods by sea, and the increasing number of sea transportation routes.<sup>2</sup> It is because most sea carriers have cheaper transportation costs and can carry many passengers and goods.<sup>3</sup>

In practice, sea transportation cannot be separated from risks or uncertain events. This is the background for carriers to enter into insurance agreements for losses in the case of sea transportation (marine cargo insurance). Based on Article 1 number 3 of Law Number 17 of 2008 concerning Shipping, after this referred to as the Shipping Law, transportation in waters is an activity of transporting and/or moving passengers and/or goods using ships. So, to minimize the risks that befall during transportation at sea, the carriers choose to transfer the risk by entering into an insurance agreement.

The insurer and the insured will pour the insurance agreement into the insurance policy. The insurance policy is not an absolute requirement in the insurance agreement but is evidence as stated in Articles 257 and 258 Wetboek van Koophandel (WvK).<sup>4</sup> The existence of this insurance policy is used as written proof of the birth of an insurance agreement which creates a legal relationship between the insurance company (the insurer) and the policyholder (the insured).<sup>5</sup> Derived from this legal relationship which in turn creates rights and obligations between the parties.<sup>6</sup> One of the insurer's obligations is to pay compensation for uncertain events experienced by the insured following the information in the policy and the amount of loss suffered. This relates to the principle of indemnity.<sup>7</sup> This relates to

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<sup>2</sup> Fadhly Wicaksono, 'Hukum Aspek Pengiriman Barang Oleh Perusahaan Jasa Ekspedisi Dan Cargo Melalui Pengangkutan Laut' (2020) 3 *Jurist-Diction*. [1698].

<sup>3</sup> Sendy Anantyo, 'Pengangkutan Melalui Laut' (2012) 1 *Diponegoro Law Review*. [2].

<sup>4</sup> Desmadi Saharuddin, *Pembayaran Ganti Rugi Pada Asuransi Syariah* (Prenada Media 2016). [14].

<sup>5</sup> Aditama Setya Prakoso, [et., al.], 'Polis Asuransi Jiwa Sebagai Alat Bukti Penuntutan Klaim Dalam Perjanjian Asuransi Jiwa (Studi Di PT Asuransi Jiwasraya Semarang Timur)' (2016) 5 *Diponegoro Law Journal*. [2-3].

<sup>6</sup> Irius Yikwa, 'Aspek Hukum Pelaksanaan Perjanjian Asuransi' (2015) III *Lex Privatum*. [136].

<sup>7</sup> Arief Suryono, 'Tanggung Jawab Penanggung Dalam Asuransi Tanggung Jawab Hukum' (2022) 10 *Privat Law*. [2].

the principle of indemnity, in which the insured only gets compensation according to the losses the insurer bears without making a profit.<sup>8</sup>

Compensation from the insurer depends on the information provided by the insured. Thus, the insured must provide correct information that will be included in the insurance policy as an implementation of the principle of good faith.<sup>9</sup> This initial information is submitted in an Application for Insurance Closure, which will be used as the basis for making a policy.<sup>10</sup> One important aspect of the policy is the date of sailing. However, even though it has been stated regarding the ship's sailing date, it still needs to consider the possibility of the insured changing the sailing date for several reasons. Some of the reasons that are often encountered, for example weather factors, factors related to loading and unloading of goods, have just been issued or the ship does not have a sailing license, or other factors.<sup>11</sup>

Problems will arise when the insured does not notify the insurer of the change in sailing date. Then, when the ship sails on a different date in the policy, the ship experiences an event that causes a loss. For this reason, the insured submits a claim for compensation for the uncertain event that befalls them. Against the loss suffered by the insured, the insurer is obliged to guarantee the loss suffered by the insured and pay the claim to the insured or their heirs.<sup>12</sup> On the other hand, the insurer will provide compensation, if the insured provides correct information in accordance with the policy.

Sailing date is not used to determine the amount of premium, but to find out when an uncertain event occurs that causes losses.<sup>13</sup> This was also confirmed by

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<sup>8</sup> Selvi Harvia Santri, 'Prinsip Utmost Good Faith Dalam Perjanjian Asuransi Kerugian' (2017) 01 UIR Law Review.[78].

<sup>9</sup> *ibid.*[82].

<sup>10</sup> Hasrat Fitmy,[*et. al.*], 'Penerapan Pasal 263 Ayat (1) Kitab Undang-Undang Hukum Dagang Asuransi Kebakaran The Application of Article 263 Paragraph (1) of The Commercial Code in Fire Insurance' (2020) 2 Soedirman Law Review.[609].

<sup>11</sup> Taufik MR, Nina Mutmainah and Adrian Kristanto Tamara, 'Pengaruh Jadwal Sandar Dan Keberangkatan Kapal Terhadap Kualitas Pelayanan Kapal' (2019) 5 Jurnal Manajemen Bisnis Transportasi dan Logistik (JMBTL).[404-405].

<sup>12</sup> Zahry Vandawati Chumaida, *Perlindungan Hukum Tertanggung Dan Tanggung Jawab Penanggung Dalam Perjanjian Asuransi Jiwa* (Revka Petra Media 2015).[50].

<sup>13</sup> Zamzam, 'Tanggung Jawab Penanggung Terhadap Kerugian Yang Diderita Oleh Tertanggung Pada Asuransi Pengangkutan Barang Melalui Laut' (Universitas Hasanuddin 1998).[49].

Mrs. Fitra from Asuransi Sinarmas who agreed to state that the submission of sailing date information was used to determine whether losses arose from the time the ship sailed to arrive at its destination. The departure date is not used by the insurer to determine the size of the risk, determine the premium, or accept the coverage. That is why there is no correlation between losses and sailing date because insured can sail on any date, but they must notify the insurer if the sailing date changed. This departure date is used by the Insurer to ascertain whether the losses incurred really occurred when the ship sailed carrying cargo.

The case related to the ambiguity of the change in sailing date including material facts or not occurred in the South Jakarta District Court Decision Number 589/Pdt.G/2012/PN.Jkt.Sel. There are 3 (three) parties involved in this case, which are PT Asuransi Umum Videi (Insurance Company) as Plaintiff, PT Asuransi Bhakti Bayangkara (Reinsurance Company) as Defendant, and PT Panca Usaha Palopo as insured. In this case, the Plaintiff entered into a reinsurance agreement with the Defendant on behalf of the Insured. Then, in its implementation, the Insured changed the sailing date without providing information to Plaintiff, so Defendant also did not get information about the change in sailing date. When a loss arose due to an uncertain event, the Insured submitted a claim to the Plaintiff, and the Plaintiff paid the claim. When Plaintiff requested a claim for compensation from Defendant, Defendant refused because Plaintiff was not informed of the change in sailing date, which was a material fact. Moreover, the reinsurance agreement between the Plaintiff and the Defendant was with a facultative policy where everything had to be agreed at the outset before the policy or risk took place.

In this case, the Judge stated that the Defendant was in default, so he was punished to pay damages to the Plaintiff. The Judge argue that the change in sailing date is not a material fact that must be disclosed by the Insured because it is beyond control dan cannot be predicted. In other hand because the Insured changed the sailing date, losses were incurred due to uncertain events on that day. So that, the insured must know if the insurer change the sailing date firstly. There are no existing regulations that explicitly state that a change in departure date is a material

fact. It has led to norm ambiguity, so the parties argue for different interpretations. The explanation of the background is the basis for further research related to the validity of Marine Cargo Insurance Indemnity Claims whose Sailing date is Not following the Policy by analyzing Decision Number 589/PDT.G/2012/PN.Jkt.Sel. The purpose is to describe the obligation of the insured to disclose the change of sailing date (utmost good faith) as regulated in Article 251 KUHD and the obligation of the insurer and reinsurer to pay the indemnity claim when the change of sailing date is not disclosed.

### **Changes of Sailing Date in Marine Cargo Insurance that Include Material Facts as Implementation of the Utmost Good Faith Principle**

Marine cargo insurance is an insurance agreement between the insurer and the insured to protect the goods and merchandise transported between domestic ports (intracellular transportation) and foreign ports (ocean transportation). To protect, save, and secure the goods being transported, the transportation company must enter into an insurance agreement as stipulated in Article 41 paragraph (3) of the Shipping Law jis. Article 15 of Government Regulation Number 31 of 2021 concerning the Implementation of the Shipping Sector jis. Article 41 of Government Regulation Number 31 of 2021 concerning the Implementation of the Shipping Sector. In fact, water transportation companies that do not ensure their responsibilities can be sentenced to a maximum imprisonment of 6 months and a maximum fine of IDR 100,000,000 as emphasized in Article 292 of the Shipping Law. This aims to provide legal protection for the parties, especially the shipper of goods during transportation activities at sea.<sup>14</sup> The reason is that the shipper has entrusted the goods to be transported by the carrier and does not rule out the possibility of uncertain events resulting in losses in the form of defects, loss, or destruction of goods. Therefore, in order to ensure the fulfilment of compensation to the shipper, the transportation company needs to ensure its transportation activities.

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<sup>14</sup>Marnia Rani, 'Asuransi Tanggung Gugat Kapal Terhadap Risiko Dan Evenemen Dalam Kegiatan Pelayaran Perdagangan Melalui Jalur Laut' (2016) 3 Jurnal Selat.[427].

If the prospective insured agrees to enter marine cargo insurance, they must fill out a Policy Closing Request Letter, which includes the name of the insured, type of insurance, attachment of related documents, period of coverage, and premium to be paid.<sup>15</sup> Based on the Policy Closing Request Letter, the insurer issues a marine cargo insurance policy. Therefore, the insured has an obligation to apply the principle of utmost good faith as specifically regulated in Article 251 WvK. Interpreting the contents of Article 251 WvK, the principle of utmost good faith is more imposed on the insured because the position of the insured is more aware of the actual circumstances related to the object of coverage.<sup>16</sup> Therefore, the insured must provide essential facts relating to the object of coverage clearly and thoroughly.

The meaning of utmost good faith can be understood through court decisions, such as court decision of case of Carter v Boehm. Case of Carter v Boehm in Indonesia is most familiar in Lord Mansfield's decision in the English Court which argue about the insured's doctrine of utmost good faith. In this case, it was stated that disclosing information related to the object of coverage is important for the insurer, affecting the underwriting process.<sup>17</sup> Carter did not disclose information about the weakness of the fort and the possibility of the fort being attacked by the French. Such information is called material facts that the insurer needs to know. So, when Carter filed a claim because the French captured the fort, Boehm refused to pay the claim.

In Indonesia, there is no provision and regulations governing explicit material fact, but it regulated implisit in Article 251 KUHD. Article 251 KUHD state that the insured is obliged to provide important facts related ti the insured object clearly and thorough which talked about material facts. Material facts are facts related to the object of coverage that affect the consideration of acceptance by the insurer

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<sup>15</sup> Rizky Amalia Ramadhani and Carlos Lazaro Prawirosastro, 'Operational System Procedure for Handling Cargo Shortage Claims in Marine Cargo Insurance PT. ASPAN Cabang Surabaya' (2018) 8 Jurnal Aplikasi Pelayaran dan Kepelabuhan.[137].

<sup>16</sup> Zahry Vandawati Chumaida, *Prinsip Itikad Baik Dalam Perjanjian Asuransi Yang Berkeadilan* (Revka Petra Media 2014).[136].

<sup>17</sup> Max Barrett, 'Carter v Boehm Considered' (2020) 4 Irish Judicial Studies Journal 93.[96].

with certain conditions and premiums.<sup>18</sup> In addition to facts that increase the risk and the premium, facts related to the previous insurer's rejection or cancellation of compensation by the previous insurer are also material facts that must be conveyed to the insurer.<sup>19</sup> The obligation to disclose material facts takes place at the time of the initial making of the agreement, renewal of the agreement, extension of the agreement, and re-arrangement.<sup>20</sup> However, not all facts related to the object of coverage are material facts that must be disclosed by the insured. Based on Section 18 (3) Marine Insurance Act 1906, there are several facts that do not need to be disclosed, including facts known or deemed known by the insurer, facts that are ignored as information, facts that tend to reduce the risk, and facts that have been guaranteed expressly or impliedly in the agreement.

The concept of material facts is all information related to the object of coverage that is considered to increase risk, premiums, and insurance acceptance by the insurer. Thus, to know the material facts in marine cargo insurance, we can analyze what factors are considered capable of increasing premiums or risks. According to Abbas Salim in Sofia's thesis, some things that affect the premium in marine cargo insurance are the type of insurance conditions chosen, the object of coverage, competition between insurance companies, changes in the economic climate, and applicable regulations.<sup>21</sup> All aspects listed in this policy can be referred to as material facts that must be disclosed by the insured clearly, correctly and honestly to the insurer because they are used as the basis for accepting coverage and determining the premium amount.

One of the aspects listed in this policy is the sailing date. This sailing date helps determine the period of coverage. However, if the policy is "warehouse to warehouse", the sailing date helps determine the date of occurrence. The sailing

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<sup>18</sup> Mokhammad Khoirul Huda, *Hukum Asuransi Jiwa: Masalah-Masalah Aktual Di Era Dirupsi 4.0* (Scopindo Media Pustaka 2020).[29].

<sup>19</sup> Ravi Aswani, 'Non-Disclosure in Insurance Law: A More Principled Approach' (2006) 10 *Amicus Curiae*. [11].

<sup>20</sup> Nargis Yeasmeen, 'Consequences of Non-Disclosure in the Contract of Insurance' (2015) 17 *IOSR Journal of Business and Management* 31.[31].

<sup>21</sup> Sofia, 'Penyelesaian Claim Marine Cargo Insurance' (Universitas Airlangga 1994).[18-19].



date determines when the uncertain event that caused the loss occurred.<sup>22</sup> This is also emphasized by Mrs Fitra from Sinarmas Insurance, who agreed to state that the submission of information on the date of sailing is used to find out and ascertain whether the loss incurred occurred when the ship sailed carrying cargo.

The case of a change in the sailing date can be seen in *Fillis v Berton* regarding the insurance of a ship from Plymouth to Bristol. In this case, the broker stated that the ship was ready to sail on December 24, but the ship sailed on December 23.<sup>23</sup> Lord Mansfield found that there was concealment of material facts and misrepresentation of facts.<sup>24</sup> A change in the sailing date is a material fact which must be communicated by the insured to the insurer.

Especially if the cargo transported is a commodity prone to damage and rot (perishable goods), such as food ingredients, spices, flowers, onions, processed meat, durian, ice cream, fish, shellfish, vegetables, et cetera.<sup>25</sup> A change in the sailing date of the ship transporting perishable goods is a material fact that must be notified by the insured. Given that perishable goods are included in goods that are vulnerable or sensitive to time, place, and require special handling. If there is a delay in transportation, it can affect the condition of the goods. This will undoubtedly increase the risk and make the insurer provide compensation due to the negligence of the insured, who did not submit changes to the ship's sailing date.

In addition, Section 48 of the Marine Insurance Act 1906 emphasises that a delay in sailing for unreasonable reasons or outside Section 49 of the Marine Insurance Act 1906 may relieve the insurer from being liable to pay claims for damages. Some of the excluded deviations referred to in Section 49 Marine Insurance Act 1906 include those permitted by special provisions in the policy, those caused by circumstances beyond the control of the skipper and his

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<sup>22</sup> Zamzam (n 49).

<sup>23</sup> Richard Peters Junior, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States* (Vol 1, Philip H Nicklin, Law Bookseller 1828).[190].

<sup>24</sup> *ibid.*

<sup>25</sup> Indra Wahyu and Irwina Meilani, 'Analisis Permintaan Kargo Udara Pada Masa Pandemi Di Bandar Udara I Gusti Ngurah Rai Bali' (2022) 6 *Jurnal Kewarganegaraan*. [939].



employer, those for the safety of the vessel or the goods insured, those to comply with express or implied warranties, those to save human life or assist a vessel in distress, those to obtain medical or surgical assistance for persons on board, or those caused by the improper conduct of the skipper or vessel. The policy may permit deviation or delay if the delay is beyond the control of the Insured. It relates to deviations that are excluded when caused by circumstances beyond the skipper's and his employer's control. Some of the things beyond their control are threats, needs related to morals, and in terms of avoiding calamities while sailing.<sup>26</sup> The skipper's actions can also cause delays, as a skipper has a statutory duty to assist vessels and those in distress.<sup>27</sup>

In Indonesia, there is no reference that is more binding force to be applied in making insurance. Arrangements related to insurance is regulated in the insurance law and WvK. Also, arrangement related to marine cargo related with insurance is regulated in the shipping law. However, insurance provision in WvK, Insurance Law, and Shipping Law not enough to cover the needs related to insurance agreements. Even, Article 251 WvK which core of insurance agreements with utmost good faith be judge unfair. This article considered prone to misuse by insurers who do not have good faith as in the Case Application Number 52/PUU-XXI/2023. This misuse is illustrated by the bad actions of the insurer who use difficult language, so insured can not understand and actually give benefits to insurer.

The Marine Insurance Act 1906 can be used as a reference for implementing insurance agreements in Indonesia. Given that the insurance agreement clause states that it is subject to English law and practice as long as it does not conflict with Indonesian law. Parties outside the UK can use the standard UK policy. If there is a dispute between the parties, they can choose Indonesian jurisdiction to resolve the dispute. It is related to the principle of freedom of contract (*Pacta Sunt Servanda*) as stipulated in Article 1338 BW, so that the provisions in the Marine Insurance Act

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<sup>26</sup> Francis Rose, *Marine Insurance: Law and Practice* (Informa Law 2013).[273].

<sup>27</sup> *ibid.*[271].

1906 can be applied in policies in Indonesia.<sup>28</sup> So, when the parties agree to enter into a marine cargo insurance agreement, it means that they also agree to use the Marine Insurance Act 1906 in the provisions of the agreement.

### **Analysis of Decision Number 589/Pdt.G/2012/PN.Jkt.Sel Related to Deviation of Insurer and Reinsurer Obligations in the Payment of Marine Cargo Insurance Indemnity Claims Due to Non-Disclosure of Changes of Sailing Date by the Insured**

The concept of reinsurance can be found in Article 271 WvK that the insurer can reinsure the risks or expenses that have been borne to other insurance companies. The reinsurance agreement was born after the insurance agreement. The reinsurance agreement's purpose is so the insurance company can still fulfil its obligation to pay compensation claims to the insured with a considerable risk burden. The legal relationship in the insurance agreement differs from that in the reinsurance agreement. The legal relationship arising in the insurance agreement only exists between the insured and the insurer. In contrast, the legal relationship in the reinsurance agreement only involves the insurer and the reinsurer.

The implementation of the reinsurance agreement must also be based on the principle of utmost good faith. This principle is implemented, not only by the insured, but also the insurer and the reinsurer. Implementation of utmost good faith principle in the insurer and the reinsurer focused on obligation to provide correct and clear information regarding risks, benefits, premiums, to the insurance or reinsurance products offered to the insured or insurer. Firstly, the insured must disclose material facts relating to the object to the insurer. Then, the insurer will be disclosing material facts relating to the object of the insured coverage to the reinsurer.

Because there is no legal relationship between the insured and the reinsurer in the reinsurance agreement, the insurer is entitled and obliged to disclose information

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<sup>28</sup> M Chris Debora Marsela Mendrofa, Hendra Haryanto and Asmaniar, 'Efektivitas Klausula This Insurance Is Subject To English Law And Practice Dalam Polis Pengangkutan Barang Indonesia (Studi Kasus Putusan Mahkamah Agung Nomor 1011k/Pdt.2009)' (2019) 1 Jurnal Krisna Law.[59].

and its changes. Remind that in the insurance agreement, the insured just have legal relationship with the insurer and in the reinsurance agreement, the reinsurer just have legal relationship with the insurer. Material facts that the insurer must disclose to the reinsurer are complete information on the object of coverage owned by the insurer and information related to the amount that has not been paid or retained by the insurer.<sup>29</sup> The insurer makes this disclosure at the beginning of the agreement until there are changes and additional information.<sup>30</sup>

Suppose the Insured or the Insurer (Insurance Company) does not submit changes in information related to material facts. In that case, it is said to have violated Article 251 WvK related to the principle of utmost good faith. Based on Article 251 WvK, there are two types of violations of the principle of utmost good faith: providing false or incorrect information and not providing facts known to the insurer.<sup>31</sup> According to Zahry Vandawati, there are several criteria to be called violating this principle, including deliberately concealing facts (concealment) to gain profit; deliberately deceiving by providing false or false information (fraudulent misrepresentation) to mislead the insurer; not disclosing facts or things needed by the insurer (non-disclosure) due to lack of knowledge, ignorance, or forgetting; accidentally giving false information (innocent misrepresentation).<sup>32</sup> The four types of violations of the principle of utmost good faith can cause the cancellation of the insurance agreement.<sup>33</sup>

The consequence of the violation of Article 251 WvK is “resulting in the cancellation of coverage”. According to Ridwan Khairandy, who quotes the opinion of J. Satrio, the sentence “cancellation of the agreement” is interpreted as “the agreement can be cancelled”. The agreement can be cancelled (*vernietigbaar*) means that the cancellation of the agreement depends on the request of the party

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<sup>29</sup> RL Carter, *Reinsurance Second Edition* (Springer-Science+Business Media, BV 2013).[125].

<sup>30</sup> *ibid.*[126].

<sup>31</sup> Chumaida (n 123).

<sup>32</sup> *ibid.*[140-141].

<sup>33</sup> Hilda Yunita Sabrie, ‘Pembayaran Klaim Asuransi Jiwa Akibat Tertanggung Bunuh Diri (Pt Asuransi Jiwa Manulife Indonesia)’ (2011) 26 *Yuridika* 36.[38].

agreeing.<sup>34</sup> The legal effect of “can be cancelled” is born after a judge decides to cancel the legal action.<sup>35</sup> This is in accordance with Article 1266 (2) BW, which states that a cancellation must be submitted to a judge. So, the legal acts claused in the agreement are still valid as long as the interested party has not filed a lawsuit to cancel the agreement and a court decision has been issued.

Cases related to violations of the principle of utmost good faith in insurance agreements and reinsurance agreements appear in Decision Number 589/Pdt.G/2012/PN.Jkt.Sel. This case involved PT Asuransi Umum Videi as the Plaintiff (Insurance Company / Insurer), PT Asuransi Bhakti Bhayangkara as the Defendant (Reinsurance Company / Reinsurer), and PT Panca Usaha Palopo Plywood as the Insured.

On 3 June 2008, Plaintiff entered into a reinsurance agreement with Defendant on behalf of the Insured in the form of facultative reinsurance with a total coverage of Rp.500,000,000 (five hundred million rupiah). The reinsurance agreement is based on the agreement between Plaintiff and Defendant on the terms and conditions of Plaintiff’s offer No. 527/MC/RA/2008. For this offer, Defendant confirmed acceptance of the offered risk (s) of PT ABB Shared Rp. 500,000,000 at 25% R/I Commission. This means Defendant accepted the risk offer with a share of IDR 500,000,000 and a 25% Reinsurance Commission. Terms and conditions of coverage agreed using the Institute Cargo Clause I.C.C.” C” 1/1/82 + including W.O.B. (washing overboard) clause with other terms and conditions under the original policy, namely Marine Cargo Policy No.01.20.11.0093.06.08 dated June 3 2008 on behalf of the Insured.

Then, Plaintiff submitted Marine Cargo Facultative Reinsurance Slip No.01.20.11.0093.06.08-00001-01/10124 and paid the premium to Defendant. In this case, the insured object is 1200 sticks/6000 m3 of meranti and mixed wood, which is transported by Tug Boat Putra Jaya-Barge Noah XI (participated) in one trip from Buruway & Fiduma (join shipment) port Kaimana-Papua to Bua Port,

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<sup>34</sup> Nindyo Pramono, ‘Problematika Putusan Hakim Dalam Perkara Pembatalan Perjanjian’ (2010) 22 *Mimbar Hukum*. [230].

<sup>35</sup> *ibid.*

Palopo, South Sulawesi. In addition to being reinsured with Defendant, Plaintiff also reinsured 5 (five) other reinsurers in the form of facultative reinsurance with same of the terms and conditions, but different shares. The reinsurers in question are PT Tugu Reasuransi Indonesia, PT Reasuransi Internasional Indonesia, PT Reasuransi Nasional Indonesia, PT Artagraha General Insurance, and PT Adhi Lintas Tanase Reinsurance Broker.

On 14 June 2008, while travelling in the waters of Karawatu Island at position 04° 01' 30" S-133° 23' 54" E, a strong windstorm and enormous waves hit the carrier, causing the insured object to spill into the sea and only 58 logs were saved. For this event, the Insured filed a claim against the Plaintiff. Then, the Plaintiff completes the obligation to compensate the insured because the claim has fulfilled the terms and conditions of the Marine Cargo Policy. Based on the results of the Survey and Adjustment dated 31 July 2008 by the Average Adjuster appointed by the Plaintiff, PT Radita Hutama Internusa, the amount of compensation (amount of claim) was obtained amounting to IDR 5,709,451,389.43. Because the liability of insurance is IDR 6,050,000,000 with the Defendant's share of IDR 500,000,000, the amount of compensation that Defendant must pay is IDR 471,855,486.73. Apart from that, PT Radia Hutama Intemusa's Average Adjuster fee was US\$21,830.00, with the Defendant's share of US\$1,804.3. Plaintiff conveyed this to Defendant through the letter Revised Definitive Loss Advice No.Revised-DLA/MC/IX/08/004-04 dated 10 October 2008.

Whereas of the 6 (six) reinsurers, only Defendant did not complete his obligations. Regarding this matter, Plaintiff warned Defendant to pay the compensation claim by letter dated 18 September 2008 No.09.0202.0908 and 20 October 2008 No.10/CL/FMS/045/1008. Until this lawsuit was filed, Defendant still did not pay the claim because the reinsurance agreement made was facultative reinsurance, so everything had to be agreed upon from the start before the policy took effect or the risk took effect. However, Plaintiff needed to be more timely in notifying the change in the ship's sailing date, which had been agreed on from 3 June 2008 to 13 June 2009. Plaintiff conveyed this on 23 June 2008 after the claim

occurred on 14 June. Moreover, the policy used in this agreement is not a time policy, but a travel policy (voyage policy) which covers the risk “from port to port”, namely from Buruway & Fiduma, Kaimana-Papua to Bua, Polopo, South Sulawesi, so that the coverage takes into account the ship’s sailing date.

On the other hand, Plaintiff only received information about the accident on 16 June 2008. Plaintiff also only received the fact that the insured had changed the sailing date through investigation at 18 June 2008. From those investigation, Plaintiff got the reason for the change in sailing date by the Insured was due to the loading and unloading of wood, which had just been completed on 13 June 2008 at 17.00. In addition, the Harbor Master has just issued a Sailing Permit No.BB.4/63/14/VI/KPL-KMN 08 for the TK NOAH XI vessel and a Sailing Permit No.BB.4/63/8/VI/KPL-KMN 08 for the TB PUTRA JAYA vessel on 12 June 2008 at 20.00 WIT. Based on this information, Plaintiff sent letter No. 10.418.06.08 dated 18 August 2008 to Defendant on 19 June 2008. Because Defendant did not answer, Plaintiff sent the Fax again on 23 June 2008. Then, the letter was answered by the Defendant by stating “Noted and Agreed”.

Defendant did not pay the compensation claim because Plaintiff had violated Article 251 WvK regarding the principle of utmost good faith by providing false information or withholding information relating to material facts from the insured object. Plaintiff did not convey the change to Defendant’s ship’s sailing date in this case. In addition, in his exception, the Defendant stated that this lawsuit was flawed due to a lack of parties. The Defendant considered that the Insured should be involved in this case.

On the other hand, the judge’s consideration stated that the sailing date of the ship stated in the policy in the insurance/reinsurance agreement for the carriage of sea goods was not an imperative provision. Failure to submit a change in sailing date is deemed not to violate the principle of utmost good faith. The reason is that this sailing date can change due to three things beyond the Insured’s control. First, the ship’s sailing date may change due to the loading and unloading time which is influenced by the volume of cargo, the adequacy of loading and unloading

equipment, or the weather. Second, delays in ship sailing due to bad weather. Third, the issuance of a Sailing Permit from Syahbandar cannot be ascertained. Given that the permit will not be issued, if loading and unloading have not been completed or the weather is terrible. The judge stated that the change in the ship's sailing date was not a material fact related to the insured object. In this case, what is meant by matters related to the insured object are the identity, type, amount, size, location, nature and condition of the insured object. Therefore, the Judge in Decision Number: 589/Pdt.G/2012/PN.Jkt.Sel stated that Defendant had defaulted and punished Defendant for paying losses related to the obligation to claim compensation (IDR 471,855,486) and interest on the claim value for material losses suffered by the Insurer (IDR 11,245,317), and the Average Adjuster fee and interest (US \$ 2,237).

Against this decision, Defendant filed an appeal in which the contents of the memory of the appeal were that the Judge did not give a fair decision and the decision was contrary to the law. The reason is because the Defendant's exception was not included in the verdict and the Judge decided more than what was requested by the Plaintiff. Then, the Plaintiff filed a Counter Memorandum of Appeal which only asked the Judge to uphold the decision and include the ruling "rejecting the Defendant's exception in its entirety". On this appeal, the Panel of Judges at the Appellate Level considered that the implementation of the reinsurance agreement was based on the Insured's interest in the object of 1200 sticks / 6000 m<sup>3</sup> of meranti and mixed wood. Thus, the Insured should have been involved in this case. Therefore, the Panel of Judges at the Appellate Level agreed with the Defendant's exception regarding the lack of parties in the lawsuit. Based on this, the Appellate Judge in Decision Number: 367/Pdt/2014/PT.DKI heard that the Defendant's appeal was accepted and annulled the first level decision, namely the South Jakarta District Court Decision Number: 589/Pdt.G/2012/PN.Jkt.Sel dated 26 June 2013.

Regarding the decision on the appeal, the Plaintiff filed an appeal which in its principal memory, stated that the Panel of Judges at the Appellate Level had wrongly applied the law because the position of the Insured had no legal relationship with the Defendant as the reinsurer. Based on the Insurance Agreement, the Insured only



has a legal relationship with the Plaintiff as the Insurer. Only the Insurer has a legal relationship with the Reinsurance based on the reinsurance agreement.

Upon the cassation request, the Supreme Court thought the Jakarta High Court had misapplied the law. The Supreme Court considers that the lawsuit is not lacking in parties because the Defendant only has an agreement with the Plaintiff. Thus Defendant is correctly obliged to compensate Plaintiff as considered in the South Jakarta District Court. Based on this matter, the Supreme Court, in decision Number: 2530 K/PDT/2015, decided that it granted the Cassation request from the Plaintiff and cancelled Decision Number: 367/Pdt/2014/PT.DKI dated 16 July 2014, which cancelled the Decision of the South Jakarta District Court Number: 589/Pdt.G/2012/PN.Jkt.Sel dated 26 June 2013. This means that Defendant still declared in default and sentenced to pay damages to Plaintiff as decided in the court of first instance.

Based on the position case above, the Judge was wrong in applying the law because in this case the Judge considered the sailing date was not a material fact that had to be conveyed to the insured. In addition, changing the sailing date is something beyond the insured's control, so it cannot be confirmed. However, concerning Article 251 WvK regarding the principle of utmost good faith, concealment is one of the factors that can cancel an agreement. To be completely released from the obligation to pay compensation claims, it is necessary to file a lawsuit to cancel the agreement. Thus the legal actions included in the agreement are also deleted.

This does not only look at the facultative reinsurance agreement or treaty reinsurance agreement because the change in sailing date must be informed. This sailing date is used as the basis for the insurer to determine whether a loss occurred during transportation. However, if it is related to using a facultative reinsurance agreement, as in this case, it strengthens that the insurer must submit the change in sailing date to the reinsurer. Remember that in voluntary reinsurance, the insurance company is free to make offers, and the reinsurance company is free to accept or reject. If the reinsurance company accepts, it means that the implementation of the insurance agreement must be in accordance with the insurance policy and the insurer's statement. If there are changes, the insurer must inform the reinsurer.

If it is related to Section 18 (3) Marine Insurance Act 1906 regarding facts that do not need to be disclosed, the date of sailing does not fall into the 4 (four) aspects referred to. Firstly, the sailing date must be known or presumed to be known by the insurer. Given that the party making the offer in the insurance agreement is the insured, the one who prepares everything and knows what will be insured is the insured. Including the date of sailing because before submitting an insurance offer, the insured has prepared documents, including a bill of lading or cover note containing the date of sailing. The insurer cannot know this sailing date through an independent survey, but requires information from the insured.

Second, the date of sailing is not a fact that is ignored as information because the Insurer needs the date of sailing and the reinsurer to find out the occurrence of uncertain events and find out whether the cargo arrived safely. Third, the sailing date is not a fact that tends to reduce risk because this sailing date can actually increase risk, especially for perishable goods. So, it is fundamentally essential to disclose changes in the sailing date, significantly if the sailing date will affect changes in the condition of the cargo. Fourth, the sailing date is not a fact that has been guaranteed expressly or implied in the agreement because this sailing date needs to be filled in based on explicit information from the insured. Thus, the sailing date is a material fact that the Insured must disclose to the Insurer.

Then, apart from using WvK and Civil Code as legal basis of marine cargo insurance in Indonesia, also uses the Marine Insurance Act 1906 from an international civil law perspective. Refer to Section 48 and Section 49 Marine Insurance Act 1906 regarding exceptions to permitted sailing delays. In this case, the cause of the change in the ship's sailing date was because the loading and unloading had just been completed, and a sailing permit had just been issued from the harbormaster. Based on the Marine Insurance Act 1906, ship delay due to the completion of loading and unloading of the ship and the issuance of a sailing license from Syahbandar is not an exception. Bearing in mind that things that are excluded, for example, things beyond the captain's control, namely threats, need related to morals and terms of avoiding accidents while sailing. On the other hand, the Judge

considers that the change in the ship's sailing date is not a material fact related to the insured object, including the identity, type, amount, size, location, nature and condition of the insured object.

To interpret changes in sailing dates, including material facts or cannot use 2 (two) touchstones. First, based on an agreement referring to Article 48 and Article 49 Marine Insurance Act 1906. Second, using the concept of material facts, namely information related to the insured object, which is considered to increase risk, increase premiums, and insurance acceptance. In this case, it is necessary to review related conditions or cases. From that, can be drawn the thread that if the goods transported are perishable goods, then the change in sailing date is clearly a material fact. However, if the goods being transported are iron or wood or other goods that are not perishable goods, then the second test stone cannot be used.

Because in the case of the cargo being transported, it is not perishable goods because it is in the form of 1200 logs/6000 m<sup>3</sup> of meranti and mixed wood, so to determine whether the change in sailing date is a material fact or cannot, use the first touchstone. According to Section 48 and Section 49 of the Marine Insurance Act 1906, it has been agreed that the Insurer shall not be liable in the event of a change in sailing date. Moreover, the reasons for changing the date of sailing in cases not including matters that are excluded as regulated in Section 49 of the Marine Insurance Act 1906. Based on the Pacta Sunt Servanda Principle, the basis for the Judge's decision must also consider the clauses in the agreement as long as it does not contradict with general principles of law, including when the clause in the agreement refers to the Marine Insurance Act 1906. Thus, the change in the ship's sailing date should be a material fact because it has been agreed upon concerning the Marine Insurance Act 1906. Given that the change in the ship's sailing date is not caused by exceptions, namely because it just finished loading and unloading and just issued a Sailing Permit from Syahbandar.

Furthermore, concerning the parties' legal relationship, which is used as the basis for the defendant's exception, appeal and cassation, it seems clear that the insured has no legal relationship with the reinsurer. Remember that the parties to

the insurance agreement are the insured and the guarantor. On the other hand, the parties to a reinsurance agreement are an insurance company (ceding company) and a reinsurance company (reinsurer). The insured does not need to know that the risk insured to the insurer is returned to the reinsurance company. Bearing in mind that the basis of the insurance agreement will be the fulfilment of the insurer's obligation to pay compensation for the uncertain events he experiences, without having to know that the money is the result of cooperation or purely from the insurer.

Because the reinsurer has no legal relationship with the insured, in this case, it is not necessary to involve the insured, and it is sufficient to involve the Insurer and the reinsurer. In addition, considering that the insured has violated the principle of utmost good faith by not notifying the change in sailing date to the Insurer, the insurance agreement should be cancelled. The consequence of not disclosing the change in sailing date from the Insurer to the reinsurer also cancels the reinsurance agreement. This means that the Defendant as reinsurance does not need to pay compensation claims to the Plaintiff as Insurer. Likewise, the Plaintiff, as the Insurer should not pay claims for compensation to the Insured. Bearing in mind that violating the principle of utmost good faith means the agreement can be cancelled. To be able to delete the agreement and legal bond between the parties, it is necessary to file a lawsuit for cancellation which the Plaintiff or Defendant can carry out. Based on the judge's decision, the Insurance Company and Reinsurance Company will be released from the obligation to pay compensation claims to the Insured.

### **Conclusion**

Disclosure of material facts by the insured to the insurer is an application of the principle of utmost good faith as stipulated in Article 251 WvK. In this case, the change in departure date is a material fact that must be disclosed by the insured to the insurer. The concept of material facts itself is information related to the insured object, which is considered to increase risk, increase premiums, and insurance acceptance of coverage by the insurer. In addition, the Marine Insurance Act 1906 can be used as a reference for the implementation of insurance agreements in

Indonesia as the implementation of the principle of freedom of contract (*Pacta Sunt Servanda*) as stipulated in Article 1338 BW.

In Decision Number: 589/Pdt.G/2012/PN.Jkt.Sel, the Judge made a mistake in applying the law. Bearing in mind that in his decision, the Judge stated that the change in departure date was not a material fact that had to be conveyed because it was outside the insured's control. The Judge did not consider and was not careful in considering and deciding this case because it did not base the decision on Article 251 WvK and did not consider the provisions in the policy, which referred to the Marine Insurance Act 1906. The consequence of not disclosing changes to the date of departure of the ship by the insured is a form of violation of the principle of utmost good faith, which can cancel the insurance agreement and reinsurance agreement.

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