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THE INDONESIAN LAW ON CONTRACTS

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PREFACE

With the evolution of the market-oriented economy as well as the increase in cross-border transactions, there is an urgent need to conduct research and comparisons of judicial systems and the role of law in development in Asian countries. The Institute of Developing Economies, Japan External Trade Organization (IDE-JETRO) established two research committees in FY 2000: Committee on "Law and Development in Economic and Social Development" and Committee on "Judicial Systems in Asia." The former has focused on the role of law in social and economic development and sought to establish a legal theoretical framework therefor. The latter committee has conducted research on judicial systems and the ongoing reform process of these systems in Asian countries, with the aim of further analyzing their dispute resolution processes.

In order to facilitate the committees' activities, IDE has organized joint research projects with research institutions in seven Asian countries. This publication, named ***IDE Asian Law Series***, is the outcome of the research conducted by respective counterparts. This series is composed of papers which correspond to the research theme of the abovementioned committees, i.e. studies on law and development in Indonesia and Philippines, and studies on judicial systems and reforms in China, India, Malaysia, Philippines, Thailand and Vietnam. For comparative study the latter papers include description of judiciary and judges, prosecutor/prosecuting attorney, advocate/lawyer, legal education, procedures and ADR with statistical information thereof.

We believe that this is an unprecedented work in its comprehensiveness, and hope that this publication will contribute as research material and for the further understanding of the legal issues we share.

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In conducting this study I wish to express my gratitude first and foremost to Dr. Naoyuki Sakumoto, who asked me to conduct thus study and also assured the Institute of Developing Economies of JETRO that in spite of my many activities, I would still be able to complete the study on time.

To be sure, this would not have been possible but for the cooperation of Mr. Setiawan, S.H. (former justice of the Supreme Court in Indonesia) who chaired the drafting of an Academic Draft for the Indonesian Bill on The Law of Obligations (Chapter 5), Mr. Taryana Sunandar S.H., M.H. who wrote Chapter 2 on The Contract Law as contained in the 1848 Civil Code, and Chapter 4 on the Principles of the UNIDROIT Model Law of International Commercial Contracts, and Ms. Wuryastuti Sunario, who translated Chapter 2, 4 and 5 in the English language.

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May God bless all of you, who have helped me finish this study as planned, and may this study not only be beneficial for Japan, but also for Indonesia.

INTRODUCTION

Some time in August 2000 I was asked by Dr. Naoyuki Sakumoto to do a study and write a book on Indonesian Contract Law for the Institute of Developing Economies – Japan External Trade Organization (or IDE-JETRO).

Since for the last 30 years, after I finished my doctoral thesis in 1972 on "Transnational Problems of Foreign Investments in Indonesia", I was convinced that the first thing to promote and improve our investment climate is to establish an Indonesian National Contract Law in order to improve legal certainty in our country, I gladly accepted the offer.

This study was meant to become an additional study towards establishing a unified Contract Law for all groups and people living in the Republic of Indonesia. Numerous studies and drafts for the codification of our Contract law have been conducted since our Independence on August 17, 1945. Unfortunately, even after 55 years of our independence we still live in a pluralistic legal environment, first created by the Dutch.

What is more, after so many decades of attempts to unify our legal system, now at the start of the 21st century and because of the Reformation Movement towards Democratization, Decentralization, protection of Human Rights and the Rule of Law which started in 1998 with the downfall of ex-President Soeharto and his New Order, it seems that the trend is back again towards more plurality and specialization.

Therefore, contrary to my own former concept and intentions, which I propagated both to my students and as the head of the National Law Reform Agency (1988 – 1996) of the (at that time) Department of Justice, at present the trend towards more unification of law during the first half century of our independence, as also voiced by our founding fathers and our eminent lawyers

and judges, Prof. Subekti¹, Prof. R. Wijono Prodjodikoro, Prof. Sutan Malikul Adil, Prof. Soetan Mohamad Sjah and many others, who even advocated that those unified laws, equally applicable to all citizens of Indonesia should be codified, seems to be unrealistic, in view of the very strong demands of the regions outside Java, such as Aceh, Riau, Kalimantan., Moluccas, East Nusa Tenggara, Irian, etc. who are threatening to secede from Indonesia, whenever their own laws and customs, and social needs are not respected by the Central Government.

In such a strong environment towards more democratization, decentralization and recognition of the local laws and customs as a form of maintaining social justice, unification and codification would only result in more opposition, more conflicts and disintegration of the state and of the nation.

Therefore, in this age of globalization, we need to find a new pattern for our national legal system which (a) on the one hand recognizes the demands of the 300 regions or autonomous areas or so, but (b) at the same time forms a common basis for the Indonesian country as a whole, thereby (c) also adhering and upholding the universal legal principles recognized by the majority of legal systems in the world.

It is with this in mind, that we have divided this study in 7 (seven) chapters, encompassing :

Chapter 1. A brief history of Contract Law in Indonesia, including some features of our Adat Law and the basic difference between "European" Contract Law (as commonly practiced in today's business and investment circles) and Adat Contract Law.

Chapter 2. A description of the "European" Contract Law as contained in the 1848 Civil Code and as interpreted and/or applied by our Courts, Government Officials and Businessmen.

¹ Prof. R. Subekti, S.H. : Bunga Rampai Ilmu Hukum, Alumni, Bandung, 1977, p. 58 – 62.

Chapter 3. The development of new (customary) Contract Law since 1967.

Chapter 4. Principles of Contract Law according to the UNIDROIT Model Law, for International Commercial Contracts, which to my mind could serve as a model, or at least as a yardstick for our national law of contracts, including the Bill on the Law of Obligations.

Chapter 5. The Academic Draft for a Bill of the Law of Obligations.

Chapter 6. The future of what according to what the researchers think will have to become or will most likely become (part of) the Indonesian Law on Contracts.

Chapter 7. Conclusions.

The Role of Judge-Made Law in Indonesia

In Indonesia the *stare decisis* rule was never applied, although in the Netherlands and in the Netherlands-Indies (before Independence) the judgements of the judges were always compiled and commented on by the experts.

Since Independence, though, no regular compilations of judgements were published and the principle of independence of the judge was very strictly adhered to. As a consequence, the judges did not think they were obliged to follow previously made considerations of previous judges or of judges of a higher court.

This was the reason why judge-made law or case law did not become a source of law in the true sense of the word, like in other countries, including the Netherlands and the former Netherlands-Indies, because :

- (1) there was no obligation for judges to follow the legal reasoning of higher judges or of previous judges;
- (2) up till the present time no continuous digest exists of court judgements, although one can find a number of publications prepared by the Supreme Court (*Yurisprudensi Mahkamah Agung, Varia Peradilan*) or by private persons or organizations (like Chidir Ali's series on court cases and the compilation of judgements on bankruptcy).

More important as a source of law than judge-made-law – in particular with respect to contracts – are the business contracts practices and customs which have developed in the last 50 years of our Independence.

International treaties and conventions, practices and customs have also grown in importance as in-direct sources of Indonesian law, since many of those norms have found their way in Indonesian Public and Administrative regulations.

In addition, many of our judges, government lawyers and attorneys not only view legislation as our most important source of law, but there is a tendency that they also interpret the law and regulations in a very strict and formal legalistic way.

That is why such Model Laws as developed by UNIDROIT and UNCITRAL are very helpful in the drafting of new laws, and in the interpretations of contracts and of old laws in order that the application and implementation of the law will become fairer and more in accordance with present day demands of justice and of legal certainty.

All this forms the background of why legal reform and judicial reforms is of utmost importance in support of economic development which requires a safe and orderly environment, where contracts and legal obligations are respected and enforceable through the courts, and administration, without thereby

neglecting the paramount importance of balance, equilibrium, fairness and justice.

Law and Economic Development

During the last 30 years of accelerated economic development, economists who were the main decision makers in the country, looked upon law as obstacles in the process of economic development.

Lawyers were regarded as backward, every time they posed that a governmental policy or public law was against the principles of the Constitution or contrary to paramount principles of fairness, balance and social justice.

Usually it was said that law would hamper progress and development. Nevertheless, they used the form of public (administrative) law to change the law, especially in the field of foreign investment for the sake of economic progress and development.

Hence we find numerous lower regulations, such as government regulations (*peraturan pemerintah*), presidential decrees (*keputusan presiden*) and even ministerial decisions (*keputusan menteri*), including those issued by the Chairman of the (Foreign) Investment Board (*Ketua Badan Koordinasi Penanaman Modal*) overriding the Parliamentary Acts (*Undang-undang*), which is completely against all principles of the rule of law.

The Reformation Movement is therefore determined to correct and reverse this illegal practice. But in the process these attempts in turn meet with a lot of opposition of the financial -, economic – and political sectors.

Whilst on the one hand the Reformation Movement has the ideals of Supremacy of Just Law, Social Justice and Democracy as its ultimate goal, thereby also trying to improve certainty of law in support of economic development, in this

transition period, however, all the wrong-doings of the past, such as corruption and nepotism for the sake of economic development (both conducted by government officials and by businessmen and "entrepreneurs") come in the open, giving the impression, as if law enforcement becomes, once again, an obstacle to economic development.

Even the legal profession is divided in those lawyers, who for the sake of money and high fees defend the old (illegal and corrupt) ways of governance and doing business, and others, who despite of all difficulties keep struggling towards the Rule of Law, Social Justice, Clean Business and Good Governance.

The struggle is a very fierce and difficult one. Nevertheless, those of us, who really want to uphold the banners of Truth, Justice and Fairness, Good and Democratic Governance and Clean Business, this struggle has to be fought in all its fierceness.

Indeed, this study, albeit only a very small contribution, is dedicated to those ideals.

Chapter 1.

A Brief History of Contract Law in Indonesia

Before the Dutch ruled over the Indonesian Archipelago, each tribe or clan living on these islands were governed by their own Customary or Adat Law, which also included Contract Law. Although the rules differed one from the other, but they had 3 (three) features in common, which Prof. Van Vollenhoven described as "(1) communal, (2) cash and carry, and (3) concrete .

Different Laws for Different Groups of the Population.

In 1855 article 131 of the Netherlands Indies State Law (State Gazette No. 2 of 1855) legally divided the Indonesian population into three groups, i.e. :

- (a) Europeans, including Japanese;
- (b) Foreign Orientals; and
- (c) Indigenous Indonesians.

Article 163 of that law ruled that :

- (a) the Civil and Commercial Code applied to Europeans and Japanese;
- (b) The Civil Code and the Commercial Code, except for those parts concerning personal law, marriage and inheritance, also applied to Foreign Orientals.
- (c) Indigenous Indonesians were not governed by the so-called "European Laws", except in the case they legally obtained the same status as "Europeans" by Decision of the Governor-General.

Hence the Civil and Commercial Code never applied to Indonesians. Except in the most exceptional case, when an Indonesian request to the Governor-General was granted to be regarded as an European. This was possible only, in the case he had a Dutch education, married a Dutch or European woman, spoke Dutch at home with his wife and children, became a Christian and was completely living in a Dutch environment.

For the bulk of Indonesians, however, the Civil Code and hence Contract Law as contained in the Civil Code, never applied, and Indonesians have nothing to do with so-called European Law.

It was only since 1967, after the Foreign Investment Law was promulgated that the Company Law under the Commercial Code and the Contract Law under the Civil Code were made applicable to (indigenous) Indonesian citizens by Governmental Regulation, which later was confirmed by the courts through case law. Whilst the "European" Contract Law and Company Law were still a novelty for Indonesians, at the same time foreign elements (especially American legal principles and clauses) were introduced in the Investment Contracts between foreign investors and Indonesian businessmen. The use of the English language combined with the underlying English legal concepts of Contract – and Company Law resulted in a terrible mixture of rules and clauses in the Investment Contracts resulting in a state of confusion as to what the law really is, and how a clause should be legally interpreted by lawyers and judges.

That is why, especially with the dawn of electronically agreed contracts, coinciding with the globalization of commerce and investments in the 21st century, it is high time that Indonesia reforms and modernizes its Law on Contracts to the needs of Indonesians, as well as to those of the international business world.

Principles of Adat Law.

As mentioned above, contrary to the Western or European Law introduced by the Dutch into Indonesia, the local laws and customs adhered to by the hundreds of tribes and clans living in the island which became to be known as Indonesian Adat Law were more pragmatic, realistic and concrete, in contrast to the European Continental abstract way of legal thinking.

A contract in what by Prof. Van Vollenhoven was called Adatrecht or Adat Law was not seen as a legal relationship causing a number of rights and obligations to exist for the parties, but was regarded as an act by which on the basis of delivery of a physical token called "*panjer*" in Jawa (but which in other regions may have different names) one party (read person or family, group or clan) promises to another party to do or give something for or to the other party or to refrain from doing something.

By the handing over of this token, which may consist of a gift, a keris (weapon), cloths, food, cattle or money, a situation of imbalance is created, so that (in order to restore the balance and dignity of the receiving party) this party should perform what it has promised to do or to give.

The concept of balance is therefore very much the same as the bargain theory in the English law of Contract.

Until the party has performed its side of the contract, the respective party is regarded to be indebted (*berhutang*) to the party who has delivered the physical object, witnessed by a number of people of the community, and his dignity will not be restored until he/she/they has performed his/her/their part of the contracts.

The contract in Adat Law therefore becomes binding at the moment the object has been delivered and accepted, and not (like in European Law) at the

moment of mere oral or written acceptance/pledge, without a *panjer* having been delivered.

What is important in Adat Law, therefore, is not the promise or the acceptance, but the act of delivery of a physical object to the other party as evidence that the balance of the relationship between the parties have (temporarily) been disturbed, so that another act will be necessary to restore the balance again.

Usually of course in a traditional society, no problem of difference in place of delivery and performance exists, but with sea faring tribes like the Bugis of South Sulawesi there exist a number of rules of Conflict laws, as for instance the law of the conclusion or performance of the contracts shall apply and the conflicts arising out of the performance of the contract shall be decided by the judge and the law where the contract is to be performed.

The Amanna Gappa Code of the 17th century of the Bugis people even mentions that the captain of the ship shall be the judge and decide upon conflicts arising on the vessel, and the applicable law shall be the law of the captain of the ship.

Also, that no passenger shall be allowed to go ashore before his conflict is settled satisfactorily on board ship, because as it is said "any fire will die out where it was started".

Chapter 2

Principles of the “European” Contract Law

In contrast to the way of thinking of Adat Law, the legal thinking behind the Law of Obligations (and Contract Law) of the Civil Code is very abstract. Because what is regulated is not so much the contract as the relationship between the parties depending on their promise and agreement, resulting in a number of legal obligations on the one hand, and rights and duties on the other.

Background of the Indonesian Contract Law.

It is often said that Indonesian Civil Law belongs to the group of the Continental “Civil Law Systems”, as opposed to the “Common Law Systems”.¹

This description is not wrong to the extent that much of Indonesian law derives from the Dutch and the French. However, the statement is not entirely true.

As Sudargo Gautama² said that when the first Dutch ships landed in the Indonesian Archipelago, they did not find a juridical “empty land”. The land was full of legal institutions. There was diversity of laws from the beginning of the days of the VOC (*Vereenigde Oost Indische Compagnie*) or United East Indian Company. From the beginning of Dutch colonization, the inhabitants of the Indonesian Archipelago, have been divided for legal purposes into various “population groups” (*bevolkingsgroepen*). This distinction was not entirely based on racial differentiation, but was also based on economic considerations. There was also a distinction between residents and non-residents, Dutch nationals

¹. Timothy Lindsey, *An Overview of Indonesian Law*, in Indonesian Law and Society, Sydney: the Federation Press, 1999, p. 1.

² Sudargo Gautama, *The Commercial Laws of Indonesia*, Bandung : Citra Aditya Bakti, 1998, p. 3.

and foreigners, but no distinction was more important than the division into population-groups, as regulated by State Gazette 1855 No. 2.

For example, matters concerning daily transactions in private life, such as what kind of contracts one could enter into, whether one could own land and where, from whom one could inherit and in what ways ; all such matters depended on the population group one belonged to. This was so, because different rules of contract law, property law and inheritance law existed for each group. Each group had its own legal system, separate regulations administered by separate government officials and regulated by separate codes or laws.

Very different systems of law existed side by side in Indonesia for centuries, although transactions between the various groups were possible which was governed by principles and rules of Interpersonal Law. In special cases unified regulations were made like in the case of the Criminal Code, which applied to all groups of inhabitants.

Application of the Civil Code and General Principles of Contract Law.

Part of Indonesian Private Law as inherited from the Dutch are the Civil Code (*Burgerlijk Wetboek*) and the Commercial Code (*Wetboek van Koophandel*). These codes (except for a few exceptions), were practically Dutch translations from the French Code Civil and Code du Commerce. The Civil Code was promulgated in Indonesia by Government Announcement on April 30, 1847, Government Gazette 1847 No. 23 and applied since the 1st January 1848.

Article II (the Transitional Regulation) of the Indonesian Constitution of 1945 states that all the existing state institutions and regulations will still apply, as long as no new ones have been established in accordance with this Constitution. This provision was made, in order to prevent a legal vacuum. Hence the old regulations and codes before our independence on August 17th,

1945 continue to apply till the present time. Nevertheless, the Government assisted by the National Law Reform Agency (Badan Pembinaan Hukum Nasional) is scrutinizing which of the old laws will have to be replaced by new ones. Some 400 laws and/or regulations will have to be replaced by new ones.

The recent development pertaining to contract law and commercial transactions has been the enactment of Act No. 1 of 1995 on the Limited Liability Company (PT), the Fiduciary Securities Act (No. 42 of 1999), and the Futures Trading Contract by Act No. 32 of 1997. Standard contracts are regulated in specific regulations such as Act No. 8 of 1999 on Consumer Protection and Act No. 18 of 1999 on Construction Services. At present a bill is being prepared for Mining Activities including mining and license contracts. Provisions concerning contracts which are prohibited can be found in Act No. 5 of 1999 concerning the Prohibition of Monopoly and Unfair Business Competition.

Contract as a Source of Obligations.

The Civil Code was promulgated in the year 1848 together with the Commercial Code. The law of contracts under the Civil Code (*Burgerlijk Wetboek*) is laid down in Book III of the Civil Code, starting with Article 1233 through Art. 1456. The 5th Chapter of Book III (art. 1457 to art. 1850 CC) regulates the so-called "nominated" or specific contracts, such as sale of goods, barter, hiring, etc.

Book III of the Civil Code, under the heading "Obligations", contains :

- (a) the law of contracts as the principal source of obligations,
- (b) the management of affairs without mandate, and
- (c) the law of torts or wrongful acts.
- (d) Nominated contracts.

Every obligation is born either by agreement or by legislation ³. There is no definition on what obligation is in the Civil Code. Legal science stipulates that

³ Article 1233 Civil Code.

obligation is a legal relation between two or more persons which sit within the field of the law of property, establishing to one party the right to get something or have something to be done by the other party, who has the obligation to fulfill such right. Legal relations happen every day, so the law grants "rights" to one party, and "obligations" to the other party and vice versa. Elements of obligations are : legal relations, property, parties, and something to give or to be done (prestatie) ⁴. If one of the parties does not respect or breaches such legal relationship, the law will be enforced in order that the relationship will be fulfilled or restored. For example : A agrees to sell a bicycle to B. As a result of that agreement, A is obliged to give his bicycle to B and at the same time has the right to its price from B, whilst B is obliged to pay the price of that bicycle to A. If A does not fulfill his obligations, then the law will "force" him to do so by legal means.

However, not all social relations result in the enforcement of the law of obligations. An agreement to go for an outing or a picnic will not bear an obligation, because such agreement is not an agreement in the legal sense. Such agreement falls within the category of moral obligations, because the non-performance of the obligation results in a reaction from other members of society as a bad attitude. The non-performance party will be hated by the other, but it is non-actionable before the court.

Sources of obligations are agreements (contract) and legislation. ⁵ Obligations born by Law can be born by mere Law (*uit de wet alleen*) or as a result of human action (*uit de wet ten gevolge van 's mensens toedoen*) ⁶.

Furthermore obligations as a result of human actions can be lawful or unlawful acts or torts (*onrechtmatige daad*).⁷

⁴ Mariam Darus Badrulzaman, *Civil Code Book III and Its Explanation* (KUHPerdata Buku III Hukum Perikatan dengan Penjelasan), Bandung, Alumni, 1993, p. 3.

⁵ Article 1233 Civil Code.

⁶ Article 1352 Civil Code.

⁷ Article 1353 Civil Code.

Obligations born by mere Law are obligations between the parties concerned (with or without intention of the parties). For example : date of expiration (*verjaring*) is an event where the legislators determine an obligation to a particular person. Because of the date of expiration, someone might be released from doing something or acquiring a right or obligation to do for something ; the death of a person will result in legal obligations to his heirs, the birth of a child results in the obligation to the parents in order to take care of their infant (Article 321 Civil Code).

Obligations which arise from the Law as a result of human lawful acts are for instance a voluntarily handling of other people's interests (*zaakwaarneming*), because the Law determines that some rights and duties must be performed by the handler, similar to the rights and duties in such cases as if an agreement was made. Article 1354 Civil Code states that "if someone, without having obtained an order for it has voluntarily handled another person's matters, he has an obligation to continue and finish that matter (business) until the people represented is able to do that matter by himself. The person, whom the other person has represented, has an obligation to compensate all costs which was spent on his behalf.

Obligations resulting from the Law but caused by unlawful acts is enacted in Article 1365 of the Civil Code, saying that those who causes another person to suffer losses, based on his fault, must restore the losses.

As Article 1233 Civil Code states that "obligations are born from contract or from legislation". That means that Law and Contracts are sources of obligations. This gives the impression as if the sources of obligations are only limited to those two sources mentioned above. However, based on the extensive interpretation on natural obligations in an Supreme Court decision of March 12, 1926, obligations can also be based on good faith or decency (good deed) as a source of a "natural" obligation (*natuurlijke verbintenis*) which can not be sued before the court to obtain full compensation, but if performed, releases the performer of his obligation.

General Provisions and Open System of Book III of the Indonesian Civil Code

The law of contract is an "open system", which means that everybody is free to make any kind of contract. Special contracts or "nominated contracts" are regulated in the Civil Code being only the most popular kinds of contracts. Because Book III of the Civil Code is an open system, the articles in Book III actually provide only General Guidelines of Contract Law. With such general provisions, people could conclude whether or not they have made a legally valid contract.

Freedom of Contract

The freedom to make contracts of whatever kind is regulated in Article 1338 paragraph 1 of the Civil Code, which provides that all contracts which have been legally concluded, have the same force as a legislative act for the parties who had concluded the contract. As a consequence of the open system of the law of contracts, the provision laid down in Book III of the Civil Code have the character of optional law. This means that the parties are free to ignore those provisions by making for themselves rules in their contracts deviating from or even contrary to those provisions laid down in Book III⁸, except that they cannot deviate from the basic rules of legality, justice, good intentions and fairness, whenever the parties have not made any provision concerning a certain matter in the contract.

Book III of the Civil Code consists of a General Part (art. 1233 – 1456), containing the general rules of the law of obligations and contracts and a Special part regulating special contracts (art. 1457 – 1855). The general principles of the law of contracts in the Civil Code form the principles not only for contracts regulated in the Civil Code itself, but also for those regulated in the Commercial Code and in other special acts or regulations.

Most articles of the law of contract, private law in general, are additional legal provisions (*aanvullend recht*), which apply in case the parties had not agreed otherwise. The additional legal provisions also apply only when both parties consent to that. Here the legislators made a fiction of presumed intention of the parties. Such fiction is needed in order to synchronize with the principle of consensus of the parties. Apart from that, such legal presumption is needed to determine the rights and duties of the parties and also to prevent any legal dispute, or for the sake of legal certainty.

The elements of obligations are : the parties, legal relations, property, and something to give or to be done (prestatie).⁸. In Book III the law of obligations is part of the law of property (*vermogensrecht*), which distinguishes between absolute rights and relative rights. Absolute rights (or rights in rem) are regulated in Book II of the Civil Code, whilst relative rights are regulated in Book III of the Civil Code. Property rights are rights which have economic value or can be counted in sums of money. So it should be clearly understood that the obligation to give or do something (prestatie) valued in money or other economic value has an important role in the law of obligation. This legal character is to be distinguished from the moral obligation which are not enforceable by law.

The Civil Code also regulates a number of so called "nominated" contracts, such as the contract of sale, barter or exchange, lease, contract of labour, partnership, association, donation, deposits, loans, "natural contracts" like gambling and life annuity, agency, guarantee and compromise.

Contracts of insurance and transportation overseas are regulated by the Commercial Code, and contracts of transportation over land and by air are regulated by special laws or ordinances.

⁸ R. Subekti, *The Law of Contracts in Indonesia, Remedies of Breach*, Jakarta : Haji Masagung, 1989.

⁹ Mariam Darus Badrulzaman, *Civil Code Book III and Its Explanation (KHUPerdata Buku III Hukum Perikatan dengan Penjelasan)*, Bandung : Alumni, 1993, p. 3.

Other commercial transactions have been provided by many Laws outside the Civil Code and Commercial Code such as the Contract for the establishment of a Limited Liability Company (PT) regulated in Act. No. 1 of 1995 on Liability Company, Fiduciary Securities in Act. No. 42 of 1999, and Futures Trading Contracts in Act. No. 32 of 1997. Standard contracts have been enacted in special rules such as in Act. No. 8 of 1999 on Consumer protection and Act No. 18 of 1999 on Construction Service, while at present a bill is being prepared for mining activities, including mining and license contracts. Finally, in Act. No. 5 of 1999 concerning Prohibition of Monopoly and Unfair Business Competition there are provisions on contract clauses, which are prohibited.

Definition and Scope of Contract Law

Chapter II of Book III of the Civil Code concerns "Obligations born from Contract or Agreement". The use of the words "contract" or "agreement" in Book III have identical meaning, Article 1313 of the Civil Code define a contract (or agreement) as an "act by which one or more persons bind themselves towards two or more other persons, with the intention to create obligations".

The term "act" between two or more persons in this article should be understood as "legal act", because both parties are required to consciously know or could or should have known of the legal consequence which would occur in the future. Hence the parties intentionally were engaged in such act for the purpose of its legal consequence. In other words, the legal consequence was indeed something that was intended by the parties. For example in the decision of the Court of Central Jakarta in the case between **Alfa Indonesia vs, Jakarta Lloyd** No. 64/1979, the defendant posed that the shipping agreement included a special agreement (*benoemde overeenkomst*). Article 506 of the Civil Code namely stated that a Bill of Lading is a letter in which was written that on a certain date the carrier received a certain (kind or amount of) goods to be delivered at a certain place of destination where it should be delivered to a certain person. The bill of lading also contains a set of conditions for transfer

goods. Therefore it was convincingly clear that the **Bill of Lading** was indeed a unilateral declaration (*eenzijdig*) made by the carrier/defendant and that it was not an agreement between the two parties (*overeenkomst*) as stipulated in Article 1313 Civil Code.

The law of Book III of the Civil Code concerns contracts in the field of private law. Agreements in public institutions or organizations are not covered by the Civil Code. Public law concerns public law relations, namely relations between states or between public institutions and organizations. However, in the last thirty years increasingly the state conclude contracts with individual persons or private companies concerning private law matters. Such as whenever the government has to buy computers or stationaries from a private company for the purpose of government procurement.

In recent times there are two opinions on that issue. If the state acted in the quality of the state (*iure imperii*) the legal relationship results in a public law relation. Whereas if the state acted in her economic capacity (*iure gestiones*)¹⁰ as for instance as a state company, private law on the matter should be settled by private law provisions. In such case the provisions of Book III of the Civil Code apply.

For example in the decision of the District Court (*Residentiegericht*) of Batavia, March 18, 1927 in the case of "**Excess Teaching Hours**".¹¹ A, a mathematic teacher, who was appointed by the Department of Education became Head of a Preparatory Team for the opening of the Medical School in Surabaya, had been given the task to give mathematic lessons to the student candidates. The task as a teacher has exceeded the number of teaching hours agreed upon, because the change of teaching schedules from the Department of Education.

¹⁰ Compare with Barry E. Carter and Phillip R. Trimble, *Foreign Sovereign Immunity and the Act of State Doctrine*, Boston : Little, Brown & Co., 1991, pp. 449 – 697.

¹¹ Translated from J. Satrio, *Hukum Perikatan, Perikatan Yang Lahir dari Perjanjian*, Bandung : Aditya Citra Bakti, 1995, pp. 30 – 32.

Based on those reasons he sued the Department of Education c.q. State in order to pay the "excess of teaching hours". The legal reasoning of the Court Decision said that the legal relationship between plaintiff and defendant was a relation between employee and the state. Such relationship was not a private agreement, but had a public law character. Article 40. I.S. (*Indische Staatregeeling*) stipulates that payment of wages for public employees is unilaterally decided by the state. Therefore, intervention by another party, even though by the Court, was not excepted. This indicated the difference between public law and private law. In other words, the private law provisions in Book III do not apply for agreement in the field of public law.

This was the situation in 1927. But recently there is a group of lawyers, who have modified this theory, saying that in specific cases Book III CC might be applicable to government contracts.

General Conditions for Validity of Contract

Article 1320 Civil Code provides for the general conditions by which a contract is valid. Such conditions concern the subject and the object of the contract. This article stipulates that for a contract to be valid, it must comply with 4 (four) conditions, namely : (1) consent between those who bind themselves (the parties); (2) capacity of the respective parties to conclude an obligation; (3) a certain (specific) subject matter, and (4) a legal cause.

When the conditions mentioned above are fulfilled, a contract is complete and valid. The validity of a contract is, as a rule, not bound to formalities. Only by exception the law prescribes formalities for a certain number of contracts.¹² The first two conditions are conditions pertaining to its subject, and the last two conditions are conditions pertaining to its object. A contract containing defective subject, namely concerning the consent of the parties or whenever one party has not obtained the capacity to conclude an obligation, does not

¹² R. Subekti, op. cit.

invalidate such contract (*nietig*), but often only raises the possibility for the other party to claim that the contract is void (*vernietigbaar*).

On the contrary, whenever the subject matter is not certain or whenever the cause is not legal, such defects on the object of the contract result in the contract being void by law.

1. Mutual Consent Between Those Who Bind Themselves

In concluding a contract there has to be at least two persons who take opposite positions and have the intention to come to a mutual agreement (consent). Hence, a consent means a meeting of minds ¹³.

According to Prof. Sudargo Gautama :

"By a free consensus (meeting of minds) is meant that both parties have voluntarily given their consent or have voluntarily agreed to the contract. According to article 1321 of the Civil Code the consent is not valid when it is the result of error, coercion or deceit".

The mere meeting of minds between two persons would not sufficiently conclude an obligation. The core consent is indeed an offer which was accepted by the other party. Offer and acceptance could come mutually from both parties. Therefore, the elements of offer and acceptance is very important to determine the birth of a contract. Unfortunately, the legislator did not provide a pattern which could be used to determine to what extent an offer or an acceptance is binding.

According to Sudargo Gautama ¹⁴ the principle of consensus concerns the formation of a contract. Generally no formal requirements are needed to make a contract binding. The mutual consent of the parties will be sufficient. The exceptions however made by the law are :

¹³ R. Subekti, op. cit

¹⁴ Sudargo Gautama, *Essays in Indonesian Law*, Bandung : Citra Aditya Bakti, 1991, pp. 188 – 189.

- (a) Besides the mutual consent of the parties, the delivery of the subject will be required to make the contract binding. This is the case in the following contracts : depository (sect. 1694 Civil Code); loan for use (sec. 1749 Civil Code); loan for consumption (sect. 1754 Civil Code).
- (b) As regards certain contracts the mutual consent is required to be made in a certain written law form, namely an authentic deed (contract of donation, Article 1692 Civil Code), and the formation of a limited liability company, (Article 30 Commercial Code) or private deed (contract of compromise, Article 1851 Civil Code).

In the Netherlands it has been enacted in the *Nieuwe Burgerlijk Wetboek* (*New Civil Code*) Article 217 to 225. Here the legislator gave some provisions on offer and acceptance. According to Articles 219 – 225, a contract is formed by an offer and its acceptance. Articles 219 – 225 apply unless the offer consists of another juridical act or usage produces a different result. An offer is valid, null and void, or subject to annulment according to the rules which are applicable to multilateral juridical acts.

There are at least 4 (four) theories regarding the doctrine of consensus, namely : the Will's theory (*wilstheorie*), the sending theory (*verzendtheorie*), the knowledge theory (*vernemingstheorie*), and the trust theory (*vertrouwenstheorie*). The will's theory states that consensus is reached at the moment both parties have expressed their will, for instance by writing a letter to the other party. The sending theory says that consensus is reached at the moment the will to except is expressed by the acceptor to the offeror. The knowledge theory states that consensus is reached whenever the offeror should have known that his offer was accepted. And the trust theory states that consensus is reached, whenever one can reasonably presume that the offer has been accepted by the acceptor.

Asser¹⁵ divided conditions for the validity of contract, in the core part (*wezenlijk oordeel*) or "essensialia" and the non-core part (*non wezenlijk oordeel*) or "naturalia" and "aksidentalia". Essensialia is a condition which is mandatory to a contract, something without which the contract cannot exist (*constructive oordeel*). Such are the conditions of consensus and the object of a contract. Naturalia is a part which "naturally" adheres to a contract, such as the obligation to assure that no defect goods shall be sold (*vrijwaring*). Aksidentalia means conditions adhered to a contract which should be expressly agreed upon by the parties, such as the provisions on the parties' domicile.

Capacity of the Parties

Everybody is capable of concluding a contract, except those who are declared incapable by law. According to Article 1330 of the Civil Code, the following are incapable of concluding contracts : minors, those who are under guardianship and married women. By a decision of the Supreme Court in 1963, the provision as regards married women is declared illegal, so that now married women are capable of concluding contracts, without the assistance of their husbands. In case an incapable person has concluded a contact, his/her legal representative has the right to demand before the court the annulment of the contract. The person himself also can demand annulment, when he becomes capable or regains his capability. It is understood that the other party (that is the party who is capable) has no right to demand annulment of the contract.

A Certain Subject Matter.

By a certain subject matter is meant a clear description of what is agreed to resulting in the certainty of the subject matter. This is necessary to enable the Judge to determine the duties of each party, when there arises a dispute. For example : a contract of sale of "rice for one hundred dollars"; shall be declared

¹⁵ See Mariam Darus Badrulzaman, *ibid*.

null and void for the reason that a certain subject matter is lacking, as it is not clear what kind or quality of rice is sold; moreover nothing is said about the quantity.

A Legal Cause.

By a legal cause is meant that what has to be performed by either party is not contrary to the law, public order or public morality. A contract whereby one of the parties undertakes to commit a crime is null and void, because it has an illegal cause.

From what is said above, we can draw the conclusion that, in case of incapacity of one of the parties or in case of lack of free consensus, the injured party has to demand the annulment of the contract from the judge. In such cases the contract is voidable. On the other hand, in case of ambiguity about the subject matter, or in case of illegal cause, the contract is null and void from the start. In these cases the judge shall *ex officio* declare the contract null and void. In case of incapacity of one of the parties or in case the imperfection of the contract, whereas in the case of ambiguity about the subject or in the case of an illegal cause he is supposed to know the imperfection of the contract at first sight.

The action for annulment of a voidable contract shall be brought within five years. This period shall begin : (1) In case of incapacity of one of the parties from the time that the incapable person becomes capable or gains his capacity; (2) In case of error, coercion or deceit, from the moment of detection or discovery of the error or the deceit or from the moment the coercion has ceased (Article 1454 of the Civil Code).

Breach of Contract.

There are four different manifestations of breach of contract, i.e. whenever : (a) The debtor has not done anything to carry out his duty; (b) the debtor has done his duty but not equivalent to what was promised in the contract; (c) The debtor has fulfilled his task, but too late; and (d) The debtor has done something that is contravention to the contract.

In all these cases the debtor is considered to be in default, as he has been neglecting his contractual duties. The law has laid down certain sanctions for such a debtor.

Debtor's Fault.

Where the debtor has done something that is in contravention to the contract, it is obvious that he is in default. Also when a time limit is fixed in the contract for carrying out the duty and the debtor has passed this time limit, it is clear that the debtor is in default. But in other case, the creditor has first to remind or to summon the debtor to fulfill his contractual duties, as for instance, when the debtor has to pay a sum of money and it is not stipulated when he has to make the payment, or when the performance by the debtor, according to the creditor is not equivalent to what was promised in the contract.

According to judicial decisions an oral reminder is enough. To be safe, it is advisable for the creditor to remind by registered letter, so that he has proof of the reminder. According to the Civil Code there are four sanctions attached to a breach of contract : Compensation (costs, damages, and interest) : Cancellation of the contract; Transfer of risk of responsibility for the object of the contract; Payment of cost procedure; when it leads to recourse to a court.

Article 1266 of the Civil Code provides for a claim of cancellation of the contract against a debtor who is in default to fulfill his obligation. The cancellation of the contract is meant as a punishment for a debtor who has neglected his duties. Indeed it is sometimes felt hard by a debtor, especially when he has already incurred expenses for the fulfillment of his contractual duties. Article 1266, therefore, provides that the court could allow a period of grace to the debtor to give him an opportunity to perform. When the court is of the opinion that a cancellation of the contract will be disastrous to the debtor, while his fault is not serious, the court will refuse to cancel the contract, though, possibly, he will entertain a claim for compensation.

The right of a seller in a cash sale to reclaim the goods sold and already delivered to the buyer in case the buyer neglects his duty to pay the price of the goods, is in fact a right to cancel the sale without the intervention of the court. This right is to be exercised by the seller within thirty days from the date of the sale while the goods are still in the possession of the buyer (Article 1145).

Chapter 3

The Development of New Customary Contract Law

Since 1967 Indonesia has taken an ever increasing open door policy with regard to foreign investments and foreign trade.

Since then thousands and thousands international contracts have been concluded, both between Indonesia private companies and foreign companies, as well as between Indonesian state companies and transnational corporations.

From the beginning, foreign contract models have simply been adopted and translated in the Indonesian language, without much thinking and research, whether those foreign concepts are in line with Indonesian contract – and business law, or not. On the contrary, very often the principles of Indonesian contracts law has been thwarted and re-interpreted, in order to accommodate the foreign concepts into Indonesian law.

Through the 35 years or so of intense foreign influence, especially of American law in Indonesia, Indonesian Contract and Business Law has astrayd far from what it theoretically should have been, given the fact that our Civil and Commercial Code of 1849 looks almost the same as it was some 150 years ago, except for a change of the Indonesian company law.

Indeed, our Contract Law, especially with regard to international contracts, mainly consists of thousands of contracts which together may be said has become the source of customary law as agreed to by both Indonesian and foreign business partners. With respect to foreign investments, banking – as well as the capital market, government administrative regulations decide on the form of the contract and other aspects of the contracts, very often making exceptions to the rules and principles laid down in the Civil Code. So that now we have numerous laws and regulations on specific contracts, while the Law on

Contracts in the Civil Code of 1848 only serves as the general principles of Contract Law in Indonesia.

Credit contracts, technical assistance contracts, management contracts, investment contracts, license contracts, franchise contracts, sale of goods contract have mostly been made along American models with a few modification in order that the foreign party's obligations and responsibilities are minimized, while the Indonesian partner's obligations are maximized.

The whole operation of the investment, starting from the land on which the factory or business is to be established, loan and credit, operation costs, including that of raw materials and machines, design and licenses, labour and manpower problems (except for off-shore personnel) up to negotiation – and administration costs and taxation have been made the responsibility of the local partner of the Joint Venture Company, whereby most of the operation costs of the Joint venture are the gains of the foreign partner of the Joint Venture before even the profits after tax will be divided between the foreign – and the local partner.

What is more, those foreign experts, loans, raw material and machineries, designs and plans of operation, are thereby calculated twice : both as the foreign party's investment (enjoying all kinds of tax-holidays and other facilities) as well as money and goods sold to "their own" (Joint Venture) Company in Indonesia.*

Nevertheless, at that time the policy of the New Order Government under ex-President Soeharto was of the opinion that Indonesia should open our doors widely for modernization, industrialization and foreign investments. This heavily economics oriented approach intentionally disregarded all protests and warnings coming from the legal professions, saying that so many of the foreign investment contracts were not only contrary to Indonesian (and universal)

* See also Sunaryati Hartono (diss) : "Beberapa Masalah Transnasional dalam Penanaman Modal Asing di Indonesia" (Transnational Problems of Foreign Investments in Indonesia), Binacipta, Bandung., 1973.

principles of Contract Law, such as violating the principles of fairness and of balance, which the UNIDROIT Principles expressly states as contracts which can be re-negotiated, or could become in-valid.

Most economist, ministers and decision-makers even arrogantly answered that "no revolution can be made with lawyers" when Indonesian lawyers pointed out the mistakes, lopsidedness and unfairness of the investment contracts made and agreed by the President c.q. The (Foreign) Investment Board, especially when one considers that the foreign investors are usually transnational corporations, while their local partners consist of economically and technologically traditional and small local corporations, by any standard. No wonder that in this Reformation Era many members of Parliament (*Dewan Perwakilan Rakyat*) insist on having the contracts agreed by many a state company, such as *Perusahaan Listrik Negara (PLN)*, *Pertamina*, and others, to be cancelled or renegotiated.

The Trend Away from Purely Civil Law Contracts

In any case, during the more than 30 years or so after 1967 i.e. when the Foreign Investment Law was first promulgated, a huge number of investment contracts came into being, which although not completely in line with the principles and rules of the Indonesian Contract Law and Law of Obligations as regulated in the Civil Code, were more or less respected and implemented by the government, and courts and recognized as new customary Contract Law.

There is, however a big difference between these investment contracts compared to the "ordinary" civil contracts regulated by the Civil Code.

Because the foreign investment contracts, although concluded before the investment permit of the (Foreign) Investment Board, will become binding only after the Joint Venture has obtained the necessary permit of the (Foreign) Investment Board (BKPM) and/or the relevant Ministerial Departments.

The civil contracts concluded before the permit is issued by the BKPM is to be regarded as binding only after and upon the condition of the BKPM permit being issued.

Therefore investment contracts are not purely civil contracts, but are governed by a mixture of private-and public law rules.

In other words : eventhough each of the contracts (such as loan, sale of goods, license contracts and the like) would be perfectly valid when standing alone, nevertheless, as part of an investment contract they are subject to the public rules of administrative and public policy.

This also applies to real estate contracts, insurance contracts, retail contracts, etc., whereby foreign investors or companies are involved.

It is therefore that a pure private law approach to contracts concluded in Indonesia is not appropriate any more, as is the case also in other states, such as in the United States, where each import contract should conform to the Food and Drug Act first, before anything else.

The Rise of Standard Contracts and International Contracts

With the industrialization of Indonesia and big business since the 1970s involving the growth of companies and banks, the use of standard contracts came into being.

Of course, before that Indonesia already made use of standard contract, such as in transportation, banking and insurance, but it is only during the 1970s that the use of standard contracts, especially in the banking, real estate and import/export sector started to be used on a big scale.

Unfortunately the law of obligations in Indonesia has no regulations for such standard contract and even the judiciary has never made any difference between the implementation and implication of standard contracts and "ordinary" contracts, where the bargaining power of both parties are considered relatively equal.

No wonder that this lack of legal sensitivity of the lawyers, and especially of the courts lead to unjust decisions and injustice, because they disregarded the principles of balance and equality as a factor which could decide on whether a contract is valid and fair, or not. What was important to the government and the judges was only that the contract was signed, making the contracts ipso facto valid. The fact that big companies could impose almost everything to weak parties for whom the contracts could be a matter of life ad death, thereby excluding most responsibilities for themselves, while imposing all kinds of obligations to the weaker party, were simply out of their considerations.

In the near future, therefore Indonesia would have to introduce a Law on Standard Contracts, like the regulation on General Standards (*Algemene Voorwaarden*) in the Netherlands where the differences of bargaining power between the parties will be considered and the consequences are regulated, in order to come to fairer arrangements.

The Need for a Law on International or Transnational Contracts

Like a Law in Standard Contracts, we also need a Law on International Contracts, where the international conflict laws and principles are explicitly spelled out.

Because at present no important industrial or business operation is any more conducted without foreign credit, foreign management, foreign technology, foreign imported raw materials and what not, or even without the products or services being exported abroad.

Business in Indonesia therefore, is not any more conducted internally between Indonesians, but almost always involves one or more foreign parties or elements. Only very small businesses are conducted between Indonesians, making Indonesia a part of the global market in the real sense of the word.

The view as if international contracts are only exceptions to the rule therefore is contrary to what we see in practice, at least in Jakarta.

Involvement of international trade and business organizations, even the IMF, IFC, the World Bank, the Asian Development Bank and UNDP, which are the channels for (business) development in Indonesia, all these organizations think in terms of international law and International contracts and agreements, to which the Indonesian government and the Indonesian people have to live by.

A separate law on International Contracts seems therefore also necessary, especially because with international contracts in Indonesia not only private international law applies, but also international conventions and treaties, such as the International Convention on the Settlement of Investment Disputes, etc.

Hence, more appropriate would be the notion of transnational contracts since both public and private international law rules and principles will have to be considered, when making and interpreting international or transnational contracts in Indonesia.

The Law on Government Contracts

A further category of newly grown contracts after the 1970s are the government contracts, i.e. standard Contract concluded with government agencies or with state companies.

Although such instruments are called contracts, they have but little to do with contracts properly so called. In fact they rather represent a list of condition stipulated by the government agency or the state company to which the private party i.e. an Indonesian (or foreign company) has to abide by. Such government contracts are therefore Standard Contracts for which public law is applicable.

Up to the present time considerations of fairness are still unrecognized, such as for instance that eventhough it lies in the power of the government to raise the prices of goods and services in general (which are relevant to the contract), nevertheless the private contractor is not allowed to make changes in the price or the time of performance or the quality of the work. This of course is theory. In fact, often it would be impossible to abide by the conditions agreed, but some of bribe will be enough to have the performance of the contracts agreed by the respective governmental agency or state company, modified.

Therefore, instead of this illegal way of doing business I would prefer to recognize the principles of force majeure, of balance and of hardship to be recognized as factors or reasons for renegotiation, as regulated by the UNIDROIT Principles of International Commercial Contracts.

Chapter 4

The UNIDROIT Principles of International Commercial Contracts

Introduction

In February 1994 the Working Group of the UNIDROIT in which the most eminent legal experts of the 56 Member States of the UNIDROIT participated *) completed its work of drafting a Model Law for International Commercial Contracts.

As this Model Law is the result of harmonization of contract law between Common Law countries and Civil Law countries, I am convinced that Indonesia need not to "re-invent the wheel" by attempting another comparative study on national Contract Laws and principles in order to arrive at a universally recognized set of principles for our Contract Law and Law of Obligations, but instead could benefit from the excellent work done by the UNIDROIT.

In fact there was already such a (limited) comparative law project conducted by the National Law Reform Agency (Badan Pembinaan Hukum Nasional - BPHN) in 1994, conducted by a team of Indonesian and foreign lawyers, which team I chaired, which involved a comparison between Indonesian Law Obligations, American Law, Dutch Law and Australian Law.

Nevertheless my personal view is that the UNIDROIT Principles of International Commercial Contracts would be a better example, and would give higher, universal recognition to the new Law of Obligations, including Law of Contract, as the experts involved in the UNIDROIT Working Group already represented a very large proportion of the legal systems in the world, and consisted of the most eminent, experienced and internationally recognized experts, not only in

* Michael Joachim Bonell : An International Restatement of Contract Law, 2nd. ed., Transnational Publishers, Inc. Irvington-on-Hudson, New York, 1997, p. 19-30.

their own law, but also in the field of International Private Law and Comparative Law.

It is therefore, that for the sake of clarity the UNIDROIT Principles of International Commercial Contracts (UPICCS) are discussed in this study, because as we can see in Chapter 5, the Indonesian Academic Draft for a Bill of the Law of Obligations (which include the Law of Contract) has not yet adopted a number of very important principles of the UNIDROIT Model Law such as for instance, the principle of Balance between the Parties and of Protection of the Weaker Party, Fair Interpretation of Standard Contracts, Matters of non-performance in changes of circumstances or other unsurmountable difficulties to perform, Relief of responsibility in certain, specifically named circumstances and the like, which are very important principles for parties of Developing Countries, where the overall situation is not yet as stable and settled as in Industrially Developed Countries.

The Principles of Commercial Contracts in UNIDROIT

In broad lines, UPICCs consists of seven Chapters, namely Chapter I : General Stipulations; Chapter II, Drawing up of Contracts; Chapter III, Validity of Contract; Chapter IV, Interpretation of Contract; Chapter V, Contents of Contract; Chapter VI, Performance of Contract, and Chapter VII, Non Performance. The Seven Chapters are further detailed in 109 Articles. UPICCs uses the method of "Restatement" as used by the ALI (American Law Institute), that is by including the "black letter law", its comments.

It must be remembered that the principles are an effort to harmonize disparate interests: those of developed and developing countries, of liberal and socialistic countries, of common law and civil law, that are applied to harmonize contract law trans-nationally. Considering the many regulations, and without ignoring other stipulations, the writer will put forward several principles that can be related to the renewal of contract law.

1. The Principle of Freedom to Enter into Contract

a. The Freedom to Decide on the Contents of the Contract

The first pillar of Contract Law is the freedom to enter into contract. The principle to enter into contract has also been formulated by UPICCs by providing a "reorientation to a new paradigm" in line with the existing social-economic disparities of today. The principle of freedom to enter into contract is simply formulated in UPICCs in article 1.1, with the statement that : "*the parties are free to enter into contract and decide on its contents*". To this are given 3 comments, namely: (1) The freedom to enter into contract as a basic principle in international commerce; (2) economic sectors that do not offer competition are an exception; and (3) party autonomy is provided with compulsory regulations.

There is an effort here to place the principle of freedom to enter into contract proportionally in various social situations.

Firstly, the principle of freedom to enter into contract is of top interest in international trade. It is the right of each businessman to freely decide on whom he wishes to offer his goods or services to, and from whom he wishes to receive supplies. Also, the opportunity to freely determine on the conditions of each transaction, forms a cornerstone of an open international economic system, that is market oriented and competitive.

Secondly, There are a number of exceptions in the principle of freedom to enter into contract. There are economic sectors that are the authority of the state to decide on behalf of public interest, which form exceptions to free and open competition. In this case, for example, certain goods or services may be requested from a designated supplier only, which is usually a public body, and who may or may not be allowed, under certain obligations, to enter into

contract with whoever so requests, but is limited only to available supply of the goods or services.

Thirdly, "party autonomy with mandatory rules". Related to the freedom to decide on the contents of the contract, in the first instance UPICCs has provided stipulations that may not be ignored by the parties (for example Article 1.5 on the "exclusion or modification by parties"). Furthermore, there are public and private regulations that are mandatory as enacted by the state (such as Anti-Trust Law, The Law on the Control of Foreign Exchange and Price, and laws that give certain obligations or prohibit conditions in the contract that are considered not fair in general, that are meant to protect the consumer. etc). These can validate the regulation contained in the Principles (which is specifically regulated in Article 1.4 on "Mandatory Rules").

b. The Freedom to Determine the Form of Contract

As a manifestation of the freedom to enter into contract, UPICCs stipulates the principle of simplicity in forming a contract. In principle, a contract need not be written. Article 1.2. states that "*in UPICCs there is no obligation that a contract must be in written form or must be proven in writing. The existence of a contract may be proven through different means, including through witnesses*". This stipulation means that (1) As a rule a Contract is not subject to formal conditions; (2) Exceptions are possible based on the law enforced; (3) conditions of form of contract that are agreed by the parties, are also possible.

In principle, UPICCs does not prescribe anything regarding the form of a contract. Although this principle refers to the written contract, but it may be extended to other conditions of contract. The condition also covers modifications and termination of contract by agreement of both parties. This is an important principle in the context of international commercial relations, as, considering modern communications systems, transactions are made very rapidly and not based on paper documents. The first sentence in this principle

takes into consideration the fact that some legal systems consider formal conditions as a substantive issue, while others stress only the evidence. The second sentence is meant to clarify that according to the principle of freedom to use any form, this also includes the validity of oral evidence in court procedure.

UPICCs gives allowance for certain national laws that prescribe specified forms of contracts. An example is the contract on the rights of land in Indonesian law. In this case, the freedom to form a contract is modified by the law in force as Indonesian law prescribes that contracts concerning land (especially with foreigners) should be in writing. National or international law may make an exception of certain conditions, such as on the form related to the entire contract as well as to the individual conditions (for instance agreements on arbitration or jurisdiction clauses). In fact, the parties may agree on a special form for the closure, modifications or termination of their contract.

c. A Contract is Binding as Law

UPICCs states the principle that a contract that is made on the basis of agreement by both parties is binding. Article 1.3. states that "*A Contract that is legally valid is binding to the parties. A contract may only be modified or terminated according to the conditions laid down by agreement or as stipulated in these principles.*" This formulation contains several principles, namely (1) the Principle of *Pacta Sunt Servanda*; (2) Modifications; (3) and the Effect of Contract on a third, unrelated party.

Firstly, this Principle lays down the basic principle in contract law, namely that of *pacta sunt servanda*. The binding nature of a contractual agreement clearly indicates that an agreement has been clearly entered into by the parties, and that such agreement will not be marred by any illegalities. Additional stipulations on closure of a legal contract may be found in national or international regulations that are valid and mandatory.

Secondly, a reasonable result of the principle of *pacta sunt servada* is that a contract may be modified or terminated at any time by agreement of the parties. Modification or termination without agreement is contrary to this exception and is acceptable only when it is in accordance with the conditions of contract or when this is clearly regulated in the Principles.

Thirdly, Whilst as a rule, a contract affects only those parties entering the contract, in certain instances, however, it may occur that it will also affect a third party. Therefore, a vendor, who on the basis of domestic law, may have the contractual obligation to protect the physical integrity of a certain good, is so obliged not only towards the buyer but also towards others with him at the place of sale. Similarly, a consignee of a cargo company has the right to sue the carrier for non-performance, when the carrier is bound to the contract through the sender. Based on the principle that bind the parties, this article does not ignore the effects to a third party, that may arise from the contract, based on the law in force. Also, these principles do not ignore the effects of cancellation or termination of contract on the right of third parties.

d. Mandatory Rules as Exceptions

UPICCs allows for mandatory rules that arise from domestic law, as well as from international law that may hamper the freedom of entering into contract. Article 1.4 states that "*in these principles there is no stipulation that must limit the implementation of mandatory rules, that arise from national, international or supra-national regulations, that are applied according to the regulations in the relevant civil code*". There are four basic principles in this formulation. These are: (1) Mandatory Rules that are in force; (2) Mandatory rules that are in force only when the Principles are included in the Contract; (3) Mandatory Rules may be enforced when the Principles are the law that regulate contracts, and (4) Reference is made to the relevant international civil law pertaining to each case.

Firstly, By mentioning the special nature of these principles, nevertheless, it should not be interpreted that they ignore mandatory rules, arising from national, international or supra-national laws. In other words, mandatory rules that are the law in the countries as an implementation of international conventions, or adopted by supra-national organizations, may not be ignored by these principles.

Secondly. In the case where these Principles are considered having been included in the contract on the basis of agreement by the parties, then the Principles will, in the first place, harmonize the mandatory rules that regulate contracts. For example, these principles will bind the parties only for as long they do not affect regulations that are in force, where the parties are not allowed to ignore these regulations through contract. Furthermore, mandatory rules on forum, and possibly also third countries, will also be enforced, on condition that they apply to any law regulating contract, and in the case of third country regulations, that there is a close relation between the countries and the contract being made.

Thirdly, however, in the case of a dispute being brought to arbitration, where these Principles apply as the applicable law regulating contracts, then these principles can still not ignore the application of mandatory rules where the application of complaint is separated from that where the law is enforced (*lois d'application nécessaire*). Examples of mandatory rules, and the application of rules that may not be ignored by choosing other laws, may be found in the area regulating foreign exchange, Import-Export licensing, regulations on restrictive trade, etc.).

Fourthly, The court and arbitration differ widely on the manner of application of mandatory rules pertaining to international commercial contracts. For that reason, this chapter avoids to consider several issues related to this problem, especially on whether as a complement, mandatory rules on forum and of *lex contractus* of third parties must also be taken into consideration. And if so, in

how far and based on which criteria. These problems are solved in accordance with the rules of international private law, relevant to each case.

Therefore, UPICCs stipulation basically regulates those areas of contract law that are within the purview of party autonomy. This contains rules that not only regulate but that are also mandatory. Article 5.1. mentions that "*the parties may ignore the application of these principles or divert or modify the validity of each rule, except when otherwise determined in these Principles*". Therefore, there are three main elements related to the existence of UPICCs, namely: (1) the Principles are non-mandatory in nature; (2) Ignoring or changing these may be done openly or tacitly; (3) There are, however, mandatory rules in the Principles to be observed.

Firstly, Rules contained in the principles in general, are not mandatory, for instance, the parties may in each separate case ignore their application in total or in part or change the contents to adjust to the principles in accordance to the needs of the special kind of transaction involved.

Secondly, Ignoring or changing the principles by the parties may be done openly or tacitly. Ignoring and changes are made tacitly when the conditions to be made have been individually negotiated or become part of standard conditions that are included in their contract by the parties. When the parties clearly agree to apply only several chapters of the Principles,- (for example, only on the performance or non-performance of the contract, then the Principles of UNIDROIT are valid),- then it is understood that the Chapter involved will be enforced together with the general principles mentioned in Chapter 1.

Thirdly, There are several stipulations in the Principles that are compulsory in nature, for instance, the importance mentioned in the Principles, when the parties are not allowed to ignore or divert from the Principles according to their own will. Given the nature of the Principles, the non-adherence to this perception has no consequence. On the other hand, it needs to be noted that stipulations that are being used reflect the standard of behaviour and rules that

are compulsory in nature based on most national laws. The Stipulations that are compulsory in nature are usually so stated.

For example, Article 1.7 on good faith and fair dealing, with stipulation in Chapter 3 on substantive validity, except insofar as these stipulations are connected or contain errors and initial impossibility (see Article 3.19). Further Article 5.7 (2) on the determination of price, and Article 7.4.13 (2) on agreed compensation for non-performance of contract. An exception is when the compulsory nature of a stipulation tacitly follows the contents and purpose of that stipulation (See article 7.1.6).

e. The International Nature and Purpose of UPICCs to be kept in mind at their Interpretation

As stated in Chapter II, "*lex mercatoria*" is a law that is uniform or in harmony with the laws of each country. This is also the wish of UPICCS. Article 1.6 says that "*in the interpretation of these principles, attention must be given to the international nature and the purpose, including the needs to promote uniformity in their implementation.*" What then needs to be noted are: (a) the Interpretation of the Principles in reverse to the interpretation of contract; (b) Consider their international nature; (c) the Purpose of the Principles; and (d) that there are additional stipulations to the Principles.

Firstly, As in each legal text that is legislative or contractual in nature, the Principles may cause uncertainty regarding their exact meaning. The interpretation of these principles will differ from the contract that the parties apply. Even when the principles are understood to be binding to the parties only at the contractual level, for example, where their application is dependent on the individual contracts, then these principles still form a set of autonomous regulations that are valid, in order that they may be uniformly applied to a number of contracts of different kinds, and are in force in many parts of the world. As a consequence, these principles must be interpreted different to such terms as used in each contract. Rules on their interpretation is

regulated in Chapter 4 of the Principles. This Chapter is concerned with the manner how the Principles must be interpreted.

Secondly, The first criteria in the interpretation of the Principles, as regulated by this article, are their "international nature". This means that the terms and concepts contained therein, must be interpreted autonomously, (for instance, in connection with the Principles themselves), and not refer to meanings as are traditionally understood in certain domestic laws. This approach becomes important, considering that the Principles are the results of comparative studies made by legal experts coming from various legal backgrounds and from diverse cultural environments. When they formulated each stipulation, these experts were forced to find a legal language that is sufficiently neutral, in order that they could reach the same understanding. Even in the exceptions where the terms or purpose have never been used in their traditional meaning.

Thirdly, by stating that in the interpretation of the Principles one must note their purpose, this article clarifies, that the Principles are not interpreted rigidly and to the letter, but must be seen in the framework of their purpose and in the rationale found in each stipulation, as is also found in the Principles as a whole. The Purpose of each stipulation can be known, both through the text itself and from the comments on the stipulations. As to the purpose of the Principles as a whole, this article clarifies that, the main purpose of the Principles is to provide a uniform framework for international commercial contracts, and firmly refers to the need to promote their uniform application. For example, by giving assurance that in practice, the Principles offer the widest possible interpretation and are uniformly applied in diverse countries. See further Article 1.7, which, although addressed to the parties, may also be included in the purpose of the Principles to investigate good faith and fair dealing in the context of contractual relations.

Fourthly, a number of issues that should have been included in the Principles are, however, not distinctly regulated. To determine whether or not issues are within the purview of the Principles, despite the fact that they are not being

clearly thus regulated, or whether they fall outside of it, it should first be determined whether or not these are clearly stated, either in the text and/or in the comments.

The need for uniformity in the application of the Principles means that whenever there is this gap, then a solution must be found, wherever possible, in the Principles themselves, before domestic law is used. The first step to a solution for unsolved questions is to apply an analogy on certain stipulations. Therefore, Article 6.1.6 on the Place of Performance, should also have regulated the problem of Compensation. Similarly, stipulations in Article 6.1.9 that relate to the problem of financial obligations expressed in a foreign currency other than the one where payment is made, should also include financial obligations that may be expressed in financial units, such as SDR (Special Drawing Rights), or ECU (European Currency Unit). When, however, a problem can not be solved by extension of the stipulation through analogue cases, then solution may be sought in the underlying general principles. Several of these basic principles are clearly stated in the Principles. Others, however, must be found in the special considerations, for instance, where regulations must first be analyzed to see whether the stipulations may be considered as a statement of a general principle, and may also be applied to the case other than that which it specifically regulates.

The parties are of course at liberty to agree on certain national laws that may be referred to, to complement the Principles. This stipulation may read as follows: "*This contract is ruled by the UNIDROIT Principles and complemented with laws from country "X", or "This contract must be interpreted and implemented in accordance with the UNIDROIT Principles, while matters not clearly solved through these, may be solved in accordance to the laws of country X".*"

2. The Principle of Good Faith and Fair Dealing

The second pillar of Contract Law is the principle of good faith and fair dealing. The two principles must become the basis of the entire contract, from the time of negotiation to its performance and termination of contract. Article 1.7 says that (1) in international commerce, each party must act according to the principle of good faith and fair dealing; and (2) that the parties may not ignore or limit this responsibility. According to the "restatement" of this article, there are three essential points in the principle of good faith and fair dealing. These are: (1) "good faith and fair dealing" as a basic, underlying concept of the Principles; (2) that in international trade, there is a specific interest in the principle of good faith and fair dealing; and (3) there is a mandatory element in the principle of good faith and fair dealing.

Firstly, there are a number of stipulations in the entire chapter, that differ from the Principles, that contain the direct or indirect application of the principle of good faith and fair dealing. This means that good faith and fair dealing is considered as one of the most basic ideas that underlie the Principles. To state in the general conditions that each party must act according to the principles of good faith and fair dealing, paragraph (1) of this article clarifies that, although there are no specific stipulations in the Principles, on the behaviour of the parties during the entire process of the contract, including during the process of negotiation, nevertheless, the parties must act in accordance with the principles of good faith and fair dealing.

Secondly, Reference made to the "principle of good faith and fair dealing in international trade", is meant firstly to clarify, that in the context of the Principles, these two concepts are not applied similar to their usual application in national legal systems. In other words, domestic standards may be considered only as long as they are generally acceptable among different legal systems. Furthermore, implications of the formula thus used mean, that the principle of good faith and fair dealing must be interpreted in the framework of special conditions in international trade. Standard business practice may differ

from one trade sector to the other, and even within one sector may differ more or less, depending on the social and economic environment where the company does its business, the company's size, technical capabilities, etc.

It must be noted that when referring to the Principles and/or comments on good faith and fair dealing, such reference is related to "good faith and fair dealing in international trade" as specified in this article.

Thirdly, The responsibility of the parties to act according to the principles of good faith and fair dealing forms a basic nature, meaning that the parties may not by contract ignore or limit this principle (clause (2)). On the other hand, it does not prevent the parties to include in their contract, the responsibility to seek improved quality of behaviour.

3. The Principle of Recognizing Local Usage in Business Transactions

As stated by Wirjono Prodjodikoro in the Draft Law that he proposed, that one of the principles that must be noted in drafting the new Contract Law is the principle of Usage and Custom. It appears that UPICCs has also included the principle in application of local usage. Article 1.8 that regulates Usage and Practices states that (1) The parties are bound by each usage that they have agreed upon and by each practice that is in force among them; and (2) that the parties are bound by usage that is widely known or routinely in use in international commerce by parties engaged in a particular trade, except when such usage is unreasonable.

This stipulation contains six important main elements , namely: (a) Practices and usage in the context of the Principles; (b) Practices in use among or between the parties; (c) Usage that has been agreed upon; (d) Other usage in force; (e) the Application of unreasonable usage; and (f) usage that ignores the Principles.

Firstly, this article lays down the principle that the parties are, in general, bound by practices and usage that meet such conditions as regulated in this article. Further, these same conditions must be met in practice, and usage to be applied to each case and for such purpose as clearly mentioned in the Principles.

Secondly, a practice that is in use between the parties in a certain contract is automatically binding, except when the parties specifically mention to ignore such use. Whether or not a practice is "in use" between the parties will naturally depend on the situation in each case. However, a behaviour that was found only once in a previous transaction between the parties is not deemed sufficient.

Thirdly, by stating that the parties are bound by the usage that they have agreed upon, clause (1) of article 1.8. merely validates the general principle regarding entering into contract as regulated in article 1.1. In fact, the parties may negotiate all conditions of contract, or in specific matters refer to sources other than usage.

The parties may formulate the application of each usage, including such usage normally used in the commercial sector, but that is not yet used by either of the parties, or usage related to other kinds of contracts. This makes it possible, however, for the parties to agree on what is wrongly interpreted as "usage", as for example to apply the term "usage" to a set of regulations drawn up by a trade association, but which, in fact, only partially decides on general behaviour.

Fourthly, clause (2) determines the criteria by which to identify usage that may be applicable when no special agreement has been made by the parties. In fact, usage must "be known in general and routinely experienced in the related trade", and forms a condition for the application of usage at international, national or local level. The next qualification that refers to "international

"commerce" is to avoid usage that is in use, and limited to domestic transactions, to be requested to be applied to transactions with foreign parties.

Only usage that is purely local or national in nature, may be applied without special reference to it by the parties. Therefore, usage that is in force in the exchange of certain commodities, or in trade exhibitions, or in harbours, is applicable when such usage is routinely followed by foreign parties. Another exception is related to the problem of a merchant who is bound in a number of contracts in a foreign country, and is thus bound by such usage as are usually applied in that country in similar contracts.

Fifthly, a usage may be well known to business people in general within a given trade sector, but its application in a special case may be unreasonable. The reason for this may be found in certain situations where one or both parties take actions that in themselves or by their nature are not normal in such transactions. In this case, usage can not be applied.

Sixthly, Once the manner of transaction and usage are in force in the case under consideration, then they ignore opposing stipulations included in the Principles. The reason for this is because they are binding to the parties as implicit conditions in their totality. It is as though they replace those conditions that are specifically formulated by the parties, but by the same token, in their application they ignore the Principles. Exceptions are made only for stipulations that are specially mentioned as mandatory.

4. The Principle of Agreement through Offer and Acceptance and through Behaviour

In principle, agreement is reached through offer and acceptance. The Contract Law of the Civil Code does not regulate these principles. On the contrary, the UPICCs formulators considered the practical elements in the process to a contract, because in this process will arise the contractual rights and

responsibilities towards the making of the contract, that are based on the principles of good faith and fair dealing. Article 2.1 of UPICCs states that "*A contract may be made either through offer and acceptance or through the behaviour of the parties that show that there exists an agreement*". In short, there are two main elements here, and these are: (1) offer and acceptance; or (2) there is the behaviour showing that there exists an agreement between the parties.

The basis for the UPICCs Principle is that an agreement between the parties is sufficient to make a contract. The concept of offer and acceptance is traditionally used to determine "whether and when" the parties have come to an agreement. The combination of the concept of "offer and acceptance" on the one hand, and that of "behaviour" on the other, seems to indicate that the drafters have tried to combine the Common Law concept with the Continental Law concept of agreement. As explained in this article and Chapter, the UNIDROIT Principles used this concept as its main tool of analysis.

In commercial transaction practice, contracts that entail complex transactions are often formed only after long negotiations, without a specified sequence of offer and acceptance. In such a case, it may be difficult to determine the actual time that the contractual agreement has been reached. According to this article, a contract may be made although the actual time of agreement may not be determined, as long as the behaviour of the parties indicate sufficiently that an agreement has been reached. In order to determine whether there is sufficient evidence as to the wishes of the parties to be tied to a contract, their behaviour must be interpreted in accordance to the criteria set out in Article 4.1. etc.

In practice there often arise disputes as to when an offer has actually been made. In this case UPICCs has tried to define on what is meant by an "offer". Article 2.2 states that "A request to enter into a contract becomes an offer when that offer sufficiently determines and shows that there is a wish of the offering party to be tied to a contract when there is acceptance". Through this definition, the term "offer" is differentiated from "other communication", where

one party in the negotiation may take the initiative to draw up a contract. This article therefore prescribes two conditions, namely that the request must include (1) an agreement to close a contract only when there is acceptance, and (2) show the wish of the offering party to be tied when there is acceptance.

Therefore, the basic elements are: (1) that there must be certainty of an offer, and (2) there is a wish to be tied. Whenever a contract is made only through offer and acceptance, further conditions must have been shown with due certainty in the offer itself. Whether or not the offer complies with these conditions may be determined from the general conditions. More detailed conditions may be mentioned, such as: (a) description of goods and services and when these will be delivered or handed over; and (b) the price of the said goods and services.

As regards the time and place of performance, this may be left undecided in the offer, without causing the offer to become less deciding. Thus, this will all depend on: (a) whether or not the offering party has seriously made an offer, (b) whether the party to whom the offer is addressed wishes to enter into a firm contract, and (c) whether conditions not mentioned in the contract may be determined through interpretation of the language of the agreement, or is not according to Article 4.1.etc, or refer to Article 4.8 or 5.2. This uncertainty may, however, be solved by referring to preceding practices or custom among the parties (vide Article 1.8), or refer to other special regulations found in other articles, as in Article 5.6 on Determining the Quality of Performance, 5.7 (On Pricing), 6.1.1 (on Time of Performance, 6.1.6 (on Place of Performance), and 6.1.10 (on Currencies not explicitly mentioned).

The second criteria to determine whether or not a party has made an offer that leads to a contract, or whether he is merely opening negotiations, can be seen from whether the party wishes to be tied when there is acceptance. This desire is rarely stated explicitly, and must therefore be interpreted in each separate case. The making of an offer (for example by firmly mentioning that this is "an offer", or merely an "expression of a wish" becomes the first indication of the

possibility of a wish, although it is not yet determining. Even more important, however, is the contents and the addressee of the request. For most people, a detailed and specified request addressed to one person or persons in particular, is usually meant as an offer, as compared to a request addressed to the general public.

A request may contain all main conditions of a contract but still does not tie the party giving the offer, despite it being accepted, if the request causes the closing of contract to be dependent on several small points that are left open in the said request.

An offer may also be withdrawn by the party making the offer. Article 2.3 states that (1) an offer becomes effective only when it reaches the party addressed to; and (2) an offer, even in the case when it can not be withdrawn, may still be withdrawn if the withdrawal reaches the addressee **before or at the time of offer**. When is an offer effective? Clause (1) of this article that is literally taken from Article 15 CISG, determines that an offer becomes effective at the time it reaches the addressee.

The exact point in time when an offer becomes effective is important, as it pinpoints the moment when the addressee may accept the offer, so that it will tie the offering party to the proposed contract.

However, there may be other reasons why an offer in practice may be important to be withdrawn. For, until such moment, the offering party is free to change his mind and decide not to enter into a contract, or replace his first offer with a second one, regardless whether the first offer will be withdrawn or not. The only condition here is that the party to whom the offer is addressed, must be informed that the offering party wishes to make changes, even before, or at the time that the addressee is informed of the first offer. Clause (2) of this article differentiates between "withdrawal" and "revocation" of an offer, as follows: before an offer becomes effective, that offer may be revoked, while the problem

whether or not it may or may not be withdrawn arises only after that time (see Article 2.4).

Article 2.4 clause (1) confirms that until a contract is made, an offer may be withdrawn if revocation is received by the person being offered, before it has become an acceptance. However, an offer may not be revoked (a) when the offer shows, both through confirmed time of receipt or through statement that the offer may not be revoked; or (b) when the party offered rightfully considers it as irrevocable and that he has acted according to the offer.

The question whether an offer may or may not be revoked, has traditionally been a most controversial problem related to the drawing up of contract. As long as there are no prospects of harmonizing the two disparate concepts in their basic approach, i.e. in the different legal systems, namely the approach of common law, where as a rule an offer may be revoked, and, conversely, the approach made by most civil law systems, then only one approach can be chosen as the main rule, and the other as exception.

Clause (1) of this article, which has been literally taken over from Article 16 CISG states that until the moment that the contract is made, then an offer, as a rule that may not be revoked. However, the same clause mentions that a revocation of an offer is subject to the condition that revocation reaches the party offered, before the latter has confirmed receipt. This happens only when the party offered states orally that he has received the offer, or when the party offered indicates to its agreement by performing an action without informing the offering party, on the rights of the offering party to revoke his offer at any time until the contract is signed (vide Article 2.6(3)). However, if the offer is received through written confirmation, then the contract is closed at the time that the acceptance is received by the offering party (see Article 2.6 (2)), when the right of the offering party to revoke his offer has ended faster, that is when the offered party has stated his acceptance. This manner of negotiation may result in disadvantages to the offering party, who may not know whether he still is, or

is no longer in a position to revoke his offer. Yet, the party offered is justified to shorten the time for the offer to be revoked.

Clause (2) defines that there are two important exceptions to the general rule on revocation of offer:, these are (1) if the offer indicates that it is irrevocable, and (2) if it was reasonable for the offeree to rely on the offer as being irrevocable.

Article 2.4 clause (1) confirms that until a contract is concluded the offer may be revoked if the revocation is received by the offeree or the person being offered, before he has dispatched an acceptance. However, an offer may not be revoked (a) when the offer shows, both through confirmed time of receipt or through statement that the offer may not be revoked; or (b) when the party offered rightfully considers it as irrevocable and he has acted accordingly to the offer.

The question whether an offer may or may not be revoked, has traditionally been a most controversial problem related to the closing of contract. As long as there are no prospects of harmonizing the two disparate concepts in their basic approach, i.e. in the different legal systems, namely the approach of offer, and acceptance, and, conversely, the approach made by most civil law systems, based on agreement, then only one approach can be chosen as the main rule, and the other is an exception.

Actions (of acceptance) made by the party being offered (offeree) may be in the form of preparations for production, buying or renting goods or equipment, laying out of expenses etc., as long as these actions are considered normal in the related trade, or are normally expected, or are known by the offering party.

An offer is not always accepted, but an offer may be rejected. Article 2.5 mentions that "An offer is terminated when rejection is received by the offering party". Rejection may be firmly mentioned or made in silence, but rejection is one of the reasons for the termination of offer. An offer is often rejected through

a response that shows acceptance but with additions, limitations or other restrictions (see article 2.11(1)).

In the case where there is no firm rejection, then statements or behaviour of the party offered must at all times convince the offering party that the party offered has no intention to accept the offer. An answer that merely asks for alternatives (for instance "can you reduce the price" or "can you send the goods earlier"), are usually not sufficient evidence of rejection.

It must be remembered that rejection will cause the offer to be terminated, disregarding the fact whether or not the offer may or may not be revoked, as mentioned in Article 2.4.

Regulations on the manner of acceptance are found in Article 2.6, that (1) A statement made or the behaviour indicated by the party offered that show acceptance to the offer, is considered an acceptance. Silence or inaction do not by themselves mean acceptance; (2) Acceptance to an offer becomes effective when indications of acceptance reach the offering party. (3) If, however, when based on an offer or as a result of existing practice among the parties or by custom, the offeree shows acceptance through an action, despite not informing the offering party, then acceptance becomes effective upon performance of the action.

In order to show that there is acceptance, the party offered must, by one or other means, show "acceptance" to the offer. A mere information that the offer has been received, or to say that the offer is attractive, does not suffice. Furthermore, acceptance must be made without condition, meaning that acceptance may not be made conditional to further actions to be taken by the offering party (for example "our receipt depends on your final acceptance"), nor by the party offered (for example "we herewith accept the conditions set out in your memorandum and will endeavour to submit the contract to our Board for their agreement within two weeks"). Finally, the contents of acceptance should

not include variations on conditions offered, or at least not alter these materially.

It is also ruled that, offer does not specify a special manner of acceptance. Indication of acceptance may be made through firm statement as well as through the implicit behaviour of the accepting party. Clause (1) of article 2.6. does not provide details on the form of behaviour, but it may be assumed that the behaviour is found in its performance, such as in advance payment on price, shipment of goods, or commencing work at appointed place.

By stating that "silence or inaction do not by themselves indicate acceptance", clause (1) explains that as a rule silence or inaction do not indicate that the offered party has accepted the offer. The situation becomes different if both parties have agreed that silence means acceptance, or when there is a certain way or custom that rules it thus. But if this has never happened, it is sufficient for the offering party to state in his offer that the offer is considered accepted when there is no response to the offer. While he takes the initiative to propose the signing of contract, the offered party is at liberty to accept or reject the offer, and may easily disregard the offer.

According to clause (2) acceptance becomes effective upon indication that acceptance has reached the accepting party (vide Article 1.9 (2)). On the definition on "reach" see Article 1.9(3). The use of the principle "receipt" is given priority to the principle of "sending", because the onus of sending is on the party offered rather than the offering party. This is because it is the former who decides on the means of communications, and who knows whether the means of communication chosen bears certain risks or delays, and who can assure that receipt reaches the addressee.

As a general rule, acceptance that is indicated merely through behaviour becomes effective only when information on the matter is received by the offering party. But it must be noted that special notification by the offered party becomes necessary only when his behaviour does not by itself explicitly indicate acceptance to the offering party within a reasonable time frame. In all

other matters, for instance when behaviour includes payments or shipment of goods by air or other fast transportation, the same results may be reached through the bank or transportation company who will inform the offering party of the remittance of money or shipment of goods.

A general exception to this general rule of clause (2) of article 2.6. may be found in the case mentioned in clause (3), namely that "on the bases of offer or as a result of general practice among the parties, or by custom, the offeree can show acceptance through action, without informing the offeror party".

In this case, acceptance becomes effective when the action is performed, without regard to whether or not the offering party has been properly informed.

Article 2.7 specifies the time of receipt. An offer must be received when the offering party has asked for confirmation, or in the case when there are no indications of time, through adequate time given, considering the situation, including the speed of communication used. A verbal offer must be received immediately, unless the situation shows otherwise.

With respect to the period of time that an offer must be received, this clause, which is in line with the second part of clause (2) of Article 18 CISG, differentiates between verbal and written offer. A verbal offer must be received immediately unless the situation shows differently. While, on a written offer, everything depends on whether the offer specifically mentions time of receipt. If affirmative, then the offer must be received within that time frame, while in any other matter, indications that there is acceptance must be received by the offering party "in adequate time period considering the situation, including communication facilities used by the offering party".

It is very important to note that the regulations as mentioned in this article are also valid in circumstances, where according to Article 2.6(3), the offered party can show acceptance through action without informing the offering party: in this case this becomes a performance that must be made within a specific ensuing time period.

To determine the exact commencement of time frame set by the offering party, including calculation of holidays within that time frame, can be seen in Article 2.8; while in the case of delayed receipt or delayed sending, see Article 2.9.c.

5. The Principle on Prohibition to Negotiate in Bad Faith

An important Principle regulated by UPICCs is regarding the extent of the principle on good faith that is in force as from time of negotiation. Article 2.15 regulates the prohibition to negotiate in bad faith, by determining that : (1) A person is free to negotiate and is not responsible for the failure of reaching an agreement; (2) However, a person in negotiation or who ceases negotiations in bad faith is responsible for the losses suffered by the other party. (3) It is bad faith, especially for someone to negotiate or continue to negotiate, when in fact he has no intention to reach an agreement with the other party.

Basically there are three important points to this rule, namely (1) the freedom to negotiate; (2) Responsibility for negotiations made in bad faith; and (3) The responsibility for the failure of negotiation in bad faith. A “restatement” of these three principles is explained by UPICCs, as follows :

Firstly, the parties are not only at liberty to decide when and with whom to make negotiations towards a contract, but also when, in what manner, and the time taken for the process of negotiation. These follow the principles of freedom to enter into contract, as mentioned in Article 1.1, and forms the basis to guarantee healthy competition among international commercial enterprises.

Secondly, it is the right of each party to freely make negotiations and to decide on the conditions of negotiations, which is not without limits, as this must not contravene with the principle of good faith and fair dealing, as regulated in Article 1.7. An example of negotiation in bad faith as explained in clause (3) of this article is when one party starts negotiations or continues to negotiate with no intention to make an agreement with the other party. Another example is

when one party, on purpose or by neglect, misleads the other party regarding, among others, the identity or conditions of contract put forward, by providing clearly misleading facts and through the withholding of facts that should have been given, on the identity of the parties and/or the contract. On the subject of responsibility to guard confidentiality, see Article 2.16.

The responsibility of the party who negotiates in bad faith is limited to the losses that he has incurred upon the other party (clause (2)). In other words, the affected party may ask for compensation of expenditures made during negotiations, and may also be indemnified for lost opportunity to enter into contract with a third party (this is called interest on trust or negative interest). However, in general he should not be asked to compensate for expected profit of the failed contract (known as interest on hope or positive interest).

Thirdly, the right to stop negotiations is also subject to the principle of good faith and fair dealing. When an offer has been made, then that offer may be revoked only within a time limit as specified in article 2.4. Even before reaching this stage, or when in the process of negotiations that do not follow the usual sequence of offer and acceptance, then one of these parties is no longer free to suddenly cease negotiations without due justification. If no agreement can be reached on this matter, then it will depend on the circumstances of the case. Specifically until the other party, who, resulting from the behaviour of the first party, puts forward sufficient reasons that may become the basis for further negotiations, including all other matters related to the contract on which agreement has been reached by both parties.

6. The Principle to Guard Confidentiality

During negotiation, company secrets may almost certainly be disclosed and, therefore, will be known to both parties. As a result, it is possible to misuse such confidential information to one's own advantage. Article 2.16 regulates the responsibility to guard confidentiality. When information is provided in

confidence by one of the parties during negotiation, then the other party has the responsibility not to divulge this information or misuse this to his interest, whether or not the contract will or will not be signed later. When necessary, such violation may be penalized or compensated on the basis of profit gained by that party. Three points may be deduced from this regulation, namely: (1) that the parties are basically not responsible to guard confidentiality; (2) there are information that is confidential by nature; and (3) that losses may be compensated.

Firstly, only when there is no responsibility to announce, then parties in the negotiation do not have the responsibility to treat exchanged information as confidential. In other words, when one party is at liberty to decide which data in the negotiated transactions may be disclosed, then such information, according to this regulation, is not confidential. Meaning, that it is information that the other party may disclose to a third party or may use for himself, even though the contract may fail.

Secondly, one of the parties has an interest that certain information provided by the other party should not be divulged or used for other purposes, except that for which it was provided. As long as that party clearly states that the information provided is confidential, then the situation is clear, namely that by receiving the information the other party is implicitly aware to treat the information as confidential.

A problem may arise when the prohibition to disclose information is considered too long, which may contravene existing laws that prohibit business practices that are hampering by nature. In fact, without such statement the party receiving the information may be burdened by the confidentiality. Because, facing the nature of the information or professional qualifications of the parties, that responsibility will be opposed to the general principle of good faith and fair dealing, when the party receiving the information discloses the information or uses such information for his personal interest when negotiations are cancelled.

Thirdly, Violation on the principle of confidentiality includes the regulation on first responsibility on losses. The amount of loss to be compensated may vary, depending on whether the parties have made a special agreement on whether or not to disclose information. Even when the adversely affected party does not suffer any losses, he has the right to ask for compensation from the party violating this agreement. This is to be taken from the gains the latter has received as a result of disclosing such information to a third party, or has misused it for his own advantage. When necessary, even when the information has not yet been disclosed or is only partially disclosed, then the disadvantaged party may ask for an injunction based on existing laws.

7. The Principle of Protecting the Weak in Contracts with Standard Conditions

As mentioned above, standard contracts form a source of "lex mercatoria". The practice of using standard conditions is common in the business world, including in Indonesia.

Article 2.19 determines that: (1) When one or both parties use standard conditions in a contract, then general conditions on the drawing up of a contract are in force, and are subject to Article 1.10-1.11. (2) Standard conditions are prepared specifications for general, as well as repeated use by one of the parties, but clearly without having held prior negotiation with the other party. This Article is the first of four articles (2.19-2.22), that regulate special situations where one or both parties use standard conditions in drawing up a contract.

"Standard conditions" must be seen as specifications of contract that are prepared for general and repeated use by one of the parties and are in fact used without prior negotiation with the other party (clause (2). The determining factor in this case is not its formal appearance (for example that the standard conditions are contained in a separate document or in the contract document

itself; whether they are printed or stored in a computer, etc), it is also not the question of who has prepared these standard conditions (the party itself, the trade association, or professional association). Also, the question is not the contents (whether the conditions contain a set of complete rules covering almost all aspects relevant to the contract, or contain only one or two specifications on exceptions on responsibility or arbitration). What is important here is the fact that the standard conditions are clearly decided by one party only, without prior negotiation with the other party. These latter were previously only concerned with standard conditions that the other party must accept in its totality, while other conditions in the same contract may be negotiated.

In practice, general conditions in the drawing up of a contract are in force without regard whether one or both parties use standard conditions or not (clause (1)). This determines, that general conditions that are proposed by one party are binding to the other party only when accepted, depending on the case whether both parties have agreed only to those conditions that are explicitly mentioned or also include those that are implicitly understood. On the other hand, standard conditions that are contained in a separate document must be clearly mentioned by the party who wishes to use those conditions. The tacit use of such conditions may, however, be recognized when this has been the practice among the parties or is a common custom. See Article 1.8.

Article 2.20 regulates that whenever there are unusual "conditions", by specifying : (1) that no condition contained in the general conditions that are by nature unacceptable to the other party will become effective, unless that condition is explicitly accepted by the other party; and (2) in order to determine whether a condition contains that nature it must be seen from its contents, language and presentation.

The elements of this specification may be divided into four categories, namely that: (1) Unusual conditions in general conditions are not effective; (2) Conditions may be "unusual" in its contents: (3) Conditions that are "unusual"

in their language and presentation; and (4) Explicit acceptance of "unusual" conditions. Below follow comments on the four categories.

Firstly, a party that accepts general conditions as given by the other party, is in principle bound by them, regardless whether or not the party is aware of all the details, or has, or has not clearly understood the consequences of the conditions. There is, however, an important Exception to this rule, namely that, however much these general conditions have been accepted in their totality, nevertheless, the related party is not bound to the conditions when their contents, language or appearance are of a nature that is reasonably unacceptable to him. The reason for this exception is to avoid a party from using standard conditions in order by misusing his advantaged position to surreptitiously force the conditions on the other party, who would have rarely accepted such conditions, if he was aware of them. For other articles that aim to protect the economically weak and less experienced, see Articles 3.10 and 4.6.

Secondly, a condition that is included in the standard conditions may be found to be unusual because of its contents. This happens when the contents in such condition is normally not found in standard conditions in similar instances. To determine whether or not a condition is normal, one must study, on the one hand, conditions that are normally in use in this particular commercial sector, and negotiations that are normally in use between the parties. For this reason, a condition that, for example, excludes or limits contractual responsibilities on the part of the proposing party, may or may not be considered "unusual" and thus become ineffective in that particular case, where its effectiveness depends on whether such conditions are considered normal in that particular trade sector, and whether it is consistent with what is normal practice among the parties in the negotiation.

Thirdly, another reason for a condition contained in the general conditions to be considered unusual by the party involved, may be on account of its written language, which may not be clear, contain misprints, as for instance, in the

case of minutes of meetings. In order to determine whether or not this has happened, consideration need not be given to the formulation and presentation normally used in the typing of standard conditions, but more to on the professional expertise and experience of the party involved. Then, particular words may be both clear and unclear at the same time, depending on whether the related party has the same profession as the party using the standard conditions.

Language may also play an important role in international trade. When standard conditions are formulated in a foreign language, then several conditions may be considered unusual to the related party, despite the fact that they are clearly expressed in the conditions themselves, as the related party does not normally expect having to accept the consequences of such conditions.

Fourthly, the risks that are expected to be taken by the related party who is to be bound to unusual conditions will disappear, as long as they are openly discussed, and when the other party notifies the related party on these conditions and he then accepts the conditions. This Article specifies that then the parties will no longer base their agreement on the "unusual" nature of the condition, but on the fact that both parties have clearly agreed on the condition.

In practice there are often conflicts between "standard conditions" and non-standard conditions" that have been agreed upon. Article 2.21 determines that "in the case of conflict between standard conditions and non-standard conditions, then it is the latter that is valid".

Standard conditions are defined as specifications that have been prepared by one party and incorporated in the contract without prior discussion by the parties (see Article 2.19(2)). It is logical that when the parties specially negotiate and agree on specifications in a given contract, then these specifications will set aside such standard conditions that oppose these, when these conditions better reflect the wishes of the parties in the case.

Specifications that are separately agreed upon, may appear in the same document as the standard conditions, but may also be included in a separate document. In the first instance, it will be more difficult to differentiate between the conditions that are standard and which are not, and to determine the position of hierarchy of the different documents. In this case, the parties will often clearly include specification of contract, and which documents form part of the contract, as well as their individual value.

A special problem may arise when changes on standard conditions are only agreed upon orally, without crossing out specifications that oppose the standard conditions, whereas, those conditions specifically regulate the exclusive nature of any written notes that are signed by the parties, or where additions or changes in contents must be made in writing. On this case see Article 2.17 and 2.18.

Article 2.22 regulates the case when there are conflicting forms, meaning when both parties put forward forms or standard conditions. When both parties use standard forms and have agreed on exceptions on standard conditions, then a contract may be made on conditions agreed, whose contents are as per normal, except when one party has shown, or later without undue delay informs the other party, that he has no wish to be bound to the contract.

There are three situations that are regulated here, these are: (1) when both parties use separate standard conditions; (2) "the conflict of forms" is linked to the general regulations on offer and acceptance; and (3) when the doctrine of "knock-out" is used.

Firstly, it often happens in commercial transactions, when both the offering party as well as the accepting party, each refer to their own standard conditions. In the case when there is no clear acceptance on the offering party of conditions put forward by the accepting party, then the question arises as to what is the contract based upon, and which standard conditions are in effect.

Secondly, Whenever general conditions of offer and acceptance are applied, then there is no contract, when the acceptance by the offered party, -as exception mentioned in Article 2.11(2),- is accompanied by a counter-offer, or when both parties have started acting on the agreement without stating any objections to the other's standard conditions. In this case it is considered that a contract has been made, based on conditions that were sent last or last referred to, which is known as the last-shot doctrine.

Thirdly, the last-shot doctrine may be correctly applied when the parties clearly show that the use of their standard conditions are a requisite to the contract. On the other hand, when the parties, as often happens in practice, refer to their standard conditions almost automatically, for example, through the exchange of printed orders, and information on order forms with conditions printed on its back, then neither may be aware of any discrepancies existing between their conditions. In this case, then there are no reasons to allow the parties to dispute the contract. Or, when action has been taken, to force the validation of the last shot conditions.

This is the reason why this article determines that, despite it being regulated in the general specifications on offer and acceptance, but when the parties have agreed on exceptions to standard conditions, it must be on those conditions that are considered normal (or known as the knock out doctrine).

However, one of the parties may always put aside the knock-out doctrine, by earlier expressing, or later, but without undue delay inform the other party, that he does not wish to be bound to a contract that is not based on his own standard conditions.

8. Principles Regarding Conditions for Validity of Contract

On this matter, the writer will not discuss all considerations regarding conditions for the validity of contract according to UPICCs. What needs to be underlined here is that UPICCs does not regulate the validity of contract as

contained in Article 1320 of the Indonesian Civil Code. The reasons for this are confirmed in Article 3.1. that state that the Principles do not regulate the invalidity of contract that arise from :

- (a) inability; (b) non possession of authority; and (3) immorality and illegality.

This article confirms that not all reasons for the invalidity of contract as found in several national legal systems are used in the context of the Principles. The reason for this exception is the complexity that arises from problem of status, agency and public policy and the extreme differences that exist on the manner how the issue is treated in domestic law. The result is that, issues such as *ultra vires*, that is the fact of an agency going beyond its authority, or whether a director has the authority to bind the company, and the contents of an immoral and illegal contract, are regulated further in the laws that are in force.

The validity of contract that is regulated by UPICCs is solely based on the aspect of agreement, because this principle basically regulates only the mechanism of agreement made by the parties as founded on the freedom to enter into contract. The following discussion will highlight only outstanding specifications that are not yet regulated in the Civil Code.

An issue that is important to discuss is article 3.3. of the Principles that regulates the situation of "initial impossibility". The article says that: (1) The mere fact that at the time of conclusion of the contract, the performance of the obligation assumed was impossible, does not affect the validity of the contract. And that (2) The mere fact that at the time of conclusion of the contract one party was not entitled to dispose of the assets involved in the contract, does not, by itself affect the validity of contract.

The contract is valid even when the assets involved in the contract were already destroyed at time of contract, with the consequence that the impossibility of execution from its onset is equal to the impossibility that will happen after the contract is made. The rights and responsibility of the parties arise from the inability of one party (or maybe of both parties) to perform that which according

to regulations is tantamount to non-performance. An example is when an obligor has known of the impossibility of performance even at forming of contract.

Clause (1) also eliminates the possibility of doubt, such as on the validity of contract to deliver prospective goods. If the initial impossibility is caused by legal prohibition (as an export or import embargo), then the validity of contract will depend on whether, based on such legal prohibition, the contract must be cancelled or whether it prohibits only its implementation. Clause (1) even deviates from regulations found in several civil legal systems that state that the object of the contract must be made possible. This clause also deviates from the same regulations that state that there is an "authority", who because of initial impossibility, While Article 3.2 clause (2) of this article regulates cases where one party has promised to move or deliver goods, while, at time of forming the contract, he has no right of delivery, title nor legal rights on the goods nor its division.

Several legal system further state, that a contract on buying and selling that has been made under such conditions is null and void. But, in the case of initial impossibility, and even for stronger reasons, clause (2) of this article considers such a contract valid. In fact, as often happens, one party may receive legal title, or authority to take out goods after the contract is made. If this does not occur, then the rules on non-performance will come into force. The authority not to take out goods must be differentiated from the inability to do so. The latter concerns the inability of a person to perform, that can affect all or at least several types of contracts that he has made, however, that is beyond the scope of the Principles. See Article 3.1 (a).

The Principles also determine the possibility of cancellation of contract when there are mistakes, either on facts or on the law (article 3.4), mistakes in expression or presentation (article 3.6), the opportunity to correct non-performance caused by mistakes (article 3.7); ... (article 3.8) and threats (article 3.9).

However, most important to discuss in full is the Principle regarding the cancellation of contract based on gross disparity among the parties, which is not found in the Indonesian Civil Code.

9. The Principle Regarding the Possible Cancellation of a Contract with Gross Disparity

Basically, this Principle is an implementation of the Principle on Good Faith and Fair Dealing and the Principle of Balance and Justice. It is based on the fact that there are gross disparities in society. For this reason there is the need for a regulatory system that can protect the party that is in a disadvantaged position. Article 3.10 on Gross Disparity states that: (1) One of the parties may cancel the contract or individual conditions of the contract at time of signing, when the contract or conditions contain in it provide unreasonably excessive advantages to the other party.

Attention must be given to the following factors: (a) the fact that the other party dishonestly profits from the dependence, economic difficulties or other urgent needs, or through his extravagance; or through ignorance, inexperience or unprofessionalism at bargaining; and (b) the nature of the contract. (2) Based on the request of the party that has the right to cancel, the court may adjust the contract or the condition in accordance with reasonable commercial standards and fair dealing. (3) The court may adjust the contract or the conditions, on request of the party receiving the cancellation, as long as the latter informs the other party of his exact request upon receiving the information, but before the other party has acted according to the contract or its conditions. Specifications in Article 3.13 (2) are in force accordingly.

This stipulation contains three factors, namely (1) excessive profit; (2) unjustified profits as a result of (a) unbalanced bargaining position, (b) the

nature and aims of contract, and (c) other factors; and (3) cancellation or adjustments.

Firstly, these stipulations allow one of the parties, in the case of gross disparity of responsibilities on the parties, which offers excessive and unjustifiable profits to one party. The matter of excessive profits must be present at time of making the contract. A contract, that does not appear to be dishonest when the contract comes in, but later shows itself to be so, may be adjusted or terminated based on the stipulation of hardship mentioned in Article 6, section2. The term "excessive" profits means that, according to this article, a significant difference in value and price or other aspects that disturb the balance in the performance and counter-performance, is not sufficient reason for the cancellation or adjustment of contract. What is required is such gross imbalance as to shock the feelings of a reasonable person.

Secondly, regarding unjustified profits, these profits must not only be excessive in their nature, but must also be unjustified. Whether or not this stipulation is met will be seen after evaluation of all aspects relevant to the case. Clause (1) of this article specifically refers to two factors that need special attention.

The **first** factor is that one of the parties has received unfair profits from the dependence, economic difficulties or urgent needs of the other party, or on account of his extravagance, ignorance, inexperience or unprofessional conduct at bargaining (sub clause (a)).

Similar to the situation where one party is dependent on the other party, a superior bargaining position that is a result of market conditions alone, is not sufficient.

The **second** factor is the nature and purpose of the contract (sub clause (b)). There are situations where excessive profits are unjustified even when the party receiving such profits has not misused his superior bargaining position.

Whether such situation has or has not occurred often depends on the nature and purpose of contract. Therefore, a condition in the contract that is valid for a very short period that informs about faulty goods or services that have been sold or delivered, - despite this being justified as agent contribution, - may become substantial at the end of the transaction. Or where the value of the goods or services are not high, this may accrue to excessive profits when the contributions are insignificant, or conversely, when the value of the goods and services are excessively high. In this case, other factors must be considered, for instance, ethics in use in business and commerce.

Thirdly, cancellation of the entire contact or of several conditions in the contract are, according to this article, subject to the general conditions regulated in Article 3.14-3.18. However, according to clause (2) of the article, upon request of the rightful party to cancel, the court may adjust the contract in accordance with reasonable commercial standards in fair transaction. Similarly, according to clause (3) the party receiving notice of cancellation may also request adjustment, as long as he immediately informs the canceling party of this request upon receipt of the cancellation notice, and before the canceling party has acted in accordance with the said cancellation.

When the parties can not agree on the procedure to be taken, this must be considered by the court whether the contract should be cancelled or adjusted, or when adjusted, with what conditions. When, upon the notice or thereafter, the party who has the right to cancel asks for adjustment only, then his right to cancel is forfeited. See Article 3.13 (2).

Nevertheless, because the condition to cancel is a right, this means that the wronged party is not forced to cancel the contract. In fact, conversely it can be reconfirmed both explicitly or tacitly. Because, if this possibility is not regulated, there may arise uncertainties about the contract.

Article 3.12 regulates such enforcement by stating that when the party who has the right to cancel, either explicitly or implicitly confirms the contract after a

period of time when notice of cancellation is in process, the cancellation of contract must be disregarded.

This article stipulates that the party who has the right to cancel, may explicitly or tacitly confirm the contract. The tacit confirmation of contract may not be sufficient, for example when the party with the right to cancel the contract sues the other party for non-performance. A confirmation is acceptable only when the other party knows of the suit or when the court has given its verdict. A confirmation of contract may also happen when the party with the right to cancel proceeds to act upon the contract without using his right to cancel the contract.

Another case may be where the party with the right to cancel the contract loses such rights. Article 3.13 states that (1) When the party who has the right to cancel the contract does so on account of a mistake, but the other party states that he wishes to continue to perform and further acts upon the contract, and this is understood by the canceling party, then the contract is considered made in accordance with the understanding of the other party. The other party must then make a statement to that effect or; (2) Upon such statement or performance of contract, then the right to cancel the contract will be forfeited and each notice of cancellation prior to this will be invalid.

According to this article, the party at fault may avoid the cancellation of contract when the other party expresses his wish to perform or clearly acts according to the contract as understood by the party faulted. The other party's interest may be based on the profits that he gains from the contract, or even in its adjusted form.

The other party must clearly state that he will perform or clearly performs the contract in its correct adjusted form upon notice of the manner in which the faulted party understands the contract. As regards how the other party has received the information on faults to understand the conditions of the contract, depends on the circumstances of the case.

Clause (2) clearly states that as soon as there is a statement by the other party, or a clear implementation, then the right of the faulted party to cancel the contract is forfeited and every earlier notification on cancellation of contract becomes invalid. Conversely, the other party no longer has the right to adjust the contract when the faulted party has not only been given notification of cancellation but has also acted in accordance with such notification.

Acceptance of contract by the other party, however, does not preclude the faulted party from suing for damages according to Article 3.18, when he has suffered irreparable loss through adjustment of the contract.

10. The Principle of “Contra Proferentem” in the Interpretation of Standard Contract

The interpretation of contract is regulated in Chapter 4 that includes eight articles (article 4.1 to 4.8). However, in this paper only those that are not regulated in the Indonesian Civil Code will be discussed, in order that these may act as examples for the renewal of the Indonesian contract law. It is also because other stipulations are basically already regulated in positive law.

An important stipulation that has developed in “lex mercatoria” is the interpretation of standard contracts. Article 4.6 regulates “contra proferentem rule” which says that when conditions of contract as proposed by one party are not clear, then the interpretation made by the opposing party must be given priority.

One party is responsible for the formulation of a condition of contract, either because that party has prepared it himself, or has merely proposed it, perhaps, by using standard conditions that have been prepared by someone else. That party must then bear the risk of possible vagueness in the formulations used. That is the reason why this article says that, when conditions of contract, as

proposed by one party are vague, then priority of interpretation will be given to that of the opposing party. While the scope of validity of this regulation will depend on the circumstances in each case; and shortcomings in the conditions of the following contract will become agenda items in further negotiations of the parties.....

Furthermore, differences of interpretation in the language of the contract, may cause disputes in international commercial contracts. Article 4.7 stipulates that when a contract is drawn in two or more language versions and both are in force, and when there are differences between the two versions, then interpretation must be made based on the language of the original contract.

International commercial contracts are often drawn in two or more language versions that can reconcile certain points. Sometimes parties clearly mention the version in force, for when all versions are equally in force then the problem arises as to how such differences must be resolved. This article, however, does not make hard and fast rules, but merely points out that preference should be given to the original version used in the contract, or, when the original is drawn up in different language version, to either one of the versions.

A situation when a different solution is preferred may arise when the parties base the contract on instruments that are widely and internationally used, such as INCOTERMS or UCP (The Uniform Customs and Practices on Documentary Credits). In the case when differences occur in other versions that are used by the parties, then the other version may be used, if this is clearer.

Article 4.8 stipulates that when the parties in the contract are in disagreement on a condition that is important to the rights and responsibilities of each, then a condition more appropriate to the circumstance must be proposed.

In order to decide on what is the more proper condition, attention must be given to the following factors, among others: (a) the wishes of the parties; (b) the

nature and purpose of contract; (c) good faith and fair dealing, and (d) properness.

Articles 4.1 – 4.7 is concerned with the interpretation of contract in its strictest sense, namely how to properly decide on the meaning of conditions of contract that are found to be vague. This article refers to problems related to the thinking process, i.e. implicit conditions. Implicit conditions or gaps will occur when, after the closure of contract, a problem occurs that has not been regulated in the contact, either because the parties did not want to regulate it or they did not expect this to happen. In several cases on implicit conditions or gaps in contract, the Principles offer ways to resolve the problem.

See, for example, Article 5.6 (Stipulation on the Quality of Performance), 5.7 (Stipulations on Price), 6.1.1 (Time of Performance), 6.1.4 (Request for Performance), 6.1.6 (Place of Performance), and 6.1.10 (Non specified currency). See also, in general Article 5.1 on implicit responsibilities. But, even when there are additions, or “stop-gap” conditions, or when general conditions are not applicable, or these regulations do not provide any correct solution to the situation as expected by the parties, or by the special nature of the contract, then this article may be validated.

Tacit conditions that are proposed, according to this Article, must be appropriate to the case concerned. To determine what is meant by “proper”, attention must first be given to the wish of the parties, which can be deduced, among other factors, from conditions that are specifically stated in the contract, or that are made before negotiations, or through the behaviour of each after the signing of contract.

In cases when the wishes of the parties can not be determined, then the condition proposed may be determined by the nature and purpose of contract, based on the principles of good faith and fair dealing and properness.

11. The Principle to Honour Contracts in Hardship

An Article that is important in the Chapter on the Performance of Contract is the stipulation on the Situation of Hardship. This must be differentiated from "Force Majeur" which is regulated in the Chapter concerning Non-Performance. Regulations on Hardship are found in Article 6.2.1 to 6.2.3.

Article 6.2.1 stipulates that, when a performance of contract becomes heavier for one party, that party is, nonetheless, still bound to perform his promise and is subject to the stipulations on hardship. This stipulation identifies two main points, namely (1) the binding nature of a contract as a general rule; and (2) the change of relevant circumstances that is acceptable only in exceptional cases.

Firstly, the aim of this article is to clarify that, as a result of the validity of the general principles regarding the binding nature of a contract (see Article 1.3.), performance of contract must, as far as possible, be implemented, regardless of the weight of burden on the performing party. In other words, although one of the parties may suffer great losses rather than earn the expected profits, or when the performance of the contract becomes insignificant for that party, yet conditions of contract must in all circumstances be honoured.

Secondly, the principle of the binding nature of a contract is, however, not absolute. Whenever situations occur that cause fundamental changes in the balance of contract, then those are exceptional situations, which in the Principles is termed "hardship", as will be explained in the ensuing articles of this section.

The phenomenon of hardship is well known in several legal systems, but is hidden behind other concepts such as frustration of purpose, *Wegfall der Geschaeftsgrundlage*, *imprevision*, *eccessiva onerosita sopravvenuta*, etc. The term hardship is chosen because this term is widely known in international trade and is confirmed by its inclusion in several international clauses, which are termed as "hardship clauses".

Article 6.2.2 defines that hardship occurs when an event happens, whereby the balance of the contract changes fundamentally, either because the costs to perform the contract have risen, or because the value of the performance of contract has been reduced for the receiving party. Furthermore, (a) the occurrence of the event is known by the party damaged only after the closing of contract; or (b) the event could not be reasonably foreseen by the party damaged; (c) the event occurred beyond the control of the party damaged; and (d) the risks involved in the event have not been estimated by the party damaged. These stipulations regulate the following :

a. **Definition of Hardship**

Article 6.2.2. UPICCs defines the term "hardship" as a circumstance where an event has occurred that has caused fundamental changes to the contract, that meet the conditions regulated in sub clause (a) to (d). There are 3 (three) elements in "hardship", namely: (1) a fundamental change has occurred in the balance of the contract, or (2) the costs of performing the contract rises, or (3) the value of the contract to one of the parties has been reduced.

Firstly, the general principle stipulates that, a change in circumstances does not effect (change) the responsibility of performance (see article 6.2.1). Then, the stipulation further mentions that hardship is applicable only when the change in the balance or equilibrium of the contract is fundamental in nature. A change in a case may be considered "fundamental", depending on circumstances. When performance of contract can be precisely measured in financial value, then a change of 50% or more from the costs of the original value of the contract is considered a "fundamental" change.

Secondly, in practice, a fundamental change in the balance of contract is reflected in two different but connected ways. First, it is marked by a substantial increase in costs experienced by one party to meet his obligations.

This party is usually the only one who must fulfil non-monetary obligations. The increase in costs, may, for example happen as a result of a dramatic increase in raw materials that are important in the production of goods or the implementation of services, or because of new safety regulations that entail higher cost of production, or by an abnormal change in the exchange rate of foreign currency.

Thirdly, the manifestation of the second kind of hardship is marked by a substantial decrease in the value received by one of the parties, including when it has completely erased all value to the receiver. The performance may be monetary or non-monetary in nature. The substantial decrease of value or a total failure in the implementation of the contract may occur when a drastic change has occurred in the market (for instance as a result of a dramatic inflationary increase in cost, way above that agreed upon in the contract), or because of failure of implementation (for example as a result of a prohibition to build on the designated plot of land, or an embargo on received goods meant for re-export).

Of course the reduction in value in the performance must be measurable objectively: a mere personal opinion of the receiving party that there has been a reduction of value, is not relevant. As in all cases where there is failure to achieve the purpose of performance, this may be considered only when the purpose is known, or at least should be known by both parties.

b. Additional Conditions on Hardship.

There are 4 (four) additional "hardship" conditions justifiable by law, and these are : (1) that the event occurred or is known to have occurred only after the closing of contract, (2) the event is one that could not have been reasonably foreseen by the party damaged, (3) the event is beyond the control of the disadvantaged party, (4) the risk must not have been expected or assumed by the disadvantaged.

Firstly, according to sub-clause (a) of this article, the event that has caused hardship has occurred, or is known to the party damaged, only after the closure of contract. When this party has known about this at time of closure of contract, he should have made his calculations at the time of contract, and may, therefore, not use hardship as a reason.

Secondly, even when the change in the balance of contract happens after conclusion of the contract, sub-clause (b) of this article clarifies that this situation will not cause hardship when it should have been reasonably anticipated by the party damaged at the time of closure of contract.

Thirdly, based on sub-clause (c) of this article, hardship arises only when the events that cause hardship are beyond the control of the party damaged. **Fourthly**, based on sub-clause (d) there will be no hardship when the damaged party had anticipated/estimated the risks in a changed situation. The word "estimate" clarifies that the risk may not have been stated clearly, but follows the nature of the contract. One of the parties that enters into a speculative transaction is considered to have anticipated a measure of risk, although the risk has not been fully realized at time of signing the contract.

c. Hardship is relevant only in Long-term Contracts in not yet performed implementation

In line with its nature, hardship becomes relevant only when it is related to forthcoming performance.

When fundamental change in the balance of contract occurs after partial performance, then hardship becomes relevant only to unperformed actions. Although this chapter does not specifically sets aside the possibility of hardship on other types of contract, hardship usually becomes relevant in long-term contracts, when performance by at least one party exceeds a certain time frame.

On the other hand, related to the definition of hardship and that of force majeur (see Article 7.1.7), according to these Principles, there may occur factual situations where a case may be considered both a hardship and a case of force majeur. When such a situation arises, then it depends on the damaged party to decide which legal action to take. When that party opts for force majeur, then legal action requires that the clause on non-performance be used. If, on the other hand, the party uses the reason of hardship, then in the first instance this is aimed at a re-negotiation in the conditions of contract, so that the contract is still valid although with changed conditions.

d. Hardship as a Result of the Law Related to the Contract

The definition of hardship in this Article is more general in nature. International commercial contracts often include more specific details in this regards. The parties may consider it more appropriate to adjust the contents of this article in the light of special situations in special transactions.

What are the legal consequences involved in this hardship, is explained in Article 6.2.3, that determines as follows: (1) At hardship, the party damaged may ask for re-negotiation. This request must be put forward immediately, pointing out the basis for such request.; (2) A request for re-negotiation does not by itself give the right to the party damaged to cease performance; (3) When no agreement has been reached in reasonable time, then either party may bring the matter to court. (4) When the court decides that there was hardship, the court may, when considered reasonable: (a) terminate the contract at a determined date or time period, or (b) change the contract to restore it to a balanced condition. Based on this decision, the restatement says as follows:

(i) The Damaged Party has the Right to ask for Re-negotiation

Because hardship contains a fundamental change in the balance of contract, clause (1) of article 6.2.3. provides in the first instance, the right to the disadvantaged party to request re-negotiation. The request, however, shall be made without undue delay.

A request for re-negotiation is not acceptable when the contract itself already contains a clause that allows automatic change in contract (for example, when there is a clause that allows automatic change in index given in changed situations).

Nevertheless, re-negotiation is allowed when the clause pertaining to change, as mentioned in the contract, does not describe the event that has actually caused the hardship.

(ii) Request for Re-negotiation Without Undue Delay

A request for re-negotiation must be made without undue delay from the time when hardship has occurred (clause (1)). The exact time when to request for re-negotiation will depend on each case: for instance, this time frame may be longer when the situation occurs in phases (see comments 3(b) of Article 6.2.2.).

The damaged party does not forfeit his right to ask for re-negotiation when he has neglected to act on this immediately. The delay may be due to allow a more in-depth study on the reasons, and whether or not hardship has occurred; and if it has, how it will affect the contract.

Clause (1) of article 6.2.3. also justifies the disadvantaged party the obligation to point out the reasons for re-negotiation, to allow the other

party to more accurately estimate whether such request for re-negotiation is or is not reasonable. A request that is not complete, is temporary considered unacceptable, except when the basis for hardship is so evident that it does not need to be specifically mentioned in the request. Clause (2) of this article determines that the party requesting re-negotiation is not by itself given the right to cease performance. This consideration is based on the special nature of hardship, and to avoid the misuse of law. The cessation of performance is justified only in exceptional circumstances.

(iii) Re-negotiation must be made in Good Faith

Although this article does not specifically mentions it, however, request for re-negotiation by the damaged party, as well as the behaviour of both parties during the process of re-negotiation are subject to the general principles of Good Faith (Article 1.7) and the Obligation to cooperate (Article 5.3). Therefore, the damaged party must in all honesty believe that there has been clear hardship and not request for re-negotiation only as a tactical maneuver. Also, when once request has been made, both parties must act in such a way that re-negotiation can be constructive, restrain from any disturbance and by providing all important information.

(iv) Failure to Reach Agreement to be Brought Before the Court

When both parties have, within a reasonable time frame, failed to reach agreement on the changes in the contract or to the changed situation, then clause (3) of this article provides the authority to the parties to bring the case before the court. This situation may arise either because the party who has not been affected, completely disregards the request

for re-negotiation, or because re-negotiations have not reached positive results, although both parties have approached the issue in good faith.

How long one party must wait before he can appropriately bring this problem before the court will depend on the complexity of the problem and the special situation in each case.

According to clause (4) of this article, when a court considers that hardship has occurred, it may resolve this in different ways. The first possibility is to terminate the contract. However, termination of contract in this case, depends on the non-performance of one party, where the outcome of this decision, as mentioned before, may be different from similar regulations generally applied (Article 7.3.1. *et seq*). Thus, clause (4) (a) determines that termination must be made "on the date and on the conditions" as determined by the court.

Another possibility is that the court makes changes to the contract in order to restore the balance of contract (clause (4) (b)). In this case, the court will decide on the fair sharing of losses between the parties. This action may, or may not cover changes in costs, depending on the nature of hardship. However, when changes cover costs, then the change does not necessarily mirror complete improvement resulting from the change in situation, for example the court will consider the extent of risks suffered by one party, and the extent to which the party receiving performance of contract actually benefits from its performance.

Clause (4) of this article clearly states that the court may terminate or change a contract only when deemed appropriate. Indeed, the situation may show that the solution does not lie in the termination or changes in contract, but must be found in the re-negotiation efforts by the parties themselves to reach agreement, or through improvements in the conditions of contract, that the parties themselves have determined.

12. The Principle of Acquittal of Obligation in Force Majeur Situations

Non-performance happens when one party fails to perform his obligation in line with the contract, which includes defective or delayed performance. **The first form** is when “Non-performance” is defined as including all forms of performance, from a defective to the complete failure of performance. Therefore, it is non-performance when a developer builds one part of the construction according to the contract, but the other part is either defective or late in completion. **The second form** is taken to lay down the principles, where “non-performance” covers the “non-excused” and the “excused”.

Non-performance may be excused by reason of the behaviour of the other party in the contract (see Article 7.1.2), (Interference of a third party) and 7.1.3 (on the Continuation of Performance), and its further comments, or by reason of unexpected external events (Article 7.1.7 (on Force Majeur) and its comments). A party does not have the right to sue the other party for damages or special treatment on excused non-performance, but the party who has not received the results of performance has the legal rights to terminate the contract, on account of excused or non-excused non-performance. See Article 7.3.1 *et.seq*, and its comments.

There is no general rule that regulates the accumulation of legal actions. It is assumed by this principle that all legal actions which are logically inconsistent may be accumulated. Therefore, in general it is regulated that when one party has succeeded to force performance, will have no right of damages, but, there is no reason why one of the parties may not terminate the contract on the basis of non-excused non-performance and at the same time sue for damages. See Article 7.2.5 (Change in legal action), 7.3.5 (The results of termination in general) and 7.4.1 (Rights on damages).

The following discussion will focus on the reason for the party acquitting non-performance because of force-majeur. Article 7.1.7 regulates the situation of

Force Majeur by stipulating that: (1) non-performance by one party may be excused when that party can prove that non-performance was caused by an obstacle beyond his control, and that it could not have been reasonably expected at time of closure of contract, or that he could not avoid or overcome the event or its effects. (2) When the obstacle is only of temporary nature, then the excuse must affect that period only within reason, with due consideration to the effects made by the obstacle upon the contract. (3) The party who fails to implement the contract has to notify the other party on the obstacle and its effects on his capabilities to perform. When the notice is not received by the other party in reasonable time, after the party who has failed to perform has known or should have known of the obstacle, then the latter will be responsible for damages as a result of non-receipt of notice.; (4) This Article does not, however, prevent any of the parties to use his rights to terminate the contract, refrain from implementing the contract, or ask for payments on interest on moneys due.

a. The Meaning of Force Majeur

This Article covers the foundation covered in the system of common law which is known as the doctrine of frustration and the impossibility of implementation of contract, which in civil law is known as the doctrine of force majeure. Otherwise known as "Unmoeglichkeit", etc, this stipulation is not identical with the two doctrines mentioned earlier. The term force majeure is chosen in this principle, because this term is better known in international trade practice, and in several international contracts is known as the force majeure clauses.

b. The Effect of Force Majeur on Rights and Obligations

This Article does not limit the rights of the parties, who have not received performance of contract, to terminate the contract, when non-performance is fundamental in nature. Whatever action has been taken, and where the

contract is acted on, form elements of excuse for the non-performing party to be acquitted from obligation on damages.

In several cases, obstacles may stand in the way of the entire performance of contact, at times this may be a delaying factor, in which case, according to this article he may be given additional time for performance. It should be noted that when additional time is given, which is longer (or shorter) than the delayed time given in crucial cases, this will result in the overall delay in the implementation of contract.

This Article should be read in conjunction with Chapter 6, section 2 of the Principles regulating hardship. See comment 6 on Article 6.2.2.

The definition of force majeur in clause (1) of this article is of a general nature. International commercial contracts often include more exact and more detailed specifications. In this case, both parties may decide the more correct stipulation and adapt the contents of this article to the special situation of the special transaction.

Chapter 5

The Academic Draft for a Bill of the Law of Obligations*

1. In response of the need for a national Law of Contract and of Obligations the National law Reform Agency (*Badan Pembinaan Hukum Nasional*) of the Department of Justice formed a research team to draft an Academic Draft for the Bill of Obligations.

The law making procedure is as follows :

First a team of university professors or recognized experts in the specific field of law to be regulated is asked to conduct a research, resulting in an Academic Draft for a Bill.

The Academic Draft, which may be drafted by anyone, including the *National Law Reform Agency* or BPHN, or any ministerial department is then sent to the Directorate General for Legislation in the Department of Justice, where a new team of some 20 (twenty) people is formed to draft the Bill itself.

After the Bill is completed and agreed by the respective Minister, including the Minister of Justice (and Human Rights), the Bill is registered in the Parliamentary National Legislative Program (*Program Legislatif Nasional*) and in due time the Bill will be discussed and debated in Parliament, until finally it is agreed by and between Parliament and the Government.

The final step consists of the signing and enacting of the Bill by the President and the publications of in/through the State Gazette.

2. The following is a preliminary research report conducted for the National Law Reform Agency of the Department of Justice on a Bill for a National Law of Obligations, which considered amongst others : the use of the term

"obligation". The term "obligation" is used quite correctly since it corresponds with the Dutch word "*verbintenis*", denoting that a legal connection has been made between two parties that imply rights and obligations. On the one hand, one party has the right to demand, while the other party is obligated to fulfil that demand (Prof. Subekti,SH).

3. Whereas, the term "agreement" is a translation of the word "*overeenkomst*", which is an event where two persons or parties agree upon something. This event covers a series of promises (Prof. Subekti,SH ibidem).
4. For these reasons, all terms used in this paper denoting "*verbintenis*" are translated into "perikatan" ; and all terms denoting "*overeenkomst*" are translated into "perjanjian".
5. There is still another term that is being used lately, namely the term "contract". This term has a narrower connotation as it is limited to its meaning as "written business contracts".

Therefore we still suggest to use the term "perjanjian".

6. Another word that is often used next to "perjanjian" is the word "persetujuan" for agreement. To my mind, "persetujuan" refers to the process of events, while "perjanjian" refers to the end-result of that process. In this context we talk about written agreements and oral agreements.
7. Consistency in the difference in meaning between obligation (*verbintenis*) on the one hand and agreement on the other is shown in the explanation to Article 1233 BW ¹: "*Alle verbintenissen ontstaan of uit overeenkomst, of de wet*", meaning that obligations originate either from an agreement or from legislation.

¹ BW is the abbreviation of Civil Code or CC.

8. Referring to Article 1233 BW, we arrive at the core problem of our system in the Law of Obligations.

The principle that an obligation originates, on the one hand from an agreement and on the other from legislation, can, according to the writer be adhered to.

9. When this principle is acceptable, then all following articles on the Law on Obligations that, in fact, are an explanation of this system, must, as a consequence also be acceptable.

10. The Law is a comprehensive system. And the Law on Obligation is no exception. To make partial exceptions on the Law on Obligation will collapse the very system of the Law.

11. If, by this reasoning the principle system on the Law of Obligations is acceptable, then the next question will be, how must we approach the body of explanations of this Law, article per article?

Since the total system on the Law on Obligations with explanations of each of its articles form one inseparable entity, then the explanations of its articles must also be accepted. Exceptions will be only in those areas that have already been regulated in part or in toto in our national legislation, as, for instance, in the Law of agreements on Lease and Rents.

12. By mentioning this fact, the writer in no way denies that our Law on Obligations has partly become out-dated. It will, indeed, be ideal that Indonesia possesses a National system on the Law of Obligations, which is whole, complete and according to our legal aspirations.

But, legislative drafters understand that the forming of a National Law on Obligations is no easy task.

13. Legislative drafters usually find themselves facing with two extreme alternatives.

Either to overhaul the old legislation; or to accept and take over the old legislation. Because of their extreme nature, they both have their drawbacks and shortcomings.

14. But, if we must make a choice between the two, the writer prefers the second alternative.

Firstly, because drafting a new Law on Obligations already poses many problems from the outset that require a long time of discussions.

Secondly, the complete overhaul of old legislation with a completely new one, unless well prepared, will result in a Law that is far from perfect.

Thirdly, and this is most important, the Law on Obligations is a neutral area of law and does not contain sensitive substance.

Fourthly, in fact some regulations in the Law of Obligations in the CC have references that are quoted widely by the public when concluding agreements, both written as well as oral.

Fifthly, the Law may be perfected through case law.

When we study the renewal of the Civil Law in the Netherlands, for instance, we see that its process had taken no less than half a century. This luxury, however, this country can not afford.

15. What has been referred to above applies in particular to the national aspects of the Law on Obligations.

However, in its international context, and in this era of globalization, the area of law, in particular the Law on Obligations, is influenced by the Convention Law and the Community Law. (see Roy Goode, Reflections on the Harmonization of Commercial Law,.....)

Here, what is meant by Convention Law is for instance, the Vienna Convention on the Sale of Goods, while Community Law covers, among others, the "Directives to the European Economic Community"

Roy Goode further mentions that the Law on Obligations in its international context is faced with issues that are now better known as the harmonization of laws.

Harmonization of laws may be achieved through the following means:

1. A multilateral convention without a Uniform Law as such;
2. A multilateral convention embodying a Uniform Law;
3. A set of bilateral treaties;
4. Community legislation, typically a Directive;
5. A model Law;
6. A codification of custom and usage promulgated by an international non-governmental organization;
7. International trade terms promulgated by such an organization;
8. Model contracts and general contractual conditions;
9. Restatements by scholars and other experts.

Sooner or later Indonesia must face these issues, especially in this era of regional groupings where neighbouring countries need to harmonize their laws.

16. One of the first areas that will be impacted by regionalization, and for that reason needs to be harmonized first, is the Law on Obligations.

How do we approach the issue of harmonization? Although harmonization of laws is within the area of International Civil Law, yet in drafting the Law of Obligations we must be aware of possibilities.

17. Outside the impact of globalization on our National Law of Obligations, there are several matters that need our attention when we adjust or change the Law of Obligations in its present form as found in the Third Book of the Civil Code.

First and foremost is the principle of consensus. We all agree that the principle of consensus will be the basis for our future Law of Obligations. However, we must focus on the *moment* when such consensus is reached. Until now generally it is understood that consensus is reached at one certain point in time. In reality, in its development, this consensus is reached not only at a certain moment, but in fact, it forms a process. In this connection we know of the process at pre-contract, at time of signing the contract, and during implementation of contract. Therefore, when we are now asked about the exact moment that an obligation is born, which in Article 1233 of BW is so readily formulated with the wordings that obligations are born from an agreement, - then we are faced with a problem that is not so easily answered.

18. "*Informatieplicht*" (obligation to inform) and "*Onderzoeksplicht*" (obligation to investigate)

During the last decade a new thought has developed namely that parties bound in a contract, will each have obligations to perform.

In outline it can be said that the creditor (the party who extends something/goods and receives something in return) is obliged to provide sufficient information on what he is extending. Conversely, the debtor party (the party who receives something/goods and for that reason extends an amount for payment) must investigate or research and act prudently, so

that the counter-performance received is commensurate with performance provided and vice versa. With this explanation, the writer has arrived at the second Article of the Law of Obligations which says that an obligation is aimed to provide something, to perform something and to not perform those actions as formulated in Article 1234 BW.

Or, jumping further to Article 1338 BW , this mentions that a contract must be made in good faith.

With the obligation to inform and the obligation to investigate, the term "good faith" must be placed in a different context than heretofore has been understood.

This is even before discussing aspects that have caused the decline of the supremacy of the principle of freedom to make agreements.

The decline in the supremacy of the principle to make agreements brings us to even more basic questions in our Law of Obligations, which must force us to change several of its principles and articles.

19. Does the principle of freedom to make agreements still exist?

The principle of freedom to make agreements is one of the cornerstones of our Law of Obligations. The regulations on the Law of Obligations, at least in its written form, is found in the Third Book of the Civil Code (BW).

The existence of this principle is reflected in Article 1338 of the Civil Code that mentions that all agreements that are legally based will act as Law to those parties who made these. This means that those parties entering an agreement can agree on any matter between them. For as long as whatever is agreed upon is legal, meaning not in contradiction with the law, social

order and morals, the agreement is binding to those parties in the same way as laws are. And therefore, they may not contravene it.

However, with time, the freedom to make contracts has declined, as parties in the contract are no longer allowed to agree on matters as they wish. In certain cases, parties are not bound to what they have agreed in the contract. This indicates a decline in the supremacy of the freedom to make contract.

There are several reasons for this that originate from the internal developments of the law of contracts itself, as well as from outside, which we will discuss as follows:

20. The Role of the Legal System

An agreement does not exist in a vacuum. Despite the fact that Article 1338 BW clearly mentions that all agreements that are legally made are binding as law for those who signed, this however, does not mean that the law as found in the agreement made by both parties can be separated from the legal system that covers it.

Article 1338 BW uses the words "*yang dibuat secara sah*" (legally made). This means that whatever has been agreed upon by the parties is valid as law, for as long as whatever has been agreed is legal, meaning not contravening the law, social order and morals.

In the case where the agreement contravenes the law, social order and ethics then the contract is invalid by law (*van rechtswege nietig*).

The fact that the freedom to contract is limited by the legal system that covers the contract, - resulting in the fact that whatever has been agreed by the parties must not contravene the law, social order and morals, - this

forms a logical constraint that ensues from the fact that a contract is allowed to exist only within a certain legal system.

The wish to introduce a "lex-mercatoria", especially in the framework of international civil laws must for this reason remain a wish. The fact remains that contract law still remains part of the legal system of a given country.

21. The Principle of Good Faith.

From the very beginning the principle of good faith has influenced the law on contracts. This principle was even identified in the statutes. Line 3 of the above-mentioned article, i.e. Article 1338 BW mentions that all agreements must be made on good faith.

What does "good faith" actually denote? In the law on contracts good faith is based on its being reasonable and just. The first is concerned with reason and the second with emotions. Both principles remind us of the concept of (*kecermatan yang patut dalam hidup bermasyarakat*) as mentioned in Article 1365 BW on acts violating the law.

Good faith in the contractual context indicates that there is a legal relationship between two or more parties. While the term "*kecermatan yang patut dalam pergaulan hidup bermasyarakat*" is used where no agreement has taken place.

Good faith implies that there is a contractual relation, and therefore is called a relationship concept. Whereas "*kecermatan serta kepatutuan dalam pergaulan hidup bermasyarakat*" is used in its general concept. However, in fact, the meaning of both is the same, says Prof. Mr. P.L. Wehry in his explanations on "Legal Developments of Good Faith in the Netherlands".

Still citing Prof. Wehry, good faith has two functions. Both these functions impact on the principle of freedom to contract.

22.Two Functions of Good Faith.

Its first function :

Good faith can add to the contents of a contract and can also add to the meanings of wordings in the laws on contract.

For example, in 1921 the High Court in Holland made a verdict on corporations or firms (HR.10 February 1921; NJ No.409), : "that although the law does not prevent a firm to establish another firm which competes with the old firm, but based on good faith, this is not allowed"

Therefore, in this case good faith adds, fills in discrepancies and completes that are not yet regulated by law. Is then the general principle of law not good faith?

Its second function

In its second function, good faith limits and annuls. This second function has actually been accepted in the doctrine before WWII, although the legal system of the time was still reluctant to concede.

Most famous example was the verdict of the High Court of the Netherlands on the amount of debts related to the rapid fall of the German Mark in 1931. The verdict is known as Mark is Mark Arrest.

The verdict is concerned with the question as who must bear the risk of fluctuating exchange rates in a loan contract? According toe Article 1756

BW such risk is with the creditor. Based on this article, however, in the 1931 verdict that the debtor only needed to repay the amounts of Marks he borrowed from the creditor, despite the fact that the value of the Mark had dropped drastically. (The original loan was DM125,000 at a rate of DM1=F.0.69; while at time of repayment the value of DM125,000 had dropped to below 1 cent.). The principle on good faith may limit the implementation of Article 1756 BW.

The Indonesian legal system has for long now made a fairer formulation. The Implementation of Article 1756 BW is limited by the principle of good faith. This formulation is used when there are fluctuations in the exchange rate, even when this is not mentioned earlier.

Most recent verdict based on this formulation was made in 1988 on the case of S.T. Silalahi against Suryono & co.

The Supreme Court ruled that to solve a civil case involving changes in exchange rate, the formulation used is that risks on rates of exchange must be borne by both parties in equal measure using the price of gold as benchmark. This formulation has become common jurisprudence until today.

23. Undue Influence

Thus far the law knows 3 (three) reasons why a contract is no longer binding to those who made it, these are reason of force, misleading and fraud. In the case where one of the three reasons have caused losses to one party, because there has been force, misleading or fraud, an annulment of the contract can be requested. Therefore, we see that, in fact the freedom to contract is already limited. Indeed, Article 1338 BW stipulates that what binds the two parties to the contract with the force of law are such agreements as what they themselves have legally put into the

contract, insofar as this does not contravene the system of law, social order and morals.

In its further development, reasons mentioned in the law, including force, misleading and fraud are no longer the only reasons used to free a person from the obligations of contract.

Now, there is a fourth reason that is used to release a person from the obligations of contract, which lies outside the scope of law (at least in this country). This reason is known as undue influence (*misbruik van omstandigheden*).

Seen from the point of balance between the two parties in a contract, then an existing imbalance becomes one item in undue influence, which is not the imbalance between delivery and counter-delivery.

Rather, such imbalance has its emphasis on the process of the contract. Therefore, the school on undue influence does not only justify the doctrines on undue causes (*ongeoorloofde oorzaak*), but rather focusses on impaired will. The party that is under undue influence is not free to determine his will. One speaks, therefore, of impaired will (*wilsgebrek*), as the fourth reason for annulment of contract besides the elements of force, misleading and fraud. The imbalance must be sought in the position of the parties involved in a contract.

There having been a loss suffered as a result of such imbalance of positions becomes a condition in the case of undue influence.

The annulment of a contract for reason of undue influence is not annulled through law. Such annulment may be requested by the party who feels the loss. This annulment may also occur even to a contract made before a notary.

Annulment does not need to involve the entire contract. Partial annulment is also permitted.

In 1985 The Supreme Court made a ruling which is better known as the Luhur Sundoro case, with legal implications as follows:

- Despite the fact that the contract made in a notary act is legal, - where one person empowers another to sell the house in dispute to a third party or to himself, however, taking into consideration its history where the letter of attorney was made as a result of the house being made a collateral until such time of repayment, and as debts were not repaid in time, the contract was changed into a power of attorney to sell the house, - such a contract becomes a quasi contract, being in fact a replacement of its original contract regarding loans.

Furthermore, as the debtor was already tied to other loan contracts that already passed verdicts by the courts, and were, therefore, in force, the debtor was as a consequence placed in a weak position and under duress. When he was then forced to sign the items of contract in the notary act to justify him, the ensuing contract may then be classified as a one-sided contract, which *in casu* is unjust if wholly enforced upon the debtor."

- Because the debtor had admitted to his debts and had placed his house as collateral, furthermore, had given power to the creditor to (*hipotik*) the house, it must be concluded that the house in dispute had been promised to the creditor as repayment of his debts, which for the sake of fairness must be added with 2% per month, counting from the date that the debt was made.

For fairness sake, the house in dispute that was already impounded for other cases, must therefore be auctioned to repay other creditors."

The basis for such ruling reminds us of considerations in the Dutch case law on "*misbruik van omstandigheden*" or undue influence. According to the doctrine and jurisprudence of that country, m.v.o is an impairment of the fourth will besides that of the other three classical impairments of force, misleading and fraud. Ever since the new Civil Code was enforced in this country, m.v.o. or undue influence as the fourth impairment of will has been installed in the legal system.

There is a Dutch fairy tale that is often cited to describe undue influence, which Prof. Mr. JLP Cohen relates as follows:

Once upon a time there was a daughter of a wheat miller, who found herself placed in a difficult situation, because her parents boasted that she could weave wheat into gold thread.

The king believed and asked the girl to demonstrate her ability. If she succeeded the king would take her as queen. If not, then she would be killed. In this very difficult situation, suddenly there appeared a goblin, who said that he could help her with her task on one condition, that once the girl became queen, she must give her first born child to him.

It is, therefore, not surprising that the girl immediately agreed to the proposition, but it is also not surprising that when the girl became queen, she failed on her promise.

The moral of the lesson is: a promise is binding. But there is no obligation when it is given under duress.

24. Development of Standard Contracts

A contract or agreement always implies that there are two parties involved, whether they are debtor and creditor, or seller and buyer.

A contract follows an agreement. Despite the fact that, according to the latest thoughts, an agreement can not be viewed as merely one point in the entire process of the agreement, the fact that there is agreement always implies that there has been negotiations. An agreement occurs only after due process of negotiations where all conditions in the agreement had been discussed.

The term "process" also implies that a time frame was required. Therefore, nowadays, an agreement is no longer considered as a mere point or moment in the process towards that agreement. In 1989 J.B.M.Vranken issued a book in the Netherlands entitled: "*Mededelingen, Informatie en Onderzoeksplichten in het verbintenisrecht*" (Announcements, Information and Investigative responsibilities in the Law of Obligations). The title clearly explains its contents. In the Law of Obligations there exists the responsibility to announce, inform and investigate. Parties to the contract are responsible to inform each other and investigate all aspects pertaining to the contract. The aim being to attain a well-balanced contract that is founded on equal consent by both parties.

What happens in practice does not always follow this advice. In general, one of the parties to the contract who holds a position of monopoly, will always try to determine conditions one-sidedly. The other party, who holds no bargaining position must usually accept whatever conditions are mentioned in the agreement, on the basis of *take it or leave it*.

This situation is seen daily, whether these conditions are prescribed by a laundry, hotel or photo-printing. This does not even stop here. Large companies who hold monopolistic positions have already printed their draft contracts ready for signing by his business partner. This is also done by state companies such as in Telecommunications, Public Utilities etc.

Does the freedom to contract then still exist in this case? Although this practice is widely accepted and is allowed, the question remains as in how far do these private companies (who hold monopolies) have the authority to determine conditions of contract, that, in fact, according to Article 1338 BW is provided to both parties to the contract? From the point of view of Article 1338 BW a contract is, in fact, a law. And where all contracts are made according to a specific standard model, then, what is actually happening here is,- to borrow the term of the Dutch writer, Sluijter,- private legislation.

This is because those conditions as determined by the company in the above contract have become law, and, therefore, no longer form an agreement. Pitlo even goes so far as to call this a "dwang-contract", or a mandatory contract. Nonetheless, another well-known writer, Asser Rutten in his book "*Handleiding tot de Beoefening van het Nederlands Burgerlijk Wetboek*, 1974, states that " Every person who signs an agreement is responsible for the contents (of the agreement) which he (or she) has signed. Whenever a person adds his (or her) signature to a form of agreement on a book, that signature raises confidence that the signatory is aware of and wants the book, whose form he (or she) has signed. It is not possible for someone to sign any (agreement) whose contents he is not aware of". (Prof. Dr. Mariam Darus Badrulzaman SH, "Asas Kebebasan Berkontrak dan Kaitannya dengan Perjanjian", Buku/Standard, Makalah pada Upgrading Notaris, 27 April 1993.)

However, up to now this country has no regulations on standard contracts. In my view, negative excesses of a standard contract may be eliminated by using the theory of good intentions and abuse of circumstances.

One point is clear, though, and that is that with proliferation of standard contracts, the principle of freedom to contract is reduced.

25. The Law as an Instrument for Economic Policy Making

The decline in the freedom to contract is also caused by the use of law as instrument for Economic Policy-making. The use of law as instrument for economic policy-making is not new. During the world economic crisis in the 1920's, the Netherlands introduced what it called "*Crisiswetgeving*", which are legislation to overcome the economic crisis. In Indonesia this kind of legislation was used in the 1950's, that even emerged in the form of the Criminal Economic Law. Here interaction was created between the law and the economy. And as a result a new branch of learning was established, that of Economic Law.

The most apparent trait of Economic law is its regulating role. This regulatory role of law, taken in its widest sense, - aimed to propel growth and development of the economy,- is the reason why the law remains no longer the basis for legal policies only. (What we now see is that) the role of law has now shifted to become an instrument of policy-making.

The shift in the role of law then caused changes in the structure and form regulating the laws themselves. Especially laws in their written form.

Ever since the French Revolution it was an established fact that Laws (in their formal sense) are the chief products and form of Legislation.

Laws as a product of parliament, and viewed as a means to limit the powers of the King (read: the Authorities) - have recorded all principles of law that are required to regulate life in society. In its later development, Laws no longer occupy a central position. Especially since the growth and development of Economic Law. The reason for this lies the process of its inception, where Economic Law was based on delegated legislation. Here we see regulating law by delegation of power.

For these reasons, the principles of Economic Law do not all appear in the form of Laws (in their formal sense). They appear in such forms as Government Regulations, Presidential Decisions, Ministerial Decisions etc. Most recent example (in the 1980s) in this country are regulations known as Paktri, Pakto, Pakdes etc. which in essence are policies made by the Authorities in the field of economy in the form of written regulations (laws).

As example, Ministerial Decision of the Minister of Finance No.1548 dated 4 December 1990 to regulate (!) the stock market, refers to Law No. 15 of 1952. Article 7 of this Law establishes that contravention of any rules in this regulation made by the Minister of Finance based on the Law, is a crime. Although this is not unusual in delegated legislation, these authorities must be used with care, especially when these are linked to legislation and legalities. To cite the words of Prof. Padmo Wahjono, the formation of laws based on delegated legislation must not divert from the most important principles of legislation, namely the ranking of strength (hierarchy) of regulations. Regulations of lower rank must not contain legal norms which are outside, or worse still contravene those of higher rank. It is natural that a Government Regulation may not be made against the Law. However, it must be conceded that this principle is not always adhered to.

Further, Mr. NG Kalergis-Mavrogenis, legal writer of the Netherlands, in his book : The power and non-power of the legislator, 1978, says that excessive use of delegated legislation may result in non-power of the legislator. The power of the legislator has then shifted to the executive, or to the administrator. Therefore, regulations will then be channeled through the function of the administration.

The impact of the development of economic law is mostly felt in the area of Civil Law, especially in the field of Law of Obligations and Contracts. The growth of economic law runs parallel with the receding of the freedom to

contract. Economic Law that appears in its form as Public Law, is mandatory in nature. As a result, the essential nature of regulation in the Law of Obligations recedes to the background.

What do we face in delegated legislation?

First of all, for a certain length of time, we will face a situation that is equal to a vacuum in the rule of law. Whenever, for example a certain article in a specific law mentions that ensuing regulations will be established in a Government Regulation, then this means that for a certain period, until those ensuing regulations are established, we will find a vacuum in the law.

Secondly, over and above that – and this is most important – we actually face a vacuum in the provision of norms. The substance of these norms have (through such measures) been relegated by the legislators (meaning the Government and Parliament) to the executive.

Now more and more aspects of Contract Law show traits of public law that are mandatory in nature. Therefore, the basic principle of Contract Law that gives freedom to both parties to commonly agree on what will be accepted as law and binding to both parties, is now no longer completely valid.

The principle of freedom to contract is in fact founded on the assumption that both parties involved in the contract are of equal strength, seen from the social as well as economic aspects. In reality this is rarely found. So that, therefore, the question is not so much on how we may give equal treatment to both parties, as to what measure of quality do we give to each party, in order that they may both be on an equal level.

Here we see the positive role of Economic Law at work. The authorities have come down by issuing regulations and laws that provide protection to

the party that is socially and economically in weaker position. This is seen, for instance, in the case of consumer protection and product liability. Decision of the Minister of Finance no. 48 of 1991 dated 19 January 1991, on the subject of leasing, shows this kind of protection. The Decision says that leasing is a guided contract. A guided contract, according to noted writer Polak, is a contract whose conditions are based, not only on the basis of freedom to contract and on mutual consent by both parties, but whose minimal requirement must be to protect the weaker party.

This can be seen for instance in Article 8 of the above Decision.

However, when we compare this with similar regulations in the Netherlands on contract to buy and sell by installments, we see that the above-mentioned Ministerial Decision does not yet contain norms that are substantial in nature. Article 1576 C of the Civil Code of that country, governing buying and selling by installments, includes a default clause. This is a condition in the agreement where the deadline falls before due date. This clause is applicable where if one installment has been made, at least one tenth of total value of sales price must be paid; and in the case where several installments have been made, at least one twentieth of total value of sales price must be paid.

We foresee that regulating laws in Economic Law will have no small impact on the general development of Indonesia's Laws of the future.

26. In the context of international civil matters, the freedom to contract is often punctuated by a choice of law, which is limited by - what is known as - public policy.

Both parties agree that in the implementation of the contract and its implications, the contract shall adhere to the law of choice. Therefore, the principle question here must be whether the parties may choose their choice of law regardless? The answer to this is: negative.

The main issue in the choice of law is the balance between the freedom to contract on the one hand and public policy (*ketertiban umum*) on the other.

On the one hand the principle of freedom to contract justifies a choice of law. On the other hand, public policy limits the extent of choice.

"Choice of law in civil and commercial matters is characterized by two contradictory phenomena: party autonomy and mandatory rules of a public law nature" (Rene van Rooi, Maurice V. Polak, *Private International Law in the Netherlands*)

Choice of law may be made for as long as this does not contravene public policy.

Supreme Court Regulation No.1 of 1990 on the system in the implementation verdicts involving Foreign Arbitration says that what is meant with the term "public policy" are basic principles pertaining to the entire legal and social system of Indonesia".

Choice of law may also not mean " avoidance of law". In the doctrine, avoidance of law is sometimes called choice of law, in its incorrect meaning; whereas "choice of law" must be made with its correct meaning.

In choice of law we are faced with points of contacts, including citizenship, domicile, and location of item. Choice of law may be made only where relevant points of contact exist.

However, an avoidance of law, is precisely an effort to influence those points of contact. For example, relevant parties may change their citizenship, location of item in question or location where the contract was made.

Choice of law may only be made in the area of contract law; this is the area that is known as regulating law. Choice of law is prohibited for example in the area of forced law.

Even in contract law, the freedom to make a choice of law is limited. Choice of law, for instance is prohibited in labour contracts.

Choice of law can only be justified when there exists a point of contact.

In the meantime, choice of law of both parties may be set aside when a stronger point of contact is in existence that is stronger than the actual choice of law itself. The following example cited by Prof. Kollewijn is often quoted, as follows: "When an Argentine citizen and a Dutch citizen, both domiciled in the Netherlands make a contract for goods to be transported from Domburg to Groningen and both parties choose to act under Argentine law, then, according to Kollewijn the choice of the Dutch law by the judge is a far stronger (choice)".

Therefore, choice of law is limited by particular systems of law only, namely those that have the most characteristic connection. It is not allowed to choose a law that has no connection whatsoever with the contract. Choice of law *may be made only with bona fide intention*. (Summary from Prof. Mr. Dr. S. Gautama, Pengantar Hukum Perdata Internasional Indonesia, 1977).

27. The Impact of the Era of Globalization

The freedom to contract is also effected by the era of globalization. With more transnational contracts made, more agreements were made by parties in Indonesia, in particular between an Indonesian and a foreign party who have chosen jurisdiction under foreign law.

In the context of choice of law we see that the jurisdiction of a foreign law – limited by the principles of public policy as explained above – has been, in this instance, chosen on purpose by parties involved in the contract. Here the word “on purpose” is used, as the possibility exists that choice of law was made in secret. Whereas, as a result of globalization, it is also possible that regulating laws of one country crosses its geographic borders without intention and not on purpose, even against the will of parties involved in the contract. Here we see the indications of *transnational reach of national regulations.*

In this ever-smaller world, more and more transnational relations occur in the area of law. Facing the impact of law (and economy) from overseas, countries do not all take the same stance and attitude. Take for instance the attitude of the Latin American countries. In the last decade there was what is known as the Calvo Doctrine (originating from Carlos Calvo, an Argentine lawyer), who was of the principle that “*a foreigner by entering a country to do business implicitly consents to be treated as are national firms.* This means that a foreign firm does not have the right to invoke the protection of its own government in investment disputes.” These Latin American countries, are, for instance reluctant to join the Centre for Settlement of Investment Disputes (ICSID). The Board of arbitration of ICSID opens the possibility for settling disputes on capital investment between a foreigner and the government where investment is made.

However, lately the implementation of the Calvo Doctrine by Latin American countries seems to have relaxed. More and more countries now offer protection towards foreign ownership through what is called as *investment guarantee agreements.*

We have from university days been taught on the limitations of validity of legal regulations. This refers to the scope and range of jurisdiction of certain regulating laws, its time of validity, persons who are included under

the regulation, and limitation pertaining to the territory where this jurisdiction prevails.

As to the latter, the territory of jurisdiction is bounded by the territory of the country where jurisdiction is made which at the same time reflects the sovereign boundaries of that country.

"Although the jurisdiction of national laws is normally limited to the particular nation, the reality is that actions taken outside the national boundaries can affect competition within the national market", thus Robock & Simmonds, in International Business & Multinational Enterprises, 1989. P. 188 and on.

It is on the basis of these principles of thought that certain countries, through their actions, expand their country's *reach of jurisdiction* into territories of other nations. "In recognition of this reality the US Courts have extended the US antitrust laws to actions abroad that substantially affect the commerce of the US and competition in the US market", say Robock & Simmonds further. In this context, for example, a verdict made by a foreign arbitration body outside the territory of the United States on a commercial contract, which contravenes the Antitrust Law of the United States, can not be validated and may not be implemented within the United States. Thus, indirectly the Anti Trust Law of the United States has acquired the power of *extra-territorial reach*, that extend to cases outside the territorial jurisdiction of the United States.

Indirectly, this also limits the freedom of the parties to bind themselves in a contract (of arbitration).

Chapter 6

The Future of Indonesian Contract Law

The previous chapters already explained, that Contract Law in Indonesia only contains (what in the common law system is usually called) commercial contract law, thereby excluding contracts concerning marriage, adoption and inheritance, as those matters are mainly regulated by separate laws on the basis of religious and (customary) Adat Law and Islamic Law principles. Apart from that a growing number of commercial contracts are separately regulated as "Special Contracts" (*Byzondere Overeenkomsten*), such as Sale of Goods, Hire Purchase, etc.

The developments since the Foreign Investment Law of 1967 and its numerous amendments by Presidential Decrees, Ministerial Decrees and Decisions of the (Foreign) Investment Board (BKPM), in addition to a number of new laws, such as the Anti Monopoly Law, the Law of Fair Competition and the like which were enacted in answer of the pressures of globalization and modernization, have in fact almost completely changed our legal environment. Therefore in reality the application of our Indonesian Contract Law is not anymore exactly the same as our Contract Law as it stood in the 1848 Civil Code, even though we do not have a new Act or Code on Contracts yet.

As the Civil Code was intended for non-indigenous (read "foreign") people only, living or doing business in Indonesia, suddenly, since 1967 (indigenous) Indonesians were made to abide by this part of the Code. Furthermore numerous new and changing policies, governmental - and presidential regulations, laws, judge-made law, international and commercial conventions and newly developed business practices also applied to indigenous Indonesians all at once in a time frame of some 30 (thirty) years, compared to their foreign domiciled business partner or representatives of transnational corporations for which those practices and laws, and especially contract law already applied at least some 150 years ago, if not longer.

Without given the time to adjust our values and norms from Adat Law and Islamic Law to the modern (read Western) way of thinking and feeling, at the same time Indonesians were put in a global transparent (and very critical) environment, where because of the existence of electronically well developed equipments, everything that happens in Indonesia is almost instantly known, evaluated and criticized by the world, in particular by businessmen, television stations and mass media representing the strongest transnational corporations in the world.

Hence the law and the legal culture of Indonesia had to jump in a matter of 50 years or so from what Europe experienced in a time span of some 500 years, and Japan during the last 150 years or so, namely from the middle ages immediately to the 21st Century into the information era.

Therefore the legal culture of Indonesia cannot be otherwise but pluralistic, covering very different values and norms belonging to what is in economic theory known as an agrarian society, an industrial society, a post-industrial society (or a credit based economy), a service oriented society up to the computerized information age. No wonder that we now experience a clash of cultural values and norms bringing and causing legal uncertainty as a result of 50 years of accelerated development.

Accordingly the law applicable to contracts in Indonesia also depend upon the object or subject matter involved in the contract, the place where the contracts is concluded (i.e. whether the contract is concluded in the villages and with village people, or in the (big) cities), where the contracts is to be performed (in the cities or in the regions), with the government or government agencies or whether the contract is concluded between Indonesian companies, or with one or more transnational corporations, whether the contract is concluded with a bank (Indonesian or foreign) or through the internet, etc.

All these combinations of parties, places and facts may result in "different" contracts, applicable to different regimes or legal norms, although according to

foreign lawyers, they should be regarded as "similar" contracts, for which the same legal regulations and laws should apply.

The situation is very much like solving problems of conflict of laws, even it seems as if the relation is an "internal" Indonesian contract.

Hence Contract Law in Indonesia should more properly be called the law on contracts, rather than Contract Law as such.

The Resurrection of Adat Law and Conflict of Laws

Although it was always intended to create a harmonized unified Indonesian Legal System, unfortunately we have not succeeded in building such a unified legal system, except in the field of public law, such as constitutional and administrative law, criminal law and procedural law.

Even in those fields of law the Reformation Movement which started in 1998 raised new demands to modernize certain aspects of the Constitution, of our Criminal Law, and of our Criminal and Civil Procedural Law.

In addition, the latest policy for more autonomous regional governance might likely result in the need for (foreign) investors to abide by the local laws and customs concerning land, environment, waters, contracts, taxation and other regional/local regulation next to the "national" contracts and investment law as spelled out in the Civil Code and modified or amended by various special legislations, governmental decrees and regulations, or judge-made law.

The economic crisis, combined with the Reformation Movement and Decentralization Policy) therefore, has brought back two fields of law to be considered by any businessman or investor, namely (a) the rules of the local Adat law of the ***locus contractus*** and of the ***locus executionies*** of the

contracts, and (b) the field of Conflict of Laws between the "national" and the local/regional law, apart from the respective International Private Law rules.

The Importance of Public Law

Like in other developed countries since World War II Public law has grown in importance, reflecting the importance of public policy in welfare states.

Indonesia is no exception, and since our Independence, and more particular since 1967, the private sector has been very much regulated by administrative rules and institutions which for the benefit of foreign investors more often than not, made exceptions to the general (private law) rules. Even though the 1980s heralded the economic policy of liberalization and privatization, this did not diminish the importance of public law rules in the area of business and investments. On the contrary, those administrative laws very often made inroads in the private law system, making specific investments possible, which according to the strict private and business law rules would not have been possible.

Before somebody is to do business or invest in Indonesia, it would therefore be wise to study not only the relevant contracts and company laws, but also the rules on land and employment, apart from all the existing public laws, which at present are in a state of constant change.

More ever, it seems almost impossible for foreign lawyers to do business and make business contracts in Indonesia, without cooperation of local Indonesian lawyers.

The Emergence of e-Commerce

Practices of e-commerce have lately started in Indonesia, and at present many seminars and conferences are held discussing the applicable law in such e-contracts.

The provisional conclusion is that not all of the continental principles contained in our Civil Code concerning the conclusion of contracts can be applied to electronically made contracts.

The technology of computers and the internet is such that the common law principles on Contract law lends itself better for regulating the making and consequences of the e-contract.

Especially the concept of offer and acceptance which is unknown in the Indonesian Contract law, although it has been adopted in the Dutch Contract law, would need some time to be accepted and adjusted in Indonesia.

It is therefore not so easy for Indonesia, compared to. For instance, Singaporean law to apply the Model Law on Electronic Commerce of the United Nations Commission on International Trade Law to e-contracts, because no tradition of common law Contract Law exists in Indonesia.

Rather, I think that contracts made electronically should be regulated in a separate specific Act, making them exceptional to the general rules and principles of Indonesian Contract Law.

This would be the opposite as compared to Singapore, where, according to Andrew C.L. Ong and others in their book entitled "Your Guide to E-Commerce Law in Singapore"¹:

"..... the Electronic Transaction Act 1988 is not intended to regulate activities on the Web or alter any existing legal rights or obligations between the parties",

and that

"the provisions of the ETA which relate to electronic contracts (Part IV) and electronic records and signatures (Part II) will only operate in the absence of agreement between the contracting parties on such issues".

¹ Andrew C.L. Ong etc. : "Your Guide to E-Commerce Law in Singapore", Drew & Napier, 2000, p.2

Chapter 7 C o n c l u s i o n s

In conclusion we can say that in Indonesia at present we should speak of the law on Contracts, rather than of Contract Law properly so called. Because as a basis we have our so-called principles of Contract Law, which are contained in the Civil Code.

Next we have a special part in our Civil Code regulating Specific Contracts (*Bijzondere Overeenkomsten*). Other contracts, such as contracts relating to land and investment contracts which become practised after the 1967 Foreign Investment Law have also been regulated in the Basic Agrarian Law No. 5 of 1960 and governmental regulations, Presidential Decrees, etc.) by specific acts of Public Law and Bilateral and Multilateral Treaties. Not to mention numerous kinds of contracts concluded in or related to the Capital Market.

Furthermore we also have a huge number of specific government contracts, which are regulated by Public Laws, whilst presumably Government Contracts, International Contracts, Standard Contracts and contracts of E-commerce will have to be regulated by a different parliamentary acts too.

In relation to the new policy of decentralization the new regional laws and regulations of each autonomous region will also apply, and will have to be considered by businessmen and investors, next to the "old" rules of Conflict of Laws (*Hukum Antar Adat*, *Hukum Antar Daerah* and *Hukum Antar Wewenang*), which will be given new life in the next years to come.

All this in an atmosphere of globalization without neglecting the universally recognized principles of Contract Law which are embodied in the UNIDROIT Principles of International Commercial Contract Law, as discussed in this book in Chapter 4.

From the discussion above in this book, the reader may have seen how complicated the problems of legal reforms are in Indonesia, because :

Firstly, the majority of Indonesians still live in their traditional, tribal environment, unaware of the pressures and demands of international business in an age of globalization, causing Indonesians to live in 20 centuries all at the same time.

Secondly, while the principles of (old) Dutch-Indies Contract Law has been recently introduced to the group of Indonesian businessmen, other (esp. American) principles of Contract and Company Law has at the same time been adopted in many Investment Contracts through specific clauses, such as clauses for arbitration by an American arbitration board, or other provisions, which are strange to Indonesian Contract Law, but not always illegal, even if it has never been regulated.

What is more, all this has been made possible on the basis of the principle of freedom of contracts.

Thirdly, while Indonesia still adheres to the pre-war legal theories, the Netherlands has already adopted its law to the needs of the 21st century by promulgating a New Civil Code, which also contains provisions which formerly formed part of Dutch Commercial Law, apart from new post World War II norms and principles which have been introduced in the Dutch Civil Code.

Fourthly, in the meantime, international conventions and model laws have come into existence, making it possible for Indonesian legislative drafters to study them and use them as a model for our Civil Code, but is scattered over a large number of other laws and regulations, including our Commercial Code and a number of public laws and regulations.

Fifthly, therefore before we can really embark on drafting a comprehensive Law of Contract in Indonesia, we will first have to study all those separate laws and

regulations, and compare their principles with those of the International Conventions and Model Laws.

Sixty, the conclusion we reach now is that a new law of Contract Law can at best consist of a list of general principles of Contract Law to be observed, which is in accordance with international practice and theory, but which does not violate the Indonesian idea of fairness, good faith and justice.

Seventhly, if so, the Indonesian Contract Law will maintain its feature of an "Open System", which allows for special regulations for specific contracts, provided the general principles of the law of Contract are still upheld. This in fact results in an Indonesian Law of Contracts rather than a Law of Contract.

Finally, the "system" envisaged by the writer of the future Contract law in Indonesia might consists of the following :

1. Principles of the Law of Obligations, including of the Law on Contracts as contained in the Civil Code and perhaps somewhat modified in the future;
2. Specific contracts, such as the contracts of sale, leasing, barter and other such "traditional" contracts which are now regulated in the Civil Code;
3. International Commercial Contracts in General. Adopting most principles of the UNIDROIT (and/or other) Principles of International Commercial Contracts;
4. Specific (public) laws on investment contracts, licensing, franchise, anti-monopoly and fair competition, etc.
5. A law on Standard Contracts;
6. A law on Government Contracts, and

7. A law on E-Commerce.

On top of that, however, one should also advise the Constitution, the International Conventions and Bilateral Agreements, the regulations issued by the Investment Board Presidential Decrees and various Governmental Regulations, Regional Regulations an the various rules of Conflict of Laws including International Private Law rules, Interregional, Inter Adat and Inter Competence Law. Not to forget the local Adat Law(s) which every local and foreign businessmen ought to respect in the picture, in order not to experience the most unpleasant disturbances we have experienced in the past three years.

All this makes the Indonesian Law on Contracts, a piece of transnational law, in the true sense of the word.

BIBLIOGRAPHY

Badan Pembinaan Hukum Nasional : Naskah Akademik Peraturan Perundang-undangan tentang Hukum Perikatan, BPHN, Jakarta, 1993/1994.

Badan Pembinaan Hukum Nasional : Pola Pikir dan Kerangka Sistem Hukum Nasional serta Rencana Pembangunan Hukum Jangka Panjang, BPHN, 1995/1996.

Bonell, M.J. : An International Restatement of Contract Law, 2nd. ed., Transnational Publishers, Inc., Irvington-on-Hudson, New York 10533.

Burns, Peter J. :The Leiden Legacy, Concepts of Law in Indonesia, P.T. Pradnya Paramita, Jakarta, 1999.

Hutagalung, Ari S., cs. : Hukum Kontrak di Indonesia, ELIPS, 1998.

Subekti, R. : Hukum Adat Indonesia dalam Yurisprudensi Mahkamah Agung, cetakan ke 4, Alumni, Bandung, 1991.

Subekti, R. : Bunga Rampai Hukum, Alumni, Bandung.

Sunaryati Hartono : Mencari Bentuk dan Sistem Hukum Perjanjian Nasional Kita, Alumni, Bandung, 1974.

Sunaryati Hartono : Beberapa Masalah Transnasional dalam Penanaman Modal Asing di Indonesia, Binacipta, Bandung, 1973.

Tay Swee Kian, C & Tang See Chin : Contract Law, Times Books International, Singapore, Kuala Lumpur, 1987.

Ter Haar, B. Bzn. :Beginselen en Stelsel van het Adatrecht, J.B. Wolters, Groningen, Djakarta 1950.

Vermande's Wettenreeks : Burgerlijk Wetboek, Koninklijke Vermande, B.V.
Wessels, 1984/1985.

Wessels, B. & Jongeneel, R.H.C. : Algemene Voorwaarden, W.E.J. Tjeenk
Willink, Zwolle, 1992.

Annex I

The Law Of Obligations in the Indonesian Civil Code 1848

Annex I**BUKU KETIGA. PERIKATAN¹⁾****BAB I. PERIKATAN PADA UMUMNYA****Bagian 1. Ketentuan-ketentuan Umum.**

1233. Perikatan, lahir karena suatu persetujuan atau karena undang-undang. (KUHPerd. 1313 dst., 1352; Rv. 102.)

1234. Perikatan ditujukan untuk memberikan sesuatu, untuk berbuat sesuatu, atau untuk tidak berbuat sesuatu. (KUHPerd. 1235 dst., 1239 dst., 1314.)

Bagian 2. Perikatan Untuk Memberikan Sesuatu

1235. Dalam perikatan untuk memberikan sesuatu, termaktub kewajiban untuk menyerahkan barang yang bersangkutan dan untuk merawatnya sebagai seorang kepala rumah tangga yang baik, sampai saat penyerahan.

Luas tidaknya kewajiban yang terakhir ini tergantung pada persetujuan tertentu, akibatnya akan ditunjuk dalam bab-bab yang bersangkutan (KUHPerd. 105, 385, 612 dst., 784, 1033, 1157, 1356, 1444 dst., 1474 dst., 1482, 1550-1⁰, 1560-1⁰, 1706 dst., 1715, 1744, 1801.)

1236. Debitur wajib memberi ganti biaya, kerugian dan bunga kepada kreditur bila ia menjadikan dirinya tidak mampu untuk menyerahkan barang itu atau tidak merawatnya sebaik-baiknya

¹⁾ From Himpunan Peraturan Perundang-undangan Republik Indonesia, PT Ichtiar Baru- Van Hoeve, Jakarta, 1989 pp 509-530. This is an unauthorized Indonesian translation from the Dutch language. No Authorized translation exists.

untuk menyelamatkannya. (KUHPerd. 1235, 1243 dst., 1264, 1275, 1391, 1444, 1480.)

1237. Pada suatu perikatan untuk memberikan barang tertentu, barang itu menjadi tanggungan kreditur sejak perikatan lahir. Jika debitur lalai untuk menyerahkan barang yang bersangkutan maka barang itu, semenjak perikatan dilakukan menjadi tanggungannya. (KUHPerd. 1264, 1275, 1391, 1444, 1460, 1481 dst., 1545, 1553, 1605, 1648, 1708, 1745 dst.)

1238. Debitur dinyatakan lalai dengan surat perintah, atau dengan akta sejenis itu, atau berdasarkan kekuatan dari perikatan sendiri, yaitu bila perikatan ini mengakibatkan debitur harus dianggap lalai dengan lewatnya waktu yang ditentukan (KUHPerd. 391, 413, 579, 1243, 1362, 1626, 1805, 1979; Rv. 1 dst.)

Bagian 3. Perikatan Untuk Berbuat Sesuatu Atau Tidak Berbuat Sesuatu

1239. Tiap perikatan untuk berbuat sesuatu, atau untuk tidak berbuat sesuatu, wajib diselesaikan dengan memberikan penggantian biaya, kerugian dan bunga, bila debitur tidak memenuhi kewajibannya (KUHPerd. 1241, 1243 dst., 1277, 1365 dst., 1383; Rv. 580 dst., 606a dst., 765; IR. 222.)

1240. Walaupun demikian, kreditur berhak menuntut penghapusan segala sesuatu yang dilakukan secara bertentangan dengan perikatan dan ia dapat minta kuasa dari hakim untuk menyuruh menghapuskan segala sesuatu yang telah dibuat itu atas tanggungan debitur, hal ini tidak mengurangi hak untuk menuntut penggantian biaya, kerugian dan bunga, jika ada alasan untuk itu. (KUHPerd. 1239, 1241, 1243, 1365.)

1241. Bila perikatan itu tidak dilaksanakan, kreditur juga boleh dikuasakan untuk melaksanakan sendiri perikatan itu atas biaya debitur. (KUHPerd. 1239 dst.)

1242. Jika perikatan itu bertujuan untuk tidak berbuat sesuatu, maka pihak manapun yang berbuat bertentangan dengan perikatan itu, karena pelanggaran itu saja, diwajibkan untuk mengganti biaya, kerugian dan bunga (KUHPerd. 641, 1243, 1245.)

Bagian 4. Penggantian Biaya, Kerugian Dan Bunga Karena Tidak Dipenuhinya Sesuatu Perikatan

1243. Penggantian biaya, kerugian dan bunga karena tak dipenuhinya suatu perikatan mulai diwajibkan, bila debitur, walaupun telah dinyatakan lalai, tetap lalai untuk memenuhi perikatan itu, atau jika sesuatu yang harus diberikan atau dilakukannya hanya dapat diberikan atau dilakukannya dalam waktu yang melampaui tenggang waktu yang telah ditentukan (KUHPerd. 1236, 1238, 1239 dst., 1246 dst., 1249 dst., 1304, 1307, 1365 dst., 1480: Rv. 607 dst.)

1244. Debitur harus dihukum untuk mengganti biaya, kerugian dan bunga bila ia tak dapat membuktikan bahwa tidak dilaksanakannya perikatan itu atau tidak tepatnya waktu dalam melaksanakan perikatan itu disebabkan oleh suatu hal yang tak terduga, yang tak dapat dipertanggungkan kepadanya, walaupun tidak ada itikad buruk padanya (KUHPerd. 1444, 1865.)

1245. Tidak ada penggantian biaya, kerugian dan bunga, bila karena keadaan memaksa atau karena hal yang terjadi secara kebetulan, debitur terhalang untuk memberikan atau berbuat sesuatu yang diwajibkan atau melaksanakan suatu perbuatan yang terlarang baginya.

1246. Biaya ganti rugi dan bunga yang boleh dituntut kreditur, terdiri atas kerugian yang telah dideritanya dan keuntungan yang sedianya dapat diperolehnya, tanpa mengurangi

pengecualian dan perubahan yang tersebut dibawah ini (KUHPerd. 58, 1603.)

1247. Debitur hanya diwajibkan mengganti biaya, kerugian dan bunga yang diharap atau sedianya dapat diduga pada waktu perikatan diadakan kecuali jika tidak dipenuhinya perikatan itu disebabkan oleh tipu-daya yang dilakukannya. (KUHPerd. 1328.)

1248. Bahkan jika tidak terpenuhinya perikatan itu disebabkan oleh tipu-daya debitur, maka penggantian biaya, kerugian dan bunga, yang menyebabkan kreditur menderita kerugian dan kehilangan keuntungan, hanya mencakup hal-hal yang menjadi akibat langsung dari tidak dilaksanakannya perikatan itu.

1249. Jika dalam suatu perikatan ditentukan, bahwa pihak yang lalai memenuhinya harus membayar suatu jumlah uang tertentu sebagai ganti kerugian, maka kepada pihak yang lain tak boleh diberikan suatu jumlah yang lebih ataupun yang kurang dari jumlah itu. (KUHPerd. 1307 dst.)

1250. (*s.d.u. dg. S. 1938-276*) Dalam perikatan yang hanya berhubungan dengan pembayaran sejumlah uang pengganitian biaya, kerugian dan bunga, yang timbul karena keterlambatan pelaksanaannya, hanya terdiri atas bunga yang ditentukan oleh undang-undang tanpa mengurangi berlakunya peraturan undang-undang khusus.

Penggantian biaya, kerugian dan bunga itu wajib dibayar, tanpa perlu dibuktikan adanya suatu kerugian oleh kreditur.

Penggantian biaya, kerugian dan bunga itu baru wajib dibayar sejak diminta di muka pengadilan, kecuali bila undang-undang menetapkan bahwa hal itu berlaku demi hukum. (KUHPerd. 391, 413, 797 dst: 1098, 1216, 1286, 1362, 1515, 1626, 1805, 1810, 1839; KUHD 147, 680, 721; S. 1848-22 jo. 1849-63.)

1251. Bunga uang pokok yang dapat ditagih dapat pula menghasilkan bunga, baik karena suatu permohonan dimuka pengadilan maupun karena suatu persetujuan yang khusus asal

saja permintaan atau persetujuan tersebut adalah mengenai bunga yang harus dibayar untuk satu tahun. (KUHPerd. 1252)

1252. Walaupun demikian penghasilan yang dapat ditagih, seperti uang upah tanah dan uang sewa lain, bunga abadi atau bunga sepanjang hidup seseorang, menghasilkan bunga mulai hari dilakukan penuntutan atau dibuat persetujuan.

Peraturan yang sama berlaku terhadap pengembalian hasil-hasil sewa dan bunga yang dibayar oleh seorang pihak ketiga kepada kreditur untuk pembebasan debitur. (KUHPerd. 502, 1770 dst., 1775.)

Bagian 5. Perikatan Bersyarat

1253. Suatu perikatan adalah bersyarat jika digantungkan pada suatu peristiwa yang mungkin dan memang belum terjadi baik dengan cara menangguhkan berlakunya perikatan itu sampai terjadinya peristiwa itu, maupun dengan cara membatalkan perikatan itu, tergantung pada terjadi tidaknya peristiwa itu. (KUHPerd. 154,997, 1169, 1263, 1265 dst., 1268, 1463 dst., 1990.)

1254. Semua syarat yang bertujuan melakukan sesuatu yang tak mungkin terlaksana sesuatu yang bertentangan dengan kesusilaan yang baik, atau sesuatu yang dilarang oleh undang-undang adalah batal dengan mengakibatkan persetujuan yang digantungkan padanya tak berlaku (AB. 23; KUHPerd. 139, 888, 1334, 1337, 1653.)

1255. Syarat yang bertujuan tidak melakukan segala sesuatu yang tak mungkin dilakukan tidak membuat perikatan yang digantungkan padanya tak berlaku (KUHPerd. 1254.)

1256. Semua perikatan adalah batal, jika pelaksanaannya semata-mata tergantung pada kemauan orang yang terikat. Tetapi jika perikatan tergantung pada suatu perbuatan yang pelaksanaannya berada dalam kekuasaan orang tersebut, dan

perbuatan itu telah terjadi, maka perikatan itu adalah sah. (KUHPerd. 171, 179, 1668, 1761.)

1257. Semua syarat harus dipenuhi dengan cara yang dikehendaki dan dimaksudkan oleh pihak-pihak yang bersangkutan. (KUHPerd. 1343.)

1258. Jika suatu perikatan tergantung pada suatu syarat bahwa suatu peristiwa akan terjadi dalam waktu tertentu, maka syarat tersebut dianggap tidak ada, bila waktu tersebut telah lampau, sedangkan peristiwa tersebut tidak terjadi.

Jika waktu tidak ditentukan, maka syarat tersebut setiap waktu dapat dipenuhi, dan syarat itu tidak dianggap tidak ada sebelum ada kepastian bahwa peristiwa itu tidak akan terjadi (KUHPerd. 997, 1263 dst., 1521.)

1259. Jika suatu perikatan tergantung pada syarat bahwa suatu peristiwa tidak akan terjadi dalam waktu tertentu maka syarat tersebut telah terpenuhi bila waktu tersebut lampau tanpa terjadinya peristiwa itu. Begitu pula syarat itu telah terpenuhi jika sebelum waktu tersebut lewat telah ada kepastian bahwa peristiwa itu tidak akan terjadi; tetapi jika tidak ditetapkan suatu waktu, maka syarat itu tidak terpenuhi sebelum ada kepastian bahwa peristiwa tersebut tidak akan terjadi.

1260. Syarat yang bersangkutan dianggap telah terpenuhi, jika debitur yang terikat oleh syarat itu menghalangi terepenuhinya syarat itu. (KUHPerd. 889.)

1261. Bila syarat telah terpenuhi , maka syarat itu berlaku surut hingga saat terjadinya perikatan.

Jika kreditur meninggal sebelum terpenuhi syarat, maka hak-haknya berpindah kepada para ahli warisnya (KUHPerd. 958, 998, 1268, 1990.)

1262. Kreditur, sebelum syarat terpenuhi boleh melakukan segala usaha yang perlu untuk menjaga supaya haknya jangan sampai hilang. (KUHPerd. 1215; F.125 dst; Rv. 714 dst.)

1263. Suatu perikatan dengan syarat tunda adalah suatu perikatan yang tergantung pada suatu peristiwa yang masih akan datang dan belum tentu akan terjadi, atau yang tergantung pada suatu hal yang sudah terjadi tetapi hal itu tidak diketahui oleh kedua belah pihak.

Dalam hal tertentu perikatan tidak dapat dilaksanakan sebelum peristiwanya terjadi; dalam hal kedua, perikatan mulai berlaku sejak terjadi (KUHPerd. 998, 1169, 1176, 1253, 1258 dst., 1264, 1463, 1990,)

1264. Jika suatu perikatan tergantung pada suatu syarat yang ditunda, maka barang yang menjadi pokok perikatan tetap menjadi tanggungan debitur, yang hanya wajib menyerahkan barang itu bila syarat dipenuhi.

Jika barang tersebut musnah seluruhnya diluar kesalahan debitur, maka baik bagi pihak yang satu maupun bagi pihak yang lain, tidak ada lagi perikatan.

Jika barang tersebut merosot harganya diluar kesalahan debitur, maka kreditur dapat memilih; memutuskan perikatan, atau menuntut penyerahan barang itu dalam keadaan seperti adanya tanpa pengurangan harga yang telah dijanjikan.

Jika harga barang tersebut merosot karena kesalahan debitur, maka kreditur berhak memutuskan perikatan atau menuntut penyerahan barang itu dalam keadaan seperti apa adanya dengan penggantian kerugian, (KUHPerd. 1237, 1243 dst., 1261, 1444.)

1265. Suatu syarat batal adalah syarat yang bila dipenuhi akan menghapuskan perikatan dan membawa segala sesuatu kembali pada keadaan semula, seolah-olah tidak pernah ada suatu perikatan.

Syarat ini tidak menunda pemenuhan perikatan; ia hanya mewajibkan kreditur mengembalikan apa yang telah diterimanya bila peristiwa yang dimaksudkan terjadi. (KUHPerd. 997, 1169, 1258 dst., 1266 dst., 1381, 1519 dst.,)

1266. Syarat batal dianggap selalu dicantumkan dalam persetujuan yang timbal-balik, andaikata salah satu pihak tidak memenuhi kewajibannya.

Dalam hal demikian persetujuan tidak batal demi hukum, tetapi pembatalan harus dimintakan kepada pengadilan.

Permintaan ini juga harus dilakukan meskipun syarat batal mengenai tidak dipenuhinya kewajiban dinyatakan di dalam persetujuan.

Jika syarat batal tidak dinyatakan dalam persetujuan, maka hakim dengan melihat keadaan atas permintaan tergugat, leluasa memberikan suatu jangka waktu untuk memenuhi kewajiban, tetapi jangka waktu itu tidak boleh lebih dari satu bulan. (KUHPerd. 1480, 1517, 1589, 1781 dst.)

1267. Pihak yang terhadapnya perikatan tidak dipenuhi, dapat memilih: memaksa pihak yang lain untuk memenuhi persetujuan, jika hal itu masih dapat dilakukan atau menuntut pembatalan persetujuan, dengan penggantian biaya kerugian dan bunga (KUHPerd. 1243 dst., 1480, 1517.)

Bagian 6. Perikatan-perikatan Dengan Waktu Yang Ditetapkan.

1268. Waktu yang ditetapkan tidaklah menunda perikatan, melainkan hanya pelaksanaannya. (KUHPerd. 1253, 1266, 1308, 1750, 1759, 1763, 1990.)

1269. Apa yang harus dibayar pada waktu yang ditentukan itu, tidak dapat ditagih sebelum waktu itu tiba; tetapi apa yang telah dibayar sebelum waktu itu, tak dapat diminta kembali (KUHPerd. 1338, 1359, 1427 dst., 1759; KUHD 139, 176.)

1270. Waktu yang ditetapkan selalu ditentukan untuk kepentingan debitur, kecuali jika dari sifat perikatan sendiri atau dari keadaan ternyata bahwa waktu itu ditentukan untuk

kepentingan kreditur (KUHPerd. 1405, 1428, 1771; KUHD 139, 176.)

1271. Debitur tidak dapat lagi menarik manfaat dari suatu ketetapan waktu jika ia telah dinyatakan pailit, atau jika jaminan yang diberikannya kepada kreditur telah merosot karena kesalahannya sendiri. (KUHPerd. 1217, 1772, 1781, 1843; F. 130.)

Bagian 7. Perikatan Dengan Pilihan Atau Perikatan Yang Boleh Dipilih Oleh Salah Satu Pihak

1272. Dalam perikatan dengan pilihan debitur dibebaskan jika ia menyerahkan salah satu dari dua barang yang disebut dalam perikatan, tetapi ia tidak dapat memaksa kreditur untuk menerima sebagian dari barang yang satu dan sebagian dari barang yang lain (KUHPerd. 1389.)

1273. Hak memilih ada pada debitur, jika hak ini tidak secara tegas diberikan kepada kreditur (KUHPerd. 757, 969, 1277, 1349, 1392, 1473.)

1274. Suatu perikatan adalah murni dan sederhana walaupun perikatan itu disusun secara boleh pilih atau secara mana suka, jika salah satu dari kedua barang yang dijanjikan tidak dapat menjadi pokok perikatan (KUHPerd. 1277, 1332.)

1275. Suatu perikatan dengan pilihan adalah murni dan sederhana, jika salah satu dari barang yang dijanjikan hilang, atau karena kesalahan debitur tidak dapat diserahkan lagi. Harga dari barang itu tidak dapat ditawarkan sebagai gantinya. Jika kedua barang telah hilang dan debitur bersalah tentang lenyapnya salah satu barang, dia harus membayar harga barang yang paling akhir hilang (KUHPerd. 1236, 1273, 1444 dst.)

1276. Jika dalam hal-hal yang disebutkan dalam pasal lalu pilihan diserahkan kepada kreditur dan hanya salah satu barang saja yang hilang, maka jika hal itu terjadi diluar kesalahan debitur,

kreditur harus memperoleh barang yang masih ada. Jika hilangnya salah satu barang tadi terjadi karena salahnya debitur, maka kreditur dapat menuntut penyerahan barang yang masih ada atau harga barang yang telah hilang.

Jika kedua barang lenyap, maka bila hilangnya barang itu, satu saja pun, terjadi karena kesalahan debitur, kreditur boleh menuntut pembayaran harga salah satu barang itu menurut pilihannya (KUHPerd. 1236, 1273, 1444.)

1277. Prinsip yang sama juga berlaku, baik jika ada lebih dari dua barang termaktub dalam perikatan maupun jika perikatan itu adalah mengenai berbuat sesuatu ataupun tidak berbuat sesuatu (KUHPerd. 1239 dst)

Bagian 8. Perikatan Tanggung-renteng Atau Perikatan Tanggung-menanggung

1278. Suatu perikatan tanggung-menanggung atau perikatan tanggung-renteng terjadi antara beberapa kreditur, jika dalam bukti persetujuan secara tegas kepada masing-masing diberikan hak untuk menuntut pemenuhan seluruh utang, sedangkan pembayaran yang dilakukan kepada salah seorang di antara mereka. Membebaskan debitur, meskipun perikatan itu menurut sifatnya dapat dipecah dan dibagi antara para kreditur tadi. (KUHPerd. 1292, 1296 dst. 1301, 1303.)

1279. Selama belum digugat oleh salah satu kreditur, debitur bebas memilih apakah ia akan membayar utang kepada yang satu atau kepada yang lain diantara para kreditur.

Meskipun demikian, pembebasan yang diberikan oleh salah satu kreditur dalam suatu perikatan tanggung-menanggung tak dpat membebaskan debitur lebih dari bagian kreditur tersebut (KUHPerd. 1439, 1857, 1917, 1938, 1985.)

1280. Di pihak para debitur terjadi suatu perikatan tanggung-menanggung manakala mereka semua wajib melaksanakan satu hal yang sama, sedemikian rupa sehingga salah satu dapat dituntut untuk seluruhnya dan pelunasan oleh salah satu membebaskan debitur lainnya terhadap kreditur (KUHPerd. 1288, 1424, 1430, 1439 dst., 1938 dst., 1983.)

1281. Suatu perikatan dapat bersifat tanggung-menanggung meskipun salah satu debitur itu diwajibkan memenuhi hal yang sama dengan cara berlainan dengan teman-temannya sepenanggungan misalnya yang satu terikat dengan bersyarat, sedangkan yang lain terikat secara murni dan sederhana, atau terhadap yang satu telah diberikan ketetapan waktu dengan persetujuan, sedang terhadap yang lain tidak diberikan (KUHPerd. 1253 dst., 1268 dst., 1287.)

1282. Tiada perikatan yang dianggap sebagai perikatan tanggung-menanggung kecuali jika dinyatakan dengan tegas.

Ketentuan ini hanya dikecualikan dalam hal suatu perikatan dianggap sebagai perikatan tanggung-menanggung karena kekuatan penetapan undang-undang (KUHPerd. 130,350 dst., 563, 1016, 1019, 1301, 1749, 1811, 1836; KUHD 18, 21, 146, 176, 221; Sv. 354; IR. 333.)

1283. Kreditur dalam suatu perikatan tanggung-menanggung dapat menagih piutangnya dari salah satu debitur yang dipilihnya dan debitur ini tidak dapat meminta agar utangnya dipecah. (KUHPerd. 1279. 1832-2^o. 1836 dst; KUHD 146, 176; 221; F. 132; Rv. 70.)

1284. Penuntutan yang ditujukan kepada salah satu debitur tidak menjadi halangan bagi kreditur itu untuk melaksanakan haknya terhadap debitur lainnya. (KUHPerd.1280)

1285. Jika barang yang harus diberikan musnah karena kesalahan seorang debitur tanggung-renteng atau lebih, atau setelah debitur dinyatakan lalai, maka para debitur lainnya tidak bebas dari kewajiban untuk membayar harga barang itu, tetapi

mereka tidak wajib untuk membayar penggantian biaya, kerugian atau bunga.

Kreditur hanya dapat menuntut penggantian biaya, kerugian dan bunga, baik dari debitur yang menyebabkan lenyapnya barang itu, maupun mereka yang lalai memenuhi perikatan (KUHPerd. 1243, 1246, 1310, 1444)

1286. Tuntutan pembayaran bunga yang diajukan terhadap salah satu diantara para debitur tanggung-renteng, mengakibatkan bunga itu juga berlaku terhadap semua orang lain yang turut berhutang (KUHPerd. 1250, 1983.)

1287. Seorang debitur dalam suatu perikatan tanggung-menanggung yang dituntut oleh kreditur, dapat memajukan semua bantahan (eksepsi-eksepsi) yang timbul dari sifat perikatan dan yang mengenai dirinya sendiri, pula semua bantahan yang mengenai diri semua debitur lain.

Ia tidak dapat memakai bantahan yang hanya mengenai beberapa debitur saja (KUHPerd. 1281, 1423, 1430, 1441, 1847, 1938, 1983.)

1288. Jika salah satu debitur menjadi satu-satunya ahli waris kreditur, atau jika kreditur merupakan satu-satunya ahli waris salah satu debitur, maka percampuran utang ini tidak dapat mengakibatkan tidak berlakunya perikatan tanggung-menanggung kecuali untuk bagian dari debitur atau kreditur yang bersangkutan (KUHPerd. 1436 dst.)

1289. Kreditur yang telah menyetujui pembagian piutangnya terhadap salah satu debitur tetap memiliki piutang terhadap para debitur lain, tetapi dikurangi bagian debitur yang telah dibebaskan dari perikatan tanggung-menanggung (KUHPerd 1303.)

1290. Kreditur yang menerima bagian salah satu debitur tanpa melepaskan haknya yang berdasarkan utang tanggung-renteng sendiri atau hak-haknya pada umumnya, tidak menghapuskan haknya secara tanggung-renteng, melainkan hanya terhadap debitur tadi.

Kreditur tidak dianggap membebaskan debitur dari perikatan tanggung-menanggung jika dia menerima suatu jumlah sebesar bagian debitur itu dalam seluruh utang sedangkan surat bukti pembayaran tidak secara tegas menyatakan bahwa apa yang diterimanya adalah untuk bagian orang tersebut.

Hal yang sama berlaku terhadap tuntutan yang ditujukan kepada salah satu debitur, selama orang ini belum membenarkan tuntutan tersebut, atau selama perkara belum diputus oleh hakim. (KUHPerd. 1289.)

1291. Kreditur yang menerima secara tersendiri dan tanpa syarat bagian dari salah satu debitur dalam pembayaran bunga tunggakan dari suatu utang, hanya kehilangan haknya sendiri terhadap bunga yang telah harus dibayar, dan tidak terhadap bunga yang belum tiba waktunya untuk ditagih atau utang pokok, kecuali bila pembayaran tersendiri itu telah terjadi selama sepuluh tahun berturut-turut (KUHPerd. 1394, 1983 dst.)

1292. Suatu perikatan, meskipun menjadi tanggung-jawab kreditur sendiri menurut hukum dapat dihadapi para debitur secara terbagi-bagi masing-masing untuk bagiannya sendiri-sendiri. (KUHPerd. 1100, 1283, 1298, 1983)

1293. Seorang debitur yang telah melunasi utangnya dalam suatu perikatan tanggung-menanggung tidak dapat menuntut kembali dari para debitur lainnya lebih daripada bagian mereka masing-masing.

Jika salah satu diantara mereka tidak mampu untuk membayar, maka kerugian yang disebabkan oleh ketidakmampuan itu harus dipikul bersama-sama oleh para debitur lainnya dan debitur yang telah melunasi utangnya menurut besarnya bagian masing-masing (KUHPerd. 1103, 1292, 1402-3^o, 1841, 1844.)

1294. Jika kreditur telah membebaskan salah satu debitur dari perikatan tanggung-menanggung dan seorang atau lebih debitur lainnya menjadi tak mampu, maka bagian dari yang tak

mampu itu harus dipikul bersama-sama oleh debitur lainnya, juga oleh mereka yang telah dibebaskan dari perikatan tanggung-menaggung (KUHPerd. 1298 dst, 1293 dst.)

1295. Jika barang yang untuknya orang-orang mengikatkan diri secara tanggung-renteng itu hanya menyangkut salah satu di antara mereka, maka mereka masing-masing terikat seluruhnya kepada kreditur, tetapi di antara mereka sendiri mereka dianggap sebagai orang penjamin bagi orang yang bersangkutan dengan barang itu, dan karena itu harus diberi ganti rugi. (KUHPerd. 1292, 1836, 1839 dst.)

Bagian 9. Perikatan-perikatan Yang Dapat Dibagi-bagi Dan Perikatan-perikatan Yang Tidak dapat Dibagi-bagi

1296. Suatu perikatan dapat dibagi-bagi atau tak dapat dibagi-bagi sekedar pokok perikatan tersebut adalah suatu barang yang penyerahannya atau suatu perbuatan yang pelaksanaanya dapat dibagi-bagi atau tak dapat dibagi-bagi baik secara nyata maupun tak nyata. (KUHPerd. 728, 739, 892, 1160, 1299 dst., 1721)

1297. Suatu perikatan tak dapat dibagi-bagi, meskipun barang atau perbuatan yang menjadi pokok perikatan itu, karena sifatnya dapat dibagi-bagi, jika barang atau perbuatan itu, menurut maksudnya, tidak boleh diserahkan atau dilaksanakan sebagian demi sebagian saja. (KUHPerd. 1160, 1300 dst.)

1298. Bahwa suatu perikatan merupakan perikatan tanggung-menanggung itu tidak berarti bahwa perikatan itu adalah suatu perikatan yang tak dapat dibagi-bagi. (KUHPerd. 1283, 1292, 1301 dst, 1983)

1299. Suatu perikatan yang dapat dibagi-bagi harus dilaksanakan antara debitur dan kreditur, seolah-olah perikatan

itu tak dapat dibagi-bagi; hal dapatnya dibagi-bagi suatu perikatan itu hanya dapat diterapkan terhadap ahli waris yang tidak dapat menagih piutangnya atau tidak wajib membayar utangnya selain untuk bagian masing-masing sebagai ahli waris atau orang yang harus mewakili kreditur atau debitur. (KUHPerd. 1100 dst. 1311 dst., 1390, 1527 dst., 1721.)

1300. Asas yang ditentukan dalam pasal yang lalu, dikecualikan terhadap ahli waris debitur.

1^o. jika utang berkenaan dengan suatu hipotek (KUHPerd. 1101 dst., 1105, 1163, 1198.)

2^o . jika utang itu terdiri atas suatu barang tertentu. (KUHPerd. 1083, 1391.)

3^o . jika utang itu mengenai berbagai barang-barang yang dapat dipilih, terserah kepada kreditur, sedang salah satu dari barang-barang itu tak dapat dibagi. (KUHPerd. 1272 dst.)

4^o . jika menurut persetujuan hanya salah satu ahli-waris saja yang diwajibkan melaksanakan perikatan itu. (KUHPerd. 800, 959, 965, 967.)

5^o . jika ternyata dengan jelas, baik karena sifat perikatan, maupun karena sifat barang yang menjadi pokok perikatan atau karena maksud yang terkandung dalam persetujuan itu, bahwa maksud kedua belah pihak adalah bahwa utangnya tidak dapat diangsur. (KUHPerd. 1297.)

Dalam ketiga hal yang pertama, si ahli waris yang menguasai barang yang harus diserahkan atau barang yang dijadikan tanggungan hipotek, dapat dituntut untuk membayar seluruh utangnya, pembayaran mana dapat dilaksanakan atas barang yang harus diserahkan itu atau barang yang dijadikan tanggungan hipotek tersebut, tanpa mengurangi haknya untuk menuntut penggantian kepada ahli waris lainnya.

Ahli waris yang dibebani dengan utang dalam hal yang keempat, dan tiap ahli waris dalam hal yang kelima, dapat pula

dituntut untuk seluruh utang, tanpa mengurangi hak mereka untuk minta ganti rugi dari ahli waris yang lain.

1301. Tiap orang yang bersama-sama wajib memikul utang yang dapat dibagi, bertanggung-jawab untuk seluruhnya, meskipun perikatan tidak dibuat secara tanggung-menanggung (KUHPerd. 1160, 1163, 1278 dst, 1297, 1310.)

1302. Hal yang sama juga berlaku bagi para ahli waris orang yang diwajibkan memenuhi perikatan seperti itu.(KUHPerd. 1102 dst., 1310, 1721.)

1303. Tiap ahli waris kreditur dapat menuntut pelaksanaan suatu perikatan yang tak dapat dibagi-bagi secara keseluruhan.

Tiada seorang pun dari antara mereka diperbolehkan sendirian memberi pembebasan dari seluruh utang maupun menerima harganya sebagai ganti barang.

Jika hanya salah satu ahli waris memberi pembebasan dari utang yang bersangkutan atau menerima harga barang yang tak dapat dibagi-bagi itu, kecuali dengan memperhitungkan bagian dari ahli waris yang telah memberikan pembebasan dari utang atau yang telah menerima harga barang itu. (KUHPerd. 1278, 1289, 1385, 1438, 1721.)

Bagian 10. Perikatan Dengan Perjanjian Hukum

1304. Perjanjian hukuman adalah suatu perjanjian yang menempatkan seseorang sebagai jaminan pelaksanaan suatu perikatan yang mewajibkannya melakukan sesuatu jika dia tidak melaksanakan hal itu (KUHPerd. 1243, 1249.)

1305. Batalnya perikatan pokok mengakibatkan batalnya perjanjian hukuman.

Tidak berlakunya perjanjian hukuman, sama sekali tidak mengakibatkan batalnya perikatan pokok. (KUHPerd. 1315, 1317.)

1306. Kreditur dapat juga menuntut pemenuhan perikatan pokok sebagai pengganti pelaksanaan hukuman terhadap debitur.

1307. Penetapan hukuman dimaksudkan sebagai penggantian biaya, kerugian dan bunga, yang diderita kreditur karena tidak dipenuhi perikatan pokok.

Ia tidak dapat menuntut utang pokok dan hukumannya bersama-sama, kecuali jika hukuman itu ditetapkan hanya untuk terlambatnya pemenuhan. (KUHPerd. 1243, 1249, 1312.)

1308. Entah perikatan pokok itu memuat ketentuan waktu untuk pelaksanaannya entah tidak, hukuman tidak dikenakan, kecuali jika orang yang terikat untuk memberikan sesuatu atau untuk mengerjakan sesuatu itu tidak melaksanakan hal itu. (KUHPerd. 1235, 1238, 1245, 1250, 1268.)

1309. Hukuman dapat diubah oleh hakim, jika sebagian perikatan pokok telah dilaksanakan. (KUHPerd. 1249.)

1310. Jika perikatan pokok yang memuat penetapan hukuman adalah mengenai suatu barang yang tak dapat dibagi-bagi maka hukuman harus dibayar kalau terjadi pelanggaran oleh salah satu ahli waris debitur, dan hukuman ini dapat dituntut baik untuk seluruhnya dari siapa yang melakukan pelanggaran terhadap perikatan maupun dari masing-masing ahli waris untuk bagiannya tetapi tanpa mengurangi hak mereka untuk menuntut kembali siapa yang menyebabkan hukuman harus dibayar segala sesuatu tidak mengurangi hak-hak kreditur hipotek (KUHPerd. 1163, 1285, 1301.)

1311. Jika perikatan pokok dengan penetapan hukuman itu adalah mengenai suatu barang yang dapat dibagi-bagi, maka hukuman hanya harus dibayar oleh ahli waris debitur yang melanggar perikatan, dan hanya untuk jumlah yang tidak melebihi bagiannya dalam perikatan pokok tanpa ada tuntutan terhadap mereka yang telah memenuhi perikatan.

Peraturan ini dikecualikan jika perjanjian hukuman ditambah dengan maksud supaya pemenuhan tidak terjadi untuk sebagian

dan salah satu ahli waris telah menghalangi pelaksanaan perikatan untuk seluruhnya, dalam hal ini, hukuman dapat dituntut dari yang terakhir ini untuk seluruhnya dan dari para ahli waris yang lain hanya untuk bagian mereka tanpa mengurangi hak mereka untuk menuntut ahli waris yang melanggar perikatan.(KUHPerd. 1299, 1306.)

1312. Jika suatu perikatan pokok yang dapat dibagi-bagi dan memakai penetapan hukuman yang tak dapat dibagi-bagi hanya dipenuhi untuk sebagian maka hukuman terhadap ahli waris debitur diganti dengan pembayaran penggantian biaya, kerugian dan bunga (KUHPerd. 1296, 1299, 1306 dst.)

BAB II. PERIKATAN YANG LAHIR DARI KONTRAK ATAU PERSETUJUAN

Bagian 1. Ketentuan-ketentuan Umum.

1313. Suatu persetujuan adalah suatu perbuatan dimana satu orang atau lebih mengikatakan diri terhadap satu orang lain atau lebih. (KUHPerd. 1233 dst.)

1314. Suatu persetujuan diadakan dengan cuma-cuma atau dengan memberatkan.

Suatu persetujuan cuma-cuma adalah suatu persetujuan, bahwa pihak yang satu akan memberikan suatu keuntungan kepada pihak yang lain tanpa menerima imbalan.

Suatu persetujuan memberatkan adalah suatu persetujuan yang wajibkan tiap pihak untuk memberikan sesuatu, melakukan sesuatu, atau tidak melakukan sesuatu. (KUHPerd. 1234, 1666.)

1315. Pada umumnya seseorang tidak dapat mengadakan perikatan atau perjanjian selain untuk dirinya sendiri. (KUHPerd. 1316, 1340, 1357, 1382 dst., 1645, 1655, 1792, 1820.)

1316. Seseorang boleh menanggung seorang pihak ketiga dan menjajikan bahwa pihak ketiga ini akan berbuat sesuatu; tetapi hal ini tidak mengurangi tuntutan ganti rugi terhadap penanggung atau orang yang berjanji itu jika pihak ketiga tersebut menolak untuk memenuhi perjanjian itu. (KUHPerd. 1338, 1645, 1823, 1873.)

1317. Dapat pula diadakan perjanjian untuk kepentingan pihak ketiga, bila suatu perjanjian yang dibuat untuk diri sendiri atau suatu pemberian kepada orang lain, mengandung syarat semacam itu.

Siapa pun yang telah menentukan suatu syarat, tidak boleh menariknya kembali, jika pihak ketiga telah menyatakan akan mempergunakan syarat itu. (KUPerd. 1323, 1338, 1669 dst., 1688, 1778, 1823.)

1318. Orang dianggap memperoleh sesuatu dengan perjanjian untuk diri sendiri dan untuk ahli warisnya dan orang yang memperoleh hak daripadanya kecuali jika dengan tegas ditetapkan atau telah nyata dari sifat persetujuan itu bahwa bukan itu maksudnya. (KUHPerd. 175, 178, 807-1^o, 833, 965, 1575, 1612, 1743, 1784, 1813, 1826.)

1319. Semua persetujuan, baik yang mempunyai nama khusus, maupun tidak dikenal dengan suatu nama tertentu, tunduk pada peraturan umum yang termuat dalam bab ini dan bab yang lalu.

Alinea kedua tidak berlaku berdasarkan S. 1938-276.

Bagian 2. Syarat-syarat Terjadinya Suatu Persetujuan Yang
Sah

1320. supaya terjadi persetujuan yang sah, perlu dipenuhi empat syarat :

1^o . kesepakatan mereka yang mengikatkan dirinya; (KUHPerd. 28, 1312 dst.)

2^o . kecakapan untuk membuat suatu perikatan; (KUHPerd. 1329 dst.)

3^o . suatu pokok persoalan tertentu; (KUHPerd. 1332 dst.)

4^o . suatu sebab yang tidak terlarang.(KUHPerd. 1335 dst.)

1321. Tiada suatu persetujuan pun mempunyai kekuatan jika diberikan karena kekhilafan atau diperoleh dengan paksaan atau penipuan. (KUHPerd. 893, 1449, 1452, 1454, 1456, 1859, 1926.)

1322. Kekhilafan tidak mengakibatkan batalnya suatu persetujuan kecuali jika kekhilafan itu terjadi mengenai hakikat barang yang menjadi pokok persetujuan.

Kekhilafan tidak mengakibatkan kebatalan, jika kekhilafan itu hanya terjadi mengenai diri orang yang dengannya seseorang bermaksud untuk mengadakan persetujuan kecuali jika persetujuan itu diberikan terutama karena diri orang yang bersangkutan. (KUHPerd. 1618, 1666, 1851 dst.)

1323. Paksaan yang dilakukan terhadap orang yang mengadakan suatu persetujuan mengakibatkan batalnya persetujuan yang bersangkutan juga bila paksaan dilakukan oleh pihak ketiga yang tidak berkepentingan dalam persetujuan yang dibuat itu. (KUHPerd. 893, 1053, 1065, 1325.)

1324. Paksaan terjadi, bila tindakan itu sedemikian rupa sehingga memberi kesan dan dapat menimbulkan ketakutan pada orang yang berakal sehat, bahwa dirinya, orang-orangnya, atau kekayaannya, terancam rugi besar dalam waktu dekat.

Dalam mempertimbangkan hal tersebut, harus diperhatikan usia, jenis kelamin, dan kedudukan orang yang bersangkutan.

1325. Paksaan menjadikan suatu persetujuan batal, bukan hanya bila dilakukan terhadap salah satu pihak yang membuat

persetujuan, melainkan juga bila dilakukan terhadap suami atau istri atau keluarganya dalam garis keatas maupun ke bawah (KUHPerd. 290 dst., 1323, 1449)

1326. Rasa takut karena hormat terhadap ayah, ibu atau keluarga lain dalam garis ke atas, tanpa disertai kekerasan, tidak cukup untuk membatalkan persetujuan. (KUHPerd. 298.)

1327. Pembatalan suatu persetujuan berdasarkan paksaan tidak dapat dituntut lagi, bila setelah paksaan berhenti persetujuan itu dibenarkan baik secara tegas maupun secara diam-diam, atau jika telah dibiarkan lewat waktu yang ditetapkan oleh undang-undang untuk dapat dipulihkan seluruhnya ke keadaan sebelumnya. (KUHPerd. 1115, 1449 dst., 1454, 1456, 1892.)

1328. Penipuan merupakan suatu alasan untuk membatalkan suatu persetujuan bila penipuan yang dipakai oleh salah satu pihak adalah sedemikian rupa, sehingga nyata bahwa pihak yang lain tidak akan mengadakan perjanjian itu tanpa adanya tipu muslihat.

Penipuan tidak dapat hanya dikira-kira, melainkan harus dibuktikan. (KUHPerd. 1053, 1065, 1449, 1865, 1922.)

1329. Tiap orang berwenang untuk membuat perikatan kecuali jika ia dinyatakan tidak cakap untuk hal itu. (KUHPerd. 1330, 1467, 1640.)

1330. Yang tak cakap untuk membuat persetujuan adalah:

1^o . anak yang belum dewasa (KUHPerd. 330, 419 dst., 1006, 1446 dst.)

2^o . anak yang ditaruh dibawah pengampuan (KUHPerd. 433 dst., 446 dst., 452, 1446 dst.)

3^o . perempuan yang telah kawin dalam hal -hal yang ditentukan undang-undang dan pada umumnya semua orang yang oleh undang-undang dilarang untuk membuat persetujuan tertentu. (KUHPerd. 399, 1446 dst., 1451, 1456 dst, 1640;F. 22.)

1331. Oleh karena itu, orang-orang yang dalam pasal yang lalu dinyatakan tidak cakap untuk membuat persetujuan, boleh

menuntut pembatalan perikatan yang telah mereka buat dalam hal kuasa untuk itu tidak dikecualikan oleh undang-undang.

Orang-orang yang cakap untuk mengikatkan diri, sama sekali tidak dapat mengemukakan sangkalan atas dasar ketidakcakapan anak-anak yang belum dewasa, orang-orang yang ditaruh di bawah pengampuan ~~dan~~ perempuan-perempuan yang bersuami. (KUHPerd. 109, 113, 116 dst., 151, 1447, 1456, 1701 dst, 1798, 1892.)

1332. Hanya barang yang dapat diperdagangkan saja yang dapat menjadi pokok persetujuan. (KUHPerd. 519dst., 537, 1953: KUHD 599.)

1333. Suatu persetujuan harus mempunyai pokok berupa suatu barang sekurang-kurangnya ditentukan jenisnya.

Jumlah barang itu tidak perlu pasti, asal saja jumlah itu kemudian dapat ditentukan atau dihitung. (KUHPerd. 968 dst, 1272 dst, 1392, 1461, 1465.)

1334. Barang yang baru ada pada waktu yang akan datang dapat menjadi pokok suatu persetujuan.

Akan tetapi seseorang tidak diperkenankan untuk melepaskan suatu warisan yang belum terbuka, ataupun untuk menentukan suatu syarat dalam perjanjian mengenai warisan itu, sekalipun dengan persetujuan orang yang akan meninggalkan warisan yang menjadi pokok persetujuan itu; hal ini tidak mengurangi ketentuan-ketentuan pasal-pasal 169, 176 dan 178. (KUHPerd. 141, 1063, 1254, 1667, 1774; Oogstverb.3; Credverb 3-5^o.)

1335. Suatu persetujuan tanpa sebab atau dibuat berdasarkan suatu sebab yang palsu atau yang terlarang tidaklah mempunyai kekuatan. (KUHPerd. 890 dst.)

1336. Jika tidak dinyatakan suatu sebab, tetapi memang ada sebab yang tidak terlarang atau jika ada sebab lain yang tidak terlarang selain dari yang dinyatakan itu, persetujuan itu adalah sah (KUHPerd.1878.)

1337. Suatu sebab adalah terlarang, jika sebab itu dilarang oleh undang-undang atau bila sebab itu bertentangan dengan kesusilaan atau dengan ketertiban umum. (AB.23; KUHPerd. 139, 891,1254, 1619)

Bagian 3. Akibat Persetujuan

1338. Semua persetujuan yang dibuat sesuai dengan undang-undang berlaku sebagai undang-undang bagi mereka yang membuatnya.

Persetujuan itu tidak dapat ditarik kembali selain dengan kesepakatan kedua belah pihak atau karena alasan-alasan yang ditentukan oleh undang-undang.

Persetujuan harus dilaksanakan dengan itikad baik (KUHPerd.751, 1066, 1243 dst., 1266 dst., 1335 dst., 1363, 1603, 1611, 1646-3^o, 1688, 1813.)

1339. Persetujuan tidak hanya mengikat apa yang dengan tegas ditentukan di dalamnya melainkan juga segala sesuatu yang menurut sifat persetujuan dituntut berdasarkan keadilan, kebiasaan, atau undang-undang (AB. 15; KUHPerd. 1347 dst., 1482, 1492, 1800 dst, 1817, 1819.)

1340. Persetujuan hanya berlaku antara pihak-pihak yang membuatnya. Persetujuan tidak dapat merugikan pihak ketiga; persetujuan tidak dapat memberi keuntungan kepada pihak ketiga selain dalam hal yang ditentukan dalam pasal 1317. (KUHPerd. 1178, 1523, 1815, 1818, 1857; F. 152)

1341. Meskipun demikian tiap kreditur boleh mengajukan tidak berlakunya segala tindakan yang tidak diwajibkan yang dilakukan oleh debitur, dengan nama apapun juga yang merugikan kreditur, asal dibuktikan, bahwa ketika tindakan tersebut dilakukan debitur dan orang yang dengannya atau untuknya

debitur itu bertindak, mengetahui bahwa tindakan itu mengakibatkan kerugian bagi para kreditur.

Hak-hak yang diperoleh pihak ketiga dengan itikad baik atas barang-barang yang menjadi obyek dari tindakan yang tidak sah, harus dihormati.

Untuk mengajukan batalnya tindakan yang dengan cuma-cuma dilakukan debitur, cukuplah kreditur menunjukkan bahwa pada waktu melakukan tindakan itu debitur mengetahui bahwa dengan cara demikian dia merugikan para kreditur, tak perdu li apakah orang yang diuntungkan juga mengetahui hal itu atau tidak (KUHPerd. 192, 920, 977, 1061, 1067, 1166, 1185, 1454, 1922, 1952; Credverb. 5; F.30,41dst.)

Bagian 4. Penafsiran Persetujuan

1342. Jika kata-kata suatu persetujuan jelas, tidak diperkenankan menyimpang daripadanya dengan jalan penafsiran. (KUHPerd. 855.)

1343. Jika kata-kata suatu persetujuan dapat diberi berbagai tafsiran, maka lebih baik diselidiki maksud kedua belah pihak yang persetujuan itu, daripada dipegang teguh arti kata menurut huruf. (KUHPerd. 886, 1257, 1473, 1855.)

1344. Jika suatu janji dapat diberi dua arti, maka janji itu harus dimengerti menurut arti yang memungkinkan janji itu dilaksanakan, bukan menurut arti yang tidak memungkinkan janji itu dilaksanakan. (KUHPerd. 887.)

1345. Jika perkataan dapat diberi dua arti, maka harus dipilih arti yang sesuai dengan sifat persetujuan. (KUHPerd.887.)

1346. Perkataan yang mempunyai dua arti harus diterangkan menurut kebiasaan di dalam negri atau di tempat persetujuan dibuat. (AB.15)

1347. Syarat-syarat yang selalu diperjanjikan menurut kebiasaan harus dianggap telah termasuk dalam persetujuan walaupun tidak dengan tegas dimaksukan dalam persetujuan. (KUHPerd. 1339, 1492.)

1348. Semua janji yang diberikan dalam suatu persetujuan harus diartikan dalam hubungannya satu sama lain; tiap-tiap janji harus ditafsirkan dalam hubungannya dengan seluruh persetujuan.

1349. Jika ada keragu-raguan suatu persetujuan harus ditafsirkan atas kerugian orang yang minta diadakan perjanjian itu. (KUHPerd. 1273, 1473, 1509, 1865, 1879.)

1350. Betapa luaspun pengertian kata-kata yang digunakan untuk menyusun suatu persetujuan, persetujuan itu hanya meliputi hal-hal yang nyata-nyata dimaksudkan kedua belah pihak sewaktu membuat persetujuan. (KUHPerd. 1854)

1351. Jika dalam suatu persetujuan dinyatakan suatu hal untuk menjelaskan perikatan, hal itu tidak dianggap mengurangi atau membatasi kekuatan persetujuan itu menurut hukum dalam hal-hal yang tidak disebut dalam persetujuan.

BAB III. PERIKATAN YANG LAHIR KARENA UNDANG-UNDANG

1352. Perikatan yang lahir karena undang-undang timbul dari undang-undang sebagai undang-undang atau dari undang-undang sebagai akibat perbuatan orang. (KUHPerd. 307 dst., 320 dst., 383, 385, 452, 652 dst, 1005, 1233, 1353, 1903-1^o; KUHD 321)

1353. Perikatan yang lahir dari undang-undang sebagai akibat perbuatan orang, muncul dari suatu perbuatan yang sah atau dari perbuatan yang melanggar hukum. (KUHPerd. 1354 dst, 1365 dst.)

1354. Jika seseorang dengan sukarela tanpa ditugaskan mewakili urusan orang lain, dengan atau tanpa setahu orang itu,

maka ia secara diam-diam mengikatkan dirinya untuk meneruskan serta menyelesaikan urusan itu, hingga orang yang ia wakili kepentingannya dapat mengerjakan sendiri urusan itu.(KUHD 154, 264.)

Ia harus membebani diri dengan segala sesuatu yang termasuk urusan itu.

Ia juga harus menjalankan segala kewajiban yang harus ia pikul jika ia menerima kekuasaan yang dinyatakan secara tegas. (KUHPerd. 374, 1645, 1792, 1800 dst. 1817)

1355. Ia diwajibkan meneruskan pengurusan itu, meskipun orang yang kepentingannya diurus olehnya meninggal sebelum urusan diselesaikan sampai para ahli waris orang itu dapat mengambil alih pengurusan itu. (KUHPerd. 1800)

1356. Dalam melakukan pengurusan itu ia wajib bertindak sebagai seorang kepala rumah tangga yang bijaksana.

Meskipun demikian, hakim berkuasa meringankan penggantian biaya, kerugian dan bunga yang disebabkan oleh kesalahan atau kelakuan orang yang mewakili pengurusan, tergantung pada keadaan yang menyebabkan ia melakukan pengurusan itu. (KUHPerd. 1235, 1243.)

1357. Pihak yang kepentingannya diwakili oleh orang lain dengan baik, diwajibkan memberi memenuhi perikatan-perikatan yang dilakukan oleh wakil itu atas namanya, memberi ganti rugi dan bunga yang disebabkan oleh segala perikatan yang secara pereorangan dibuat olehnya dan mengganti segala pengeluaran yang berfaedah dan perlu. (KUHPerd. 1807 dst.)

1358. Orang yang mewakili urusan orang lain tanpa mendapat perintah tidak berhak atas suatu upah. (KUHPerd. 1794.)

1359. Tiap pembayaran mengandaikan adanya suatu utang; apa yang telah dibayar tanpa diwajibkan untuk itu, dapat dituntut kembali.

Terhadap perikatan bebas (natuurlijke verbindtenis) yang secara sukarela telah dipenuhi tak dapat dilakukan penuntutan kembali (KUHPerd. 1269, 1382 dst, 1766, 1791)

1360. Barangsiapa, secara sadar atau tidak, menerima sesuatu yang tak harus dibayar kepadanya wajib mengembalikannya kepada orang yang memberikannya.(KUHPerd. 531, 1321, 1364.)

1361. Jika seseorang karena khilaf mengira dirinya berutang, membayar suatu utang, maka ia berhak menuntut kembali apa yang telah dibayar kepada kreditur.

Walaupun demikian, hak itu hilang jika akibat pembayaran tersebut, kreditur telah memusnahkan surat-surat pengakuan utang tanpa megurangi hak orang yang telah membayar itu untuk menuntutnya kembali dari debitur yang sesungguhnya (KUHPerd. 1359, 1382, 1766,1791.)

1362. Barangsiapa dengan itikad buruk menerima suatu barang yang tidak harus dibayarkan kepadanya, wajib mengembalikannya dengan harga dan hasil-hasil terhitung dari hari pembayaran, tanpa mengurangi penggantian biaya, kerugian dan bunga jika barang itu telah menderita penyusutan.

Jika barang itu musnah, meskipun hal ini terjadi diluar kesalahannya, ia wajib membayar harganya dan mengganti biaya, kerugian dan bunga, kecuali jika ia dapat membuktikan bahwa barang itu akan musnah juga seandainya berada pada orang yang seharusnya menerimanya (KUHPerd. 532,549, 575, 1364, 1444,1967.)

1363. Barangsiapa menjual suatu barang yang diterimanya dengan itikad baik sebagai pembayaran yang tak diwajibkan, cukup memberikan kembali harganya.

Jika ia dengan itikad baik telah memberikan barang itu dengan cuma-cuma kepada orang lain, maka ia tak usah mengembalikan sesuatu apapun (KUHPerd. 531, 548, 1348, 1717.)

1364. Orang yang kepadanya barang yang bersangkutan dikembalikan, diwajibkan, bahkan juga kepada orang yang dengan itikad buruk telah memiliki barang itu, mengganti segala pengeluaran yang perlu dan telah dilakukan guna keselamatan barang itu.

Orang yang menguasai barang itu berhak memegangnya dalam penggunaannya hingga pengeluaran-pengeluaran tersebut diganti (KUHPerd.548 dst, 567,574 dst., 579, 1139-4^o, 1148-1149.)

1365. Tiap perbuatan yang melanggar hukum dengan membawa kerugian kepada orang lain mewajibkan orang yang menimbulkan kerugian itu karena kesalahannya untuk mengganti kerugian tersebut. (KUHPerd. 568, 602, 1246, 1447, 1918 dst., Rv 580-7^o, 582, Aut. 27; Octr. 43 dst., KUHP 1382 bis.)

1366. Setiap orang bertanggung jawab bukan hanya atas kerugian yang disebabkan perbuatan-perbuatan, melainkan juga atas kerugian yang disebakan kelalaihan atau kesembronoannya. (KUHPerd.654, 802, 1207, 1753;Rv 582.)

1367. Seseorang tidak hanya bertanggung jawab atas kerugian yang disebabkan perbuatannya sendiri, melainkan juga atas kerugian yang disebabkan perbuatan orang-orang yang menjadi tanggungannya atau disebabkan barang-barang yang berada dibawah pengawasannya.

(s.d.u. dg. S. 1927-31 jis. 390, 421.) Orang tua dan wali bertanggung jawab atas kerugian yang disebabkan oleh anak-anak yang belum dewasa yang tinggal pada mereka dan terhadap siapa mereka melakukan kekuasaan orang tua atau wali.

Majikan dan orang yang mengangkat orang lain untuk mewakili urusan-urusan mereka, bertanggung jawab atas kerugian yang disebabkan oleh pelayan atau bawahan mereka dalam melakukan pekerjaan yang ditugaskan kepada orang-orang itu.

Guru sekolah atau kepala tukang bertanggung jawab atas kerugian yang disebabkan oleh murid-muridnya atau tukang-tukangnya selama waktu orang itu berada di bawah

pengawasannya.

(s.d.u. dg. S 1927-31 jis. 390.421) Tanggung jawab yang disebutkan di atas berakhir, jika orang tua, wali, guru sekolah atau kepala tukang itu, membuktikan bahwa mereka masing-masing tidak dapat mencegah perbuatan atas mana mereka seharusnya bertanggung jawab. (KUHPerd. 299,802, 1368 dst., 1566, 1613, 1710, 1803, KUHD 321 dst., 331 dst., 358a , 373, 534 dst; WVO 28)

1368. Pemilik binatang atau siapa yang memakainya selama binatang itu dipakainya bertanggung jawab atas kerugian yang disebabkan oleh binatang tersebut baik binatang itu ada dibawah pengawasannya maupun binatang tersebut tersesat atau terlepas dari pengawasannya. (KUHPerd. 654, 1366, 1609.)

1369. Pemilik sebuah gedung bertanggung jawab atas kerugian yang disebabkan oleh ambruknya gedung itu seluruhnya atau sebagian, jika ini terjadi karena kelalaian dalam pemeliharaan atau karena kekurangan dalam pembangunan ataupun dalam penataannya (KUPerd. 654, 1366, 1609.)

1370. Dalam hal pembunuhan dengan sengaja atau kematian seseorang karena kurang hatinya orang lain, suami atau istri yang ditinggalkan, anak atau orang tua korban, yang lazimnya mendapat nafkah dari pekerjaan si korban, berhak menuntut ganti rugi yang harus dinilai menurut kedudukan dan kekayaan kedua belah pihak, serta menurut keadaan (Ab 28 dst; KUHPerd. 1365,1380, 1918 dst.)

1371. Menyebabkan luka atau cacat anggota badan seseorang dengan sengaja atau kurang hati-hati, memberikan hak kepada si korban, selain untuk menuntut penggantian biaya pengobatan, juga untuk menuntut penggantian kerugian yang disebabkan oleh luka atau accat tersebut.

Juga penggantian kerugian ini dinilai menurut kedudukan dan kemampuan kedua belah pihak, dan menurut keadaan.

Ketentuan terakhir ini pada umumnya berlaku dalam hal menilai kerugian yang ditimbulkan oleh suatu kejahatan terhadap pribadi seseorang. (AB. 28:KHUpert. 1365 dst, 1918 dst.)

1372. (*s.d.u. dg. S. 1917-497*). Tuntutan perdata tentang hal penghinaan diajukan untuk memperoleh penggantian kerugian serta pemulihan kehormatan dan nama baik.

Dalam menilai satu sama lain, hakim harus memperhatikan kasar atau tidaknya penghinaan, begitu pula pangkat, kedudukan dan kemampuan kedua belah pihak, dan keadaan. (AB. 28: KUHPerd. 1374 dst., 1379 dst., 1853, 1918; Sv. 163;KUHP 310; ISR. 66⁷.)

1373. (*s.d.u. dg. S. 1917-497*). Selain itu orang yang dihina dapat menuntut pula supaya dalam putusan juga dinyatakan bahwa perbuatan yang telah dilakukan adalah perbuatan memfitnah.

(*s.d.t. dg. S. 1917-497*). Jika ia menuntut supaya dinyatakan bahwa perbuatan itu adalah fitnah, maka berlakulah ketentuan-ketentuan dalam pasal 314 Kitab Undang-undang Hukum Pidana tentang penuntutan perbuatan memfitnah.

Jika diminta oleh pihak yang dihina, putusan akan ditempelkan di tempat umum, dalam jumlah sekian lembar dan tempat, sebagaimana diperintahkan oleh hakim, atas biaya si terhukum.

1374. Tanpa mengurangi kewajibannya untuk memberikan ganti rugi, tergugat dapat mencegah pengabulan tuntutan yang disebutkan dalam pasal yang lalu dengan menwarkan dengan sungguh-sungguh melakukan di muka umum dihadapan hakim suatu pernyataan yang berbunyi bahwa ia menyesali perbuatan yang telah ia lakukan, bahwa ia meminta maaf karenanya dan menganggap orang yang dihina itu sebagai orang yang terhormat. (KUHPerd. 1378.)

1375. (*s.d.u. dg. S. 1917-497*). Tuntutan-tuntutan yang disebutkan dalam pasal yang lain dapat juga diajukan oleh suami

atau istri, orang tua, kakek-nenek, anak dan cucu, karena penghinaan yang dilakukan terhadap istri atau suami, anak, cucu, orang tua dan kakek-nenek mereka, setelah orang-orang yang bersangkutan meninggal.

1376. (*s.d.u. dg. S. 1917-497*). Tuntutan perdata tentang penghinaan tidak dapat dikabulkan jika tidak ternyata adanya maksud untuk menghina. Maksud untuk menghina tidak dianggap ada, jika perbuatan termasuk nyata-nyata dilakukan untuk kepentingan umum atau untuk pembelaan diri secara terpaksa (KUHPerd. 1918; Rv. 171; Sv. 9 dst; 131 dst.)

1377. (*s.d.u. dg. S. 1917-497*). Begitu pula tuntutan perdata itu tidak dapat dikabulkan jika orang yang dihina itu, dengan suatu putusan hakim yang telah memperoleh kekuatan hukum yang pasti, telah dipersalahkan melakukan perbuatan yang dituduhkan kepadanya.

Akan tetapi jika seseorang terus-menerus melancarkan penghinaan terhadap seseorang yang lain, dengan maksud semata-mata untuk menghina, juga setelah kebenaran tuduhan ternyata dari suatu putusan yang memperoleh kekuatan hukum yang pasti atau dari sepucuk akta otentik, maka ia diwajibkan memberikan kepada orang yang dihina tersebut penggantian kerugian yang dideritanya (KUHPerd. 1918 dst; KUHP 312 dst.)

1378. Segala tuntutan yang diatur dalam keenam pasal yang lau, gugur dengan pembebasan yang dinyatakan secara tegas atau secara diam-diam, jika setelah penghinaan terjadi dan diketahui oleh orang yang dihina, ia melakukan perbuatan-perbuatan yang menyatakan adanya perdamaian atau pengampunan yang bertentangan dengan maksud untuk menuntut penggantian kerugian atau pemulihian kehormatan. (AB. 30; KUHPerd. 1374, 1853; Sv. 10.)

1379. Hak untuk menuntut ganti rugi sebagaimana disebutkan dalam pasal 1372, tidak hilang dengan meninggalnya

orang yang menghina ataupun orang yang dihina. (KUHPerd. 1375; Sv. 163)

1380. (*s.d.u. dg. S. 1917-497; S. 1938-276.*) Tuntutan dalam perkara penghinaan gugur dengan lewatnya waktu satu tahun, terhitung mulai hari perbuatan termasuk dilakukan si tergugat dan diketahui oleh si penggugat. (KUHPerd. 1372, dst. 1375.)

BAB IV. HAPUSNYA PERIKATAN

1381. Perikatan hapus:

karena pembayaran; (KUHPerd 1382 dst.)

karena penawaran pembayaran tunai, diikuti dengan penyimpanan atau penitipan; (KUHPerd. 1404 dst)

karena pembaharuan utang; (KUHPerd 1413. dst)

karena perjumpaan utang atau kompensasi; (KUHPerd; 1425 dst)

karena pencampuran utang: (KUHPerd. 1436 dst)

karena pembebasan utang; (KUHPerd. 1438 dst.)

karena musnahnya barang yang terutang; (KUHPerd 1444 dst)

karena kebatalan atau pembatalan; (KUHPerd 1446 dst)

karena berlakunya suatu syarat pembatalan, yang diatur dalam Bab I buku ini; (KUHPerd. 1265 dst) dan karena kadaluwarsa yang akan diatur dalam suatu bab tersendiri (KUHPerd. 1265,1268 dst., 1338, 1646, 1963, 1967)

Bagian 1. Pembayaran.

1382. Tiap perikatan dapat dipenuhi oleh siapa pun yang berkepentingan, seperti orang yang turut berutang atau penanggung utang.

Suatu perikatan bahkan dapat dipenuhi oleh pihak ketiga yang tidak berkepentingan asal pihak ketiga itu bertindak atas nama dan untuk melunasi utang debitur, atau asal ia tidak mengambil alih hak-hak kreditur sebagai pengganti jika ia bertindak atas namanya sendiri. (KUHPerd. 109, 1280 dst., 1315 dst., 1354 dst., 1383, 1400 dst. 1405-2^o, 1792, 1820 dst., 1823; KUHD 158 dst, Rv, 591-2 .)

1383. Suatu perikatan untuk berbuat sesuatu tidak dapat dipenuhi seorang pihak ketiga jika hal itu berlawanan dengan kehendak kreditur, yang mempunyai kepentingan supaya perbuatannya dilakukan sendiri oleh debitur. (KUHPerd. 1239, 1612)

1384. Agar supaya pembayaran untuk melunasi suatu utang berlaku sah, orang yang melakukannya haruslah pemilik mutlak barang yang dibayarkan dan pula harus berkuasa untuk memindah tangankan barang itu.

Meskipun demikian pembayaran sejumlah uang atau suatu barang lain yang dapat dihabiskan tak dpt diminta kembali dari seseorang yang dengan itikad baik telah menghabiskan barang yang telah dibayarkan itu, sekalipun pembayaran itu dilakukan oleh orang yang bukan pemiliknya atau orang yang tak cakap memindah tangankan barang itu. (KUHPerd. 505, 1239 dst, 1363, 1386, 1471.)

1385. Pembayaran harus dilakukan kepada kreditur atau kepada orang yang dikuasakan olehnya, atau juga kepada orang yang dikuasakan oleh hakim atau oleh undang-undang untuk menerima pembayaran bagi kreditur.

Pembayaran yang dilakukan kepada seseorang yang tidak mempunyai kuasa menerima bagi kreditur, sah sejauh hal itu disetujui kreditur atau nyata-nyata bermanfaat baginya. (KUHPerd. 105, 108, 307, 385, 430, 452, 464 dst., 1005 dst., 1126 dst., 1279, 1354, 1387. 1602f, 1636, 1655, 1719, 1796, 1892; KUHD 17, 20dst., 44 dst., 331; F.22, 226; Rv. 744)

1386. Pembayaran yang dengan itikad baik dilakukan kepada seseorang yang memegang surat piutang adalah sah, juga bila surat piutang tersebut karena suatu hukuman untuk menyerahkannya kepada orang lain, diambil dari penguasaan orang itu. (KUHPerd. 1361 dst.)

1387. Pembayaran yang dilakukan kepada kreditur yang tidak cakap untuk menerimanya adalah tidak sah, kecuali jika debitur membuktikan bahwa kreditur sungguh-sungguh mendapat manfaat dari pembayaran itu. (KUHPerd. 108, 116, 452, 1330, 1451, 1702, 1798.)

1388. Pembayaran yang dilakukan oleh seorang debitur kepada seorang kreditur, meskipun telah dilakukan penyitaan atau suatu perlawanan adalah tak sah bagi para kreditur yang telah melakukan penyitaan atau perlawanan; mereka ini, berdasarkan hak mereka dapat memaksa debitur untuk membayar sekali lagi, tanpa mengurangi hak debitur dalam hal yang demikian untuk menagih kembali dari kreditur yang bersangkutan (KUHPerd. 1434; Rv. 729 dst.)

1389. Tiada seorang kreditur pun dapat dipaksa menerima sebagai pembayaran suatu barang lain dari barang yang terutang, meskipun barang yang ditawarkan itu sama harganya dengan barang yang terutang, bahkan lebih tinggi (KUHPerd. 1740, 1756 dst., KUHD 140.)

1390. Seorang debitur tidak dapat memaksa kreditur untuk menerima pembayaran utang dengan angsuran meskipun utang itu dapat dibagi-bagi. (KUHPerd. 1299; KUHD 138.)

1391. Seorang yang berutang barang tertentu, dibebaskan jika ia menyerahkan kembali barang tersebut dalam keadaan seperti pada waktu penyerahan, asal kekurangan-kekurangan yang mungkin terdapat pada barang tersebut tidak disebabkan oleh kesalahan atau kelalaiannya atau oleh kelalaian orang-orang yang menjadi tanggungannya atau timbul setelah ia terlambat

menyerahkan barang itu. (KUHPerd. 782, 963, 1157, 1237, 1301, 1444, 1481, 1715, 1747.)

1392. Jika barang yang terutang itu hanya ditentukan jenisnya, maka untuk membebaskan diri dari utangnya, debitur tidak wajib memberikan barang dari jenis terbaik, tetapi tak cukuplah ia memberikan barang dari jenis yang terburuk. (KUHPerd. 969.)

1393. Pembayaran harus dilakukan di tempat yang ditetapkan dalam persetujuan jika dalam persetujuan tidak ditetapkan suatu tempat maka pembayaran mengenai suatu barang yang sudah ditentukan harus terjadi di tempat barang itu berada sewaktu perjanjian tersebut.

Di luar kedua hal tersebut, pembayaran harus dilakukan di tempat tinggal kreditur, selama orang ini terus-menerus berdiam dalam karesidenan tempat tinggalnya sewaktu persetujuan dibuat, dan di dalam hal-hal lain di tempat tinggal debitur. (KUHPerd. 24-1405-6⁰. 1412, 1432, 1477, 1514, 1724, 1764; KUHD 143a. 176, 218a; Rv. 310.)

1394. Mengenai pembayaran sewa rumah, sewa tanah, tunjangan tahunan untuk nafkah, bunga abadi atau bunga cagak hidup, bunga uang pinjaman dan pada umumnya segala sesuatu yang harus dibayar tiap tahun atau tiap waktu yang lebih pendek, maka dengan adanya tiga surat tanda pembayaran tiga angsuran berturut-turut, timbul suatu persangkaan bahwa angsuran-angsuran yang lebih dahulu telah dibayar lunas, kecuali jika dibuktikan sebaliknya (KUHPerd. 1291, 1769, 1916m 1921)

1395. Biaya yang harus dikeluarkan untuk menyelenggarakan pembayaran ditanggung oleh debitur. (KUHPerd. 1407, 1466, 1476, 1724; Rv. 58).

1396. Seorang yang mempunyai berbagai utang, pada waktu melakukan pembayaran berhak menyatakan utang mana yang hendak dibayarnya. (KUHPerd. 1398, 1628)

1397. Seorang yang mempunyai suatu utang dengan bunga, tanpa izin kreditur tak dapat melakukan pembayaran untuk pelunasan uang pokok lebih dahulu dengan menunda pembayaran bunganya.

Pembayaran yang dilakukan untuk uang pokok dan bunga tetapi tidak cukup untuk melunasi seluruh utang digunakan terlebih dahulu untuk melunasi bunga. (KUHPerd. 1769.)

1398. Jika seseorang mempunyai berbagai utang, menerima suatu tanda pembayaran, sedangkan kreditur telah menyatakan bahwa apa yang diterimanya itu adalah khusus untuk melunasi salah satu di antara utang-utang tersebut, maka tak dapat lagi debitur menuntut supaya pembayaran itu dianggap sebagai pelunasan suatu utang yang lain, kecuali jika pihak kreditur telah dilakukan penipuan, atau debitur dengan sengaja tidak diberi tahu tentang adanya pernyataan tersebut.

1399. Jika tanda pembayaran tidak menyebutkan untuk utang mana pembayaran dilakukan, maka pembayaran itu harus dianggap sebagai pelunas utang yang pada waktu itu paling perlu dilunasi debitur di antara utang-utang yang sama-sama dapat ditagih; tetapi jika tidak semua piutang dapat ditagih, maka pembayaran harus dianggap sebagai pelunasan utang yang dapat ditagih lebih dahulu daripada utang-utang lainnya, meskipun utang yang terdahulu tadi kurang penting sifatnya daripada utang-utang lainnya itu.

Jika utang-utang itu sama sifatnya, maka pelunasan harus dianggap berlaku untuk utang yang paling lama; tetapi jika utang-utang dalam segala-galanya sama, maka pelunasan harus dianggap berlaku untuk masing-masing utang menurutimbangan jumlah masing-masing.

Jika tidak ada satu pun yang sudah dapat ditagih, maka penentuan pelunasan harus dilakukan seperti dalam hal utang-utang yang sudah dapat ditagih. (KUHPerd. 1433;Rv.580dst.)

1400. Subrogasi atau perpindahan hak kreditur kepada pihak ketiga yang membayar kepada kreditur, dapat terjadi karena persetujuan atau karena undang-undang. (KUHperd. 1401 dst.)

1401. Perpindahan ini terjadi karena persetujuan:

1^o. bila kreditur dengan menerima pembayaran dari pihak ketiga menetapkan bahwa orang ini akan menggantikannya dalam menggunakan hak-haknya, gugatan-gugatannya, hak-hak istimewa dan hipotek-hipoteknya terhadap debitur.

Subrogasi ini harus dinyatakan dengan tegas dan dilakukan bersamaan dengan waktu pembayaran.

2^o. bila debitur meminjam sejumlah uang untuk melunasi utangnya, dan menetapkan bahwa orang yang meminjamkan uang itu akan mengambil-alih hak-hak kreditur, agar subrogasi ini sah, baik perjanjian pinjam uang maupun tanda pelunasan, harus dibuat dengan akta otentik dan dalam surat perjanjian pinjam uang harus diterangkan bahwa uang itu dipinjam guna melunasi utang tersebut; sedangkan dalam surat tanda pelunasan harus diterangkan bahwa pembayaran dilakukan dengan uang yang dipinjamkan oleh kreditur baru.

Subrogasi ini dilaksanakan tanpa bantuan kreditur. (KUHPerd. 400, 613, 1382, 1403, 1848.)

1402. Subrogasi terjadi karena undang-undang:

1^o. untuk seorang kreditur yang melunasi utang kepada seorang debitur kepada seorang kreditur lain, yang berdasarkan hak istimewa atau hipoteknya mempunyai suatu hak yang lebih tinggi daripada kreditur yang tersebut pertama (KUHPerd. 1133, 1382.)

2^o. Untuk seorang pembeli suatu barang tak bergerak yang memakai uang harga barang tersebut untuk melunasi para kreditur, kepada siapa barang itu diperikatkan dalam hipotek; (KUHPerd. 1198 dst.)

3^o. Untuk seseorang yang terikat untuk melunasi suatu utang bersama-sama dengan orang lain atau untuk orang lain dan

berkepentingan untuk membayar utang itu; (KUHPerd. 1106, 1202, 1204, 1280 dst., 1293, 1301 dst., 1840, 1848; KUHD 146, 148, 162, 284.)

40. Untuk seorang ahli waris yang telah membayar utang-utang warisan dengan uangnya sendiri, sedang ia menerima warisan itu dengan hak istimewa untuk mengadakan pencatatan tentang keadaan harta peninggalan. (KUHPerd. 1032-¹⁰)

1403. Subrogasi yang ditetapkan dalam pasal-pasal yang lalu terjadi, baik terhadap orang-orang penanggung utang maupun terhadap para debitur; subrogasi tersebut tidak dapat mengurangi hak-hak kreditur jika ia hanya menerima pembayaran sebagian; dalam hal ini, ia dapat melaksanakan hak-haknya, mengenai apa yang masih harus dibayar kepadanya, lebih dahulu daripada orang yang memberinya suatu pembayaran sebagian. (KUHPerd. 1301-¹⁰, 1840.)

Bagian 2. Penawaran Pembayaran Tunai, Yang Diikuti Oleh Penyimpanan Atau Penitipan

1404. Jika kreditur menolak pembayaran, maka debitur dapat melakukan penawaran pembayaran tunai atas apa yang harus dibayarnya; dan jika kreditur juga menolaknya , maka debitur dapat menitipkan uang atau barangnya kepada pengadilan.

Penawaran demikian yang diikuti dengan penitipan, membebaskan debitur dan berlaku baginya sebagai pembayaran asal penawaran itu dilakukan meurut undang-undang; sedangkan apa yang dititipkan secara demikian adalah atas tanggungan kreditur (KUHPerd. 1237, 1408, 1766; Rv.809 dst.)

1405. Agar penawaran yang demikian sah:

¹⁰ . bahwa penawaran itu dilakukan kepada seorang kreditur atau kepada seorang yang berkuasa menerimanya untuk dia; (KUHPerd. 1385, 1387.)

2^o . bahwa penawaran itu dilakukan oleh orang yang berkuasa untuk membayar; (KUHPerd 1382, 1384.)

3^o . bahwa penawaran itu mengenai seluruh uang pokok yang dapat dituntut dan bunga yang dapat ditagih serta biaya yang telah ditetapkan dan mengenai sejumlah uang untuk biaya yang belum ditetapkan tanpa mengurangi penetapan kemudian, (KUHPerd. 1390, 1406-2^o)

4^o . bahwa ketetapan waktu telah tiba jika itu dibuat untuk kepentingan kreditur. (KUHPerd. 1270 dst., KUHD 139)

5^o . bahwa syarat yang menjadi beban utang telah terpenuhi; (KUHPerd. 1263 dst.)

6^o . bahwa penawaran itu dilakukan di tempat yang menurut persetujuan pembayaran harus dilakukan dan jika tiada suatu persetujuan khusus menegenai itu, kepada kreditur pribadi atau di tempat tinggal yang sebenarnya atau tempat tinggal yang telah dipilihnya; (KUHPerd. 17, 24 dst., 1393, 1421; Rv. 433, 809.)

7^o . bahwa penawaran itu dilakukan oleh seorang notaris atau jurusita masing-masing disertai dua orang saksi. (Rv. 809 dst. Not.22).

1406. Agar suatu penyimpanan sah tidak perlu adanya kuasa dari hakim; cukuplah : (Rv. 810.)

1^o . bahwa sebelum penyimpanan itu, kepada kreditur disampaikan suatu keterangan yang memuat penunjukan hari, jam dan tempat penyimpanan barang yang ditawarkan (Rv. 809.)

2^o . bahwa debitur telah melepaskan barang yang ditawarkan itu, dengan menitikannya kepada kas penyimpanan atau penitipan di kepaniteraan pada pengadilan yang akan mengadilinya jika ada perselisihan, beserta bunga sampai pada saat penitipan; (KUHPerd. 1405-3^o ; Rv. 530-3^o)

3^o. bahwa oleh notaris atau jurusita masing-masing disertai dua orang saksi dibuat berita acara yang menerangkan jenis mata uang yang disampaikan, penolakan kreditur atau ketidakdatangan

untuk menerima uang itu, dan akhirnya pelaksanaan penyimpanan itu sendiri; (KUHPerd. 1405-7^o).

4^o. bahwa jika kreditur tidak datang untuk menerimanya berita acara tentang penitipan diberitahukan kepadanya, dengan peringatan untuk mengambil apa yang dititipkan itu. (Rv. 810.)

1407. Biaya yang dikeluarkan untuk menyelenggarakan penawaran pembayaran tunai dan penyimpanan harus dipikul oleh kreditur, jika hal itu dilakukan sesuai dengan undang-undang. (KUHPerd. 1395, 1412.)

1408. Selama apa yang dititipkan itu tidak diambil oleh kreditur, debitur dapat mengambilnya kembali; dalam hal itu orang-orang yang turut berhutang dan para penanggung utang tidak dibebaskan. (KUHPerd. 1409 dst., 1845 dst.)

1409. Bila debitur sendiri sudah memperoleh suatu putusan hakim yang telah memperoleh kekuatan hukum yang pasti, dan dengan putusan itu penawaran yang dilakukannya telah dinyatakan sah, maka ia tidak dapat lagi mengambil kembali apa yang dititipkan untuk kerugian orang-orang yang ikut berutang dan para penanggung utang, meskipun dengan izin kreditur. (KUHPerd. 1404; Rv. 811.)

1410. Orang-orang yang ikut berutang dan para penanggung utang dibebaskan juga, jika kreditur semenjak hari pemberitahuan penyimpanan, telah melewatkhan waktu satu tahun, tanpa menyangkal sahnya penyimpanan itu. (KUHPerd. 1404.)

1411. Kreditur yang telah mengizinkan barang yang dititipkan itu diambil kembali oleh debitur setelah penitipan itu dikuatkan putusan hakim yang telah memperoleh kekuatan hukum yang pasti, tidak dapat lagi menggunakan hak-hak istimewanya atau hipotek yang melekat pada piutang tersebut untuk menuntut pembayaran piutangnya. (KUHPerd. 1408 dst., 1413, 1421.)

1412. Jika apa yang harus dibayar berupa suatu barang yang harus diserahkan di tempat barang itu berada, maka debitur harus memperingatkan kreditur dengan perantaraan pengadilan supaya

mengambilna, dengan suatu akta yang harus diberitahukan kepada kreditur sendiri atau ke alamat tempat tinggalnya, atau ke alamat tempat tinggal yang dipilih untuk pelaksanaan persetujuan. Jika peringatan ini telah dijalankan dan kreditur tidak mengambil barangnya, maka debitur dapat diizinkan oleh hakim untuk menitipkan barang tersebut di suatu tempat lain. (KUHPerd. 24, 1393, 1405-6^o, 1477, 1738-3^o.)

Bagian 3. Pembaharuan Utang.

1413. Ada tiga macam jalan untuk melaksanakan pembaharuan utang:

1^o. bila seorang debitur membuat suatu perikatan utang baru untuk kepentingan kreditur yang menggantikan utang lama, yang dihapuskan karenanya;

2^o. bila seorang debitur baru ditunjuk untuk menggantikan debitur lama, yang oleh kreditur dibebaskan dari perikatannya;

3^o. bila sebagai akibat suatu persetujuan baru seorang kreditur baru ditunjuk untuk menggantikan kreditur lama, yang terhadapnya debitur dibebaskan dari perikatannya(KUHPerd. 1400, 1417, 1421, 1790:KUHD 236.)

1414. Pembaharuan utang hanya dapat dilakukan antara orang-orang yang cakap untuk mengadakan perikatan. (KUHPerd 1329 dst.)

1415. Pembaharuan utang tidak dapat hanya dikira-kira, kehendak seorang untuk mengadakannya harus terbukti dari isi akta. (KUHPerd. 1417, 1420, 1438)

1416. Pembaharuan utang dengan penunjukan seorang debitur baru untuk mengganti yang lama, dapat dijalankan tanpa bantuan debitur pertama. (KUHPerd 1382.)

1417. Pemberian kuasa atau pemindahan dengan mana seorang debitur memberikan kepada seorang kreditur seorang debitur baru yang mengikatkan dirinya kepada kreditur, tidak menimbulkan suatu pembaharuan utang, jika kreditur tidak secara tegas mengatakan bahwa ia bermaksud membebaskan debitur yang melakukan pemindahan itu dari perikatannya. (KUHPerd. 1400 dst., 1415, 1418, 1420, 1431.)

1418. Kreditur yang membebaskan debitur yang melakukan pemindahan tak dapat menuntut orang tersebut, jika orang yang ditunjuk untuk menggantikan itu jatuh pailit atau nyata-nyata tak mampu kecuali jika hak untuk menuntut itu dengan tegas dipertahankan dalam persetujuan atau jika debitur yang telah ditunjuk sebagai pengganti itu pada saat pemindahan telah nyata-nyata bangkrut atau kekayaannya telah berada dalam keadaan terus-menerus merosot. (KUHPerd. 1417, 1536: F. 1 dst.)

1419. Debitur yang dengan pemindahan telah mengikatkan dirinya kepada seorang kreditur baru dan dengan demikian telah dibebaskan dari kreditur lama, tak dapat mengajukan terhadap kreditur baru itu tangkisan- tangkisan yang sebenarnya dapat ia ajukan terhadap kreditur lama, meskipun ini tidak dikatakannya sewaktu membuat perikatan baru; namun dalam hal yang terakhir ini tidaklah berkurang haknya untuk menuntut kreditur lama (KUHPerd. 1417 dst.)

1420. Jika debitur hanya menunjuk seseorang yang harus membayar untuk dia, maka tidak terjadi suatu pembaharuan utang.

Hal yang sama berlaku jika kreditur hanya menunjuk seseorang yang diwajibkan menerima pembayaran utang untuknya. (KUHPerd. 1415, 1417, 1792 dst.)

1421. Hak-hak istimewa dan hipotek yang melekat pada piutang lama, tidak berpindah pada piutang baru yang menggantikannya, kecuali jika hal itu secara tegas dipertahankan oleh debitur. (KUHPerd. 1134, 1209-1⁰, 1411, 1435.)

1422. Bila pembaharuan utang diadakan dengan penunjukan seorang debitur baru yang menggantikan debitur lama, maka hak-hak istimewa dan hipotek-hipotek yang dari semula melekat pada piutang, tidak berpindah ke barang-barang debitur baru. (KUHPerd. 1421)

1423. Bila pembaharuan utang diadakan antara kreditur dan salah seorang dari para debitur yang berutang secara tanggung-menanggung maka hak-hak istimewa dan hipotek tidak dapat dipertahankan selain atas barang-barang orang yang membuat perikatan baru, (KUHPerd. 1280 dst., 1287, 1424.)

1424. Karena adanya suatu pembaharuan utang antara kreditur dan salah seorang dari para debitur yang berutang secara tanggung-menanggung maka para debitur lainnya dibebaskan dari perikatan.

Pembaharuan utang yang dilakukan terhadap debitur utama membebaskan para penanggung utang.

Meskipun demikian, jika dalam hal yang pertama si kreditur telah menuntut para debitur lain itu, atau dalam hal yang kedua ia telah menuntut para penanggung utang supaya turut serta pada perjanjian baru, tetapi orang-orang itu menolak, maka perikatan utang lama tetap berlaku. (KUHPerd. 1280 dst., 1287 dst., 1430, 1437, 1442 dst., 1845 dst., 1938.)

Bagian 4. Kompensasi Atas Perjumpaan Utang

1425. Jika dua orang saling berutang, maka terjadilah antara mereka suatu perjumpaan utang, yang menghapuskan utang-utang kedua orang tersebut dengan cara dan dalam hal-hal berikut. (KUHPerd. 971, 1429 dst., 1602 r.)

1426. Perjumpaan terjadi demi hukum, bahkan tanpa setahu debitur, dan kedua utang itu saling menghapuskan pada saat

utang itu bersama-sama ada, bertimbali-balik untuk jumlah yang sama.

1427. Perjumpaan hanya terjadi antara dua utang yang dua-duanya berpokok sejumlah utang atau sejumlah barang yang dapat dihabiskan dan dari jenis yang sama, dan yang dua-duanya dapat diselesaikan dan ditagih seketika.

Bahan makanan, gandum dan hasil-hasil pertanian yang penyerahannya tidak dibantah dan harganya ditetapkan menurut catatan harga atau keterangan lain yang biasa dipakai di Indonesia, dapat diperjumpakan dengan sejumlah uang yang telah diselesaikan dan seketika dapat ditagih. (KUHPerd. 505, 1263, 1269, 1271; F. 52 dst.)

1428. Semua penundaan pembayaran kepada seseorang tidak menghalangi suatu perjumpaan utang (KUHPerd. 1266, 1268 dst., 1760.)

1429. Perjumpaan terjadi tanpa membedakan sumber piutang kedua belah pihak itu kecuali:

1^o. bila dituntut pengembalian suatu barang yang secara berlawanan dengan hukum dirampas dari pemiliknya.

2^o. bila apa yang dituntut adalah pengembalian suatu barang yang dititipkan atau dipinjamkan; (KUHPerd. 1694 dst., 1714 dst., 1740 dst.)

3^o. terhadap suatu utang yang bersumber pada tunjangan nafkah yang telah dinyatakan tak dapat disita. (Rv. 749-2^o dan 3^o)

1430. seorang penanggung utang boleh memperjumpakan apa yang wajib dibayar kepada debitur utama tetapi debitur utama tak diperkenankan memperjumpakan apa yang harus dibayar kreditur kepada si penanggung utang.

Debitur dalam perikatan tanggung-menanggung juga tidak boleh memperjumpakan apa yang harus dibayar kreditur kepada para debitur lain.(KUHPerd. 1287, 1410, 14241437, 1442, 1846 dst., 1938 dst.)

1431. Seorang debitur yang secara murni dan sederhana telah menyetujui pemindahan hak-hak yang dilakukan oleh kreditur kepada seorang pihak ketiga,tak boleh lagi menggunakan terhadap pihak ketiga ini suatu perjumpaan utang yang sedianya dapat diajukan kepada kreditur sebelum pemindahan hak-hak tersebut.

Pemindahan hak-hak yang tidak disetujui oleh debitur tetapi telah diberitahukan kepadanya hanyalah menghalangi perjumpaan utang-utang yang lahir sesudah pemberitahuan tersebut. (KUHperd. 613, 1417, 1420, 1435, 1533.)

1432. Jika utang-utang kedua belah pihak tidak dapat dibayar di tempat yang sama, maka utang-utang itu tidak dapat diperjumpakan tanpa mengganti biaya pengiriman. (KUHPerd. 1393, 1395, 1405, 1412,)

1433. Jika ada berbagai utang yang dapat diperjumpakan dan harus ditagih dari satu orang maka dalam memperjumpakan utang harus dituruti peraturan-peraturan yang tercantum dalam pasal 1399. (KUHPerd. 1397)

1434. Perjumpaan tidak dapat terjadi atas kerugian hak yang diperoleh seorang pihak ketiga.

Dengan demikian, seorang debitur yang kemudian menjadi kreditur pula setelah pihak ketiga menyita barang yang harus dibayarkan tak dapat menggunakan perjumpaan utang atas kerugian si penyita. (KUHPerd. 1388; Rv. 728 dst., 744)

1435. Seseorang yang telah membayar suatu utang yang telah dihapuskan demi hukum karena perjumpaan, pada waktu menagih suatu piutang yang tidak diperjumpakan , tak dapat lagi menggunakan hak-hak istimewa dan hipotek-hipotek yang melekat pada piutang itu untuk kerugian pihak ketiga, kecuali jika ada suatu alasan sah yang menyebabkan ia tidak tahu tentang adanya piutang tersebut yang seharusnya diperjumpakan dengan utangnya. (KUHPerd. 1426.)

Bagian 5. Percampuran Utang

1436. Bila kedudukan sebagian kreditur dan debitur berkumpul pada satu orang, maka terjadilah demi hukum suatu percampuran utang, dan oleh sebab itu piutang dihapuskan (KUHPerd. 706, 718-1^o, 736, 754-1^o, 807-3^o, 818, 1032, 1539, 1727.)

1437. Percampuran utang yang terjadi pada debitur utama berlaku juga untuk keuntungan para penanggung utangnya.

Percampuran yang terjadi pada diri si penanggung utang, sekali-kali tidak mengakibatkan hapusnya utang pokok.

Percampuran yang terjadi pada diri salah satu dari para debitur tanggung-menanggung, tidak berlaku untuk keuntungan para debitur tanggung-menanggung lain hingga melebihi bagiannya dalam utang tanggung-menanggung. (KUHPerd. 1288, 1293, 1410, 1424, 1430, 1442, 1821, 1846, 1938 dst.)

Bagian 6. Pembebasan Utang

1438. Pembebasan suatu utang tidak dapat hanya didugaduga, melainkan harus dibuktikan (KUHPerd. 1415, 1441, 1865)

1439. Pengembalian sepucuk surat piutang di bawah tangan yang asli secara sukarela oleh kreditur kepada debitur, merupakan suatu bukti tentang pembebasan utangnya, bahkan juga terhadap orang-orang lain yang turut berutang secara tanggung-menanggung. (KUHPerd. 1279 dst., 1321, 1857, 1874 dst., 1878, 1916.)

1440. Pembebasan suatu utang atau pelepasan menurut persetujuan untuk kepentingan salah seorang debitur dalam

perikatan tanggung-menanggung , membebaskan semua debitur yang lain, kecuali jika kreditur dengan tegas menyatakan hendak mempertahankan hak-haknya terhadap orang-orang yang tersebut terakhir dalam hal itu, ia tidak dapat menagih piutangnya sebelum dikurangkan bagian dari debitur yang telah dibebaskan olehnya. (KUHPerd. 1279 dst., 1287, 1289, 1442, 1857.)

1441. Pengambilan barang yang diberikan dalam gadai tidaklah cukup untuk dijadikan alasan dugaan tentang pembebasan utang (KUHPerd. 1150 dst., 1438.)

1442. Pembebasan suatu utang atau pelepasan menurut persetujuan yang diberikan kepada debitur utama, membebaskan para penanggung utang.

Pembebasan yang diberikan kepada penanggung utang tidak membebaskan debitur utama.

Pembebasan yang diberikan kepada salah seorang penanggung utang tidak membebaskan para penanggung lainnya. (KUHPerd. 1410, 1424, 1430, 1437, 1821, 1838, 1846 dst., 1938.)

1443. Apa yang telah diterima kreditur dari seorang penanggung utang sebagai pelunasan tanggungannya, harus dianggap telah dibayar untuk mengurangi utang yang bersangkutan dan harus digunakan untuk melunasi utang debitur utama dan tanggungan para penanggung lainnya. (F. 131.)

Bagian 7. Musnahnya Barang Yang Terutang

1444. Jika barang tertentu yang menjadi pokok suatu persetujuan musnah, tak dapat diperdagangkan, atau hilang hingga tak diketahui sama sekali apakah barang itu masih ada atau tidak, maka hapuslah perikatannya, asal barang itu musnah atau hilang di luar kesalahan debitur dan sebelum ia lalai menyerahkannya.

Bahkan meskipun debitur lalai menyerahkan suatu barang, yang sebelumnya tidak ditanggung terhadap kejadian-kejadian

yang tak terduga, perikatan tetap hapus jika barang itu akan musnah juga dengan cara yang sama di tangan kreditur seandainya barang tersebut sudah diserahkan kepadanya.

Debitur diwajibkan membuktikan kejadian tak terduga yang dikemukakannya.

(s.d.u. dg. S. 1917-497.) Dengan cara bagaimanapun suatu barang hilang atau musnah, orang yang mengambil barang itu sekali-kali tidak bebas dari kewajiban untuk mengganti harga (KUHPerd. 579-3^o, 718-2^o, 736, 754-5^o, 795, 807-6^o, 818, 923, 999, 1099, 1157, 1235 dst., 1244, 1264, 1275, 1285, 1327, 1332 dst., 1362, 1472, 1510, 1553, 1605, 1607, 1646-2^o, 1648, 1708, 1744 dst.)

1445. Jika barang yang terutang musnah tak lagi dapat diperdagangkan atau hilang di luar kesalahan debitur, maka debitur jika ia mempunyai hak atau tuntutan ganti rugi mengenai barang tersebut, diwajibkan memberikan hak dan tuntutan tersebut kepada kreditur. (KUHPerd. 1716)

Bagian 8. Kebatalan Dan Pembatalan Perikatan

1446. Semua perikatan yang dibuat oleh anak-anak yang belum dewasa atau orang-orang yang berada di bawah pengampuan adalah batal demi hukum, dan atas tuntutan yang diajukan oleh atau dari pihak mereka, harus dinyatakan batal, semata-mata atas dasar kebelumdewasaan atau pengampunannya.

Perikatan yang dibuat oleh perempuan yang bersuami dan oleh anak-anak yang belum dewasa yang telah disamakan dengan orang dewasa, tidak batal demi hukum, sejauh perikatan tersebut tidak melampaui batas kekuasaan mereka. (KUHPerd. 108 dst., 113, 116, 282, 330 dst., 419, 425, 429 dst., 452, 1330 dst., 1453.)

1447. Ketentuan pasal yang lalu tidak berlaku untuk perikatan yang timbul dari suatu kejahatan atau pelanggaran atau dari suatu perbuatan yang telah menimbulkan kerugian bagi orang lain.

(*s.d.u. dg. S. 1926-335 jis. 458, 565 dan S. 1927-108.*) Begitu juga kebelumdewasaan tidak dapat diajukan sebagai alasan untuk melawan perikatan yang dibuat oleh anak-anak yang belum dewasa dalam perjanjian perkawinan dengan mengindahkan ketentuan pasal 151, atau dalam persetujuan perburuhan dengan mengingat ketentuan pasal 1601g atau persetujuan perburuhan yang tunduk pada ketentuan pasal 1601h. (KUHPerd. 1365 dst.)

1448. (*s.d.u. dg. S. 1927-31 jis. 390, 421.*) Jika tata cara yang ditentukan untuk sahnya perbuatan yang menguntungkan anak-anak yang belum dewasa dan orang-orang yang berada dibawah pengampuan telah terpenuhi, atau jika orang yang menjalankan kekuasaan orang tua, wali, atau pengampu telah melakukan perbuatan-perbuatan yang tidak melampaui batas-batas kekuasaanya, maka anak-anak yang belum dewasa dan orang-orang yang berada di bawah pengampuan itu dianggap telah melakukan sendiri perbuatan-perbuatan itu setelah mereka menjadi dewasa atau tidak lagi berada di bawah pengampuan tanpa mengurangi hak mereka untuk menuntut orang yang melakukan kekuasaan orang tua, wali, atau pengampu itu bila ada alasan untuk itu. (KUHPerd. 309, 330, 393 dst., 401, 403, 407, 430, 352.)

1449. Perikatan yang dibuat dengan paksaan, penyesatan atau penipuan menimbulkan tuntutan untuk membatalkannya. (KUHPerd. 1053, 1121, 1321 dst., 1452 dst., 1858.)

1450. Dengan alasan telah dirugikan, orang-orang dewasa, dan juga anak-anak yang belum dewasa bila mereka dapat dianggap sebagai orang dewasa, hanyalah dapat menuntut pembatalan perikatan yang telah mereka buat dalam hal-hal

khusus yang ditetapkan dengan undang-undang (Ov. 79; KUHPerd. 429, 1053, 1112-3^o, 1113 dst., 1124, 1858; F. 41 dst.)

1451. Pernyataan batalnya perikatan-perikatan berdasarkan ketidakcakapan orang-orang tersebut dalam pasal 1330, mengakibatkan pulihnya barang-barang dan orang-orang yang bersangkutan dalam keadaan seperti sebelum perikatan dibuat, dengan pengertian bahwa segala sesuatu yang telah diberikan atau dibayar kepada orang yang tak berwenang, akibat perikatan itu, hanya dapat dituntut kembali, bila barang yang bersangkutan masih berada di tangan orang yang tidak berwenang itu, atau bila ternyata bahwa orang ini telah mendapat keuntungan dari apa yang telah diberikan atau dibayar itu, atau bila apa yang dinikmati telah dipakai bagi kpentingannya. (KUHPerd. 116, 1387, 1446, 1702.)

1452. Pernyataan batal yang berdasarkan adanya paksaan, penyesatan atau penipuan juga mnegakibatkan barang dan orang yang bersangkutan pulih dalam keadaan seperti sebelum perikatan dibuat (KUHPerd. 1451.)

1453. Dalam hal-hal tersebut dalam pasal 1446 dan 1449, orang yang terhadapnya tuntutan untuk pernyataan batalnya suatu perikatan dikabulkan wajib juga mengganti biaya, kerugian dan bunga jika ada alasan untuk itu. (KUHPerd. 1243 dst.)

1454. (*s.d.u. dg. S. 1906-348*) Bila suatu tuntutan untuk pernyataan batalnya suatu perikatan tidak dibatasi dengan suatu ketentuan undang-undang khusus mengenai waktu yang lebih pendek, maka waktu itu adalah lima tahun; (KUHPerd. 1489, 1243 dst.)

waktu tersebut mulai berlaku:

- dalam hal kebelumdewasaan, sejak hari kedewasaan;
- dalam hal pengampuan, sejak hari pencabutan pengampuan;
- dalam hal paksaan, sejak hari paksaan itu berhenti;
- dalam hal penyesatan atau penipuan sejak hari diketahuinya penyesatan atau penipuan itu;

dalam hal perbuatan seorang perempuan bersuami yang dilakukan tanpa kuasa si suami, sejak hari pembubaran perkawinan;

dalam hal batalnya suatu perikatan termasuk dalam pasal 1341, sejak hari diketahuinya bahwa kesadaran yang diperlukan untuk kebatalan itu ada.

Waktu tersebut di atas, yaitu waktu yang ditetapkan untuk mengajukan tuntutan, tidak berlaku terhadap kebatalan yang diajukan sebagai pembelaan atau tangkisan yang selalu dapat dikemukakan (KUHPerd. 108, 115 dst., 414, 1511, 1690; F.49)

1455. Barangsiapa mengira bahwa ia dapat menuntut pembatalan suatu perikatan atas dasar berbagai alasan, wajib mengajukan alasan-alasan itu sekaligus atas ancaman akan ditolak alas an-alasan yang diajukan kemudian, kecuali bila alasan-alasan yang diajukan kemudian karena kesalahan pihak lawan, tidak dapat diketahui lebih dahulu. (Rv. 41, 136.)

1456. Tuntutan untuk pernyataan batalnya suatu perikatan, gugur jika perikatan itu dikuatkan secara tegas atau secara diam-diam, sebagai berikut: oleh anak yang belum dewasa setelah ia menjadi dewasa: oleh orang di bawah pengampuan, setelah pengampuannya dihapuskan; oleh perempuan bersuami yang bertindak tanpa bantuan suaminya, setelah perkawinannya bubar; oleh orang yang mengajukan alas an adanya paksaan, penyesatan atau penipuan, setelah paksaan itu berhenti atau setelah penyesatan atau penipuan itu diketahuinya.

BAB V JUAL – BELI

Bagian 1. Ketentuan-ketentuan Umum

1457. Jual beli adalah suatu persetujuan dengan mana pihak yang satu mengikatkan dirinya untuk menyerahkan suatu

barang dan pihak yang lain membayar harga yang dijanjikan. (KUHPerd. 499, 1235 dst., 1332 dst., 1465, 1533 dst.)

1458. Jual-beli dianggap telah terjadi antara kedua belah pihak segera setelah orang-orang itu mencapai kesepakatan tentang barang tersebut beserta harganya meskipun barang itu belum diserahkan dan harganya belum dibayar (KUHPerd. 1340, 1474, 1513; Rv. 102)

1459. Hak milik atas barang yang dijual tidak pindah kepada pembeli selama barang itu belum diserahkan menurut pasal 612, 613 dan 616 (Ov. 26; KUHPerd. 584, 1475, 1686; Rv. 526)

1460. Jika barang yang dijual itu berupa barang yang sudah ditentukan, maka sejak saat pembelian, barang itu menjadi tanggungan si pembeli, meskipun pembayarannya belum dilakukan, si penjual berhak menuntut harganya. (KUHPerd. 1237, 1266, 1444, 1462, 1481, 1513.)

1461. Jika barang dijual bukan menurut tumpukan melainkan menurut berat, jumlah atau ukuran, maka barang itu tetap menjadi tanggungan si penjual sampai ditimbang, dihitung atau diukur.

1462. Sebaliknya jika barang itu dijual menurut tumpukan, maka barang itu menjadi tanggungan si pembeli meskipun belum ditimbang, dihitung atau diukur. (KUHPerd 1460.)

1463. Jual-beli yang dilakukan dengan percobaan atau atas barang yang biasanya dicoba terlebih dahulu selalu dianggap telah dilakukan dengan syarat tangguh (KUHPerd. 1263 dst.)

1464. Jika pembelian dilakukan dengan memberi uang panjar, maka salah satu pihak tak dapat membatalkan pembelian itu dengan menyuruh memiliki atau mengembalikan uang panjarnya. (KUHPerd. 1338, 1488.)

1465. Harga beli harus ditetapkan oleh kedua belah pihak.

Namun penaksirannya dapat diserahkan kepada pihak ketiga.

Jika pihak ketiga itu tidak suka atau tidak mampu membuat taksiran, maka tidaklah terjadi suatu pembelian. (KUHPerd. 1458, 1634.)

1466. Biaya akta jual-beli dan biaya tambahan lain dipikul oleh pembeli kecuali jika diperjanjikan sebaliknya. (KUHPerd. 1395, 1476; Overschr. 10; Rv.Ov. 13.)

1467. Antara suami-istri tidak dapat terjadi jual-beli, kecuali dalam tiga hal berikut:

1^o . jika seorang suami atau istri menyerahkan barang-barang kepada istri atau suaminya, yang telah dipisahkan daripadanya oleh pengadilan untuk memenuhi hak istri atau suaminya itu menurut hukum; (KUHPerd. 186 dst, 243.)

2^o . jika penyerahan dilakukan oleh seorang suami kepada istrinya berdasarkan alasan yang sah, misalnya untuk mengembalikan barang si istri yang telah dijual atau uang si istri, sekedar barang atau uang tersebut dikecualikan dari persatuan; (KUHPerd. 105, 124, 139 dst., 153, 195.)

3^o . jika si istri menyerahkan barang kepada suaminya untuk melunasi jumlah utang yang telah ia janjikan kepada suaminya itu sebagai harta perkawinan sekedar barang itu dikecualikan dari persatuan. (KUHPerd. 139.)

Namun ketiga hal ini tidak mengurangi hak para ahli waris pihak-pihak yang melakukan perbuatan, bila salah satu pihak telah memperoleh keuntungan secara tidak langsung. (KUHPerd. 105, 140, 183, 309, 393, 425, 452, 481, 985, 1678; Rv. 507)

1468. Para hakim, jaksa, panitera, advokat, pengacara, juru sita dan notaris tidak boleh atas dasar penyerahan menjadi pemilik hak dan tuntutan yang menjadi pokok perkara yang sedang ditangani oleh pengadilan negeri yang wilayahnya mereka melakukan pekerjaan atas ancaman kebatalan serta penggantian biaya, kerugian dan bunga. (KUHPerd. 1243 dst., 1554.)

1469. Atas ancaman yang sama, para pegawai yang memangku suatu jabatan umum tidak boleh membeli barang-

barang yang dijual oleh atau dihadapan mereka, untuk dirinya sendiri atau untuk orang lain. (KUHPerd. 184, 911 dst., 1454)

Sekedar mengenai benda bergerak, jika dianggap perlu untuk kepentingan umum, pemerintah berkuasa membebaskan pegawai-pegawai tersebut dari larangan tersebut.

Demikian pula, dalam hal-hal luar biasa, tetapi hanya untuk kepentingan para penjual, pemerintah boleh memberikan izin kepada pegawai-pegawai termasuk dalam pasal ini, untuk membeli barang-barang tak bergerak yang dijual di hadapan mereka. (Wsk. 3)

1470. Begitu pula atas ancaman yang sama, tidaklah boleh menjadi pembeli pada penjualan di bawah tangan. Baik pembelian itu dilakukan oleh mereka sendiri maupun melalui perantara;

Para kuasa sejauh mengenai barang-barang yang dikuasakan kepada mereka untuk dijual; para pengurus, sejauh mengenai benda milik negara dan milik badan-badan umum yang dipercayakan kepada pemeliharaan dan pengurusan mereka.

Namun pemerintah leluasa untuk memberikan kebebasan dari larangan itu kepada para pengurus umum.

Semua wali dapat membeli barang-barang tak bergerak kepunyaan anak-anak yang berada di bawah perwalian mereka, dengan cara yang ditentukan dalam pasal 399. (KUHPerd. 351, 400, 452, 1243, 1454, 1792 dst., 1800; Wsk. 7)

1471. Jual beli atas barang orang lain adalah batal dan dapat memberikan dasar kepada pembeli untuk menuntut penggantian biaya, kerugian dan bunga jika ia tidak mengetahui bahwa barang itu kepunyaan orang lain. (KUHperd. 582, 966, 1180, 1316, 1363, 1384, 1493 dst., 1496 dst., 1499, 1523, 1717, 1961, 1977.)

1472. Jika pada saat penjualan barang yang dijual telah musnah sama sekali, maka pembelian adalah batal.

Jika yang musnah hanya sebahagian saja, maka pembeli leluasa untuk membatalkan pembelian atau menuntut bagian yang

masih ada, serta menyuruh menetapkan harganya menurut penilaian yang seimbang. (KUHPerd. 1275, 1320-3^o, 1388, 1444.)

Bagian 2. Kewajiban-kewajiban Penjual

1473. Penjual wajib menyatakan dengan jelas untuk apa ia mengikatkan dirinya; janji yang tidak jelas dan dapat diartikan dalam berbagai pengertian, harus ditafsirakan untuk kerugiannya. (KUHPerd. 1342 dst., 1349.)

1474. Penjual mempunyai dua kewajiban utama, yaitu menyerahkan barangnya dan menanggungnya. (KUHPerd. 1235, 1475 dst., 1491.)

1475. Penyerahan ialah pemindahan barang yang telah dijual ke dalam kekuasaan dan hak milik si pembeli. (KUHPerd. 612 dst, 1459.)

1476. Biaya penyerahan dipikul oleh penjual, sedangkan biaya pengambilan dipikul oleh pembeli, kecuali kalau dijanjikan sebaliknya. (KUHPerd. 1466, 1495.)

1477. Penyerahan harus dilakukan di tempat barang yang dijual itu berada pada waktu penjualan, jika tentang hal itu tidak diadakan persetujuan lain (KUHPerd. 1338, 1393, 1412.)

1478. Penjual tidak wajib menyerahkan barang yang bersangkutan jika pembeli belum membayar harganya sedangkan penjual tidak mengizinkan penundaan pembayaran kepadanya. (KUHPerd. 1139-3^o, 1144, 1182, 1390, 1514.)

1479. *Dicabut dg. S. 1906-348*

1480. Jika penyerahan tidak dapat dilaksanakan karena kelalaian penjual, maka pembeli dapat menuntut pembatalan pembelian menurut ketentuan-ketentuan pasal 1266 dan 1267. (KUHPerd. 1236, 1243, 1517.)

1481. Barang yang bersangkutan harus diserahkan dalam keadaan seperti pada waktu penjualan.

Sejak saat penyerahan segala hasil menjadi kepunyaan si pembeli (KUHPerd. 500 dst., 571, 963, 1235, 1237, 1243, 1391, 1460.)

1482. Kewajiban menyerahkan suatu barang meliputi segala sesuatu yang menjadi perlengkapannya dan dimaksudkan bagi pemakaianya yang tetap beserta surat bukti milik jika ada. (KUHPerd. 507, 584, 588, 612 dst., 1235 dst., 1338 dst., 1481, 1533.)

1483. Penjual wajib menyerahkan barang yang dijual dalam keadaan utuh sebagaimana dinyatakan dalam persetujuan dengan perubahan-perubahan sebagai berikut:

1484. Jika penjualan sebuah barang tak bergerak dilakukan dengan menyebutkan luas atau isinya, dan harganya ditentukan menurut ukurannya, maka penjual wajib menyerahkan jumlah yang dinyatakan dalam persetujuan, dan jika ia tak mampu melakukannya atau pembeli tidak menuntutnya maka penjual harus bersedia menerima pengurangan harga menurut perimbangan (KUHPerd. 1489, 1501, 1588.)

1485. Sebalinya jika dalam hal yang disebutkan dalam pasal yang lalu barang tak bergerak itu ternyata lebih luas daripada yang dinyatakan dalam persetujuan maka pembeli boleh memilih untuk menambah harganya menurut perbandingan atau membatalkan pembelian itu, bila kelebihannya itu mencapai seperduapuluhan dari luas yang dinyatakan dalam persetujuan. (KUHPerd 1489.)

1486. Dalam hal lain, baik jika yang dijual itu adalah barang tertentu, maupun jika penjualan itu mengenai pekarangan yang terbatas dan terpisah satu sama lain, ataupun jika penjualan itu mengenai suatu barang yang dari semula telah disebutkan ukurannya, atau yang keterangan tentang ukurannya akan menyusul, maka penyebutan ukuran itu tidak dapat menjadi alasan bagi penjual untuk menambah harga untuk apa yang

melebihi ukuran itu, pula tidak dapat menjadi alasan bagi pembeli untuk mengurangi harga untuk apa yang kurang dari ukuran itu kecuali bila selisih antara ukuran yang sebenarnya dan ukuran yang dinyatakan dalam persetujuan adalah seperdua puluh dihitung menurut harga seluruh barang yang dijual, kecuali jika dijanjikan sebaliknya. (KUHPerd. 1484 dst.)

1487. Jika menurut pasal yang lalu alasan untuk menaikkan harga untuk kelebihan dari ukuran maka pembeli boleh memilih untuk membatalkan pembelian, atau untuk membayar harga yang telah dinaikkan serta bunga bila ia telah memegang barang tak bergerak itu. (KUHPerd. 1471, 1515)

1488. Dalam hal pembeli membatalkan pembelian ,penjual wajib mengembalikan harga barang, jika itu telah diterima olehnya dan juga biaya yang telah dikeluarkan untuk melakukan pembelian dan penyerahan sejauh pembeli telah membayarnya menurut persetujuan (KUHPerd. 1464, 1466, 1474, 1476, 1480, 1485,dst.)

1489. Tuntutan dari pihak penjual untuk memperoleh penambahan uang harga penjualan dan tuntutan dari pihak pembeli untuk memperoleh pengurangan uang harga pembelian atau pembatalan pembelian harus diajukan dalam waktu satu tahun, terhitung mulai dari hari dilakukannya penyerahan, jika tidak maka tuntutan itu gugur. (KUHPerd. 1454, 1484 dst, 1490)

1490. Jika dua bidang pekarangan dijual bersama-sama dalam satu persetujuan dengan suatu harga dan luas masing-masing disebut tetapi yang satu ternyata lebih luas daripada yang lain maka selisih ini dihapus dengan cara memperjumpakan keduanya sampai jumlah yang diperlukan dan tuntutan untuk penambahan atau untuk pengurangan tidak boleh diajukan selain menurut aturan-aturan yang ditentukan di atas. (KUHPerd. 1484 dst.)

1491. Penanggungan yang menjadi kwajiban penjual terhadap pembeli adalah untuk menjamin dua hal; yaitu pertama penguasaan barang yang dijual itu secara aman dan tenteram,

kedua, cacat yang tersembunyi pada barang tersebut, atau, yang sedemikian rupa sehingga menimbulkan alasan untuk membatalkan pembelian itu. (KUHPerd. 1084, 1208, 1474 dst., 1492 dst, 1504 dst., 1534 dst., 1990: Rv 70 dst.)

1492. Meskipun pada waktu penjualan dilakukan tidak dibuat janji tentang penanggungan ,penjual, demi hukum, wajib menanggung pembeli terhadap tuntutan hak melalui hukum untuk menyerahkan seluruh atau sebagian barang yang dijual itu kepada pihak ketiga, atau terhadap beban yang menurut keterangan pihak ketiga dimilikinya atas barang tersebut tetapi tidak diberitahukan sewaktu pembelian dilakukan. (KUHperd. 1208, 1339, 1474, 1496 dst., 1500 dst., 1544; Rv 580- 1^o , KUHP 266.)

1493. Kedua belah pihak, dengan persetujuan-persetujuan istimewa, boleh memperluas atau mengurangi kewajiban yang ditetapkan oleh undang-undang ini; bahkan mereka boleh mengadakan persetujuan bahwa penjual tidak wajib menanggung sesuatu apa pun. (KUHPerd. 1249, 1338, 1473, 1506, 1534.)

1494. Meskipun telah diperjanjikan bahwa penjual tidak akan menanggung sesuatu apa pun, ia tetap bertanggungjawab atas akibat dari suatu perbuatan yang dilakukannya; segala persetujuan yang bertentangan dengan ini adalah batal. (AB.23; KUHPErd. 1534; KUHP 266)

1495. Dalam hal ada janji yang sama, jika terjadi penuntutan hak melalui hukum (iutwinning) untuk menyerahkan barang yang dijual kepada seseorang maka penjual wajib mengembalikan uang harga pembelian, kecuali bila pembeli pada waktu pembelian mengetahui adanya penghukuman untuk menyerahkan barang yang dibelinya itu, atau membeli barang itu dengan menyatakan akan memikul sendiri untung-ruginya (KUHPerd. 1493, 1496-1^o , 1505, 1774.)

1496. Jika dijanjikan penanggungan atau jika tidak dijanjikan apa-apa, maka pembeli dalam hal adanya tuntutan hak

melalui hukum untuk menyerahkan barang yang dibelinya kepada seseorang berhak menuntut kembali dari penjual;

1^o . pengembalian uang harga pembelian (KUHPerd. 1495, 1497)

2^o . pengembalian hasil, jika ia wajib menyerahkan hasil itu kepada pemilik yang melakukan tuntutan itu (KUHPerd. 575 dst.)

3^o . biaya yang dikeluarkan sehubungan dengan gugatan pembeli atau ditanggung pula biaya yang telah dikeluarkan oleh penggugat asal (KUHPerd. 1503; Rv. 58)

4^o . penggantian biaya, kerugian dan bunga serta biaya perkara mengenai pembelian dan penyerahan sekedar itu telah dibayar oleh pembeli (KUHPerd. 1208, 1243, 1246, 1466, 1476, 1488 dst., 1498 dst., 1508 dst: Rv 70 dst)

1497. Jika ternyata bahwa pada waktu diadakan penuntutan hak melalui hukum (iutwinning) barang itu telah merosot harganya, atau sangat rusak, baik karena kelalaian pembeli maupun karena keadaan memaksa maka penjual wajib mengembalikan uang harga pembelian seluruhnya.

Tetapi jika pembeli telah mendapat keuntungan karena kerugian yang disebabkan olehnya, maka si penjual berhak mengurangi harga barang tersebut dengan suatu jumlah yang sama dengan keuntungan tersebut. (KUHPerd. 1207)

1498. Jika ternyata bahwa pada waktu diadakan penuntutan hak melalui hukum (uitwinning) barang itu telah bertambah harganya meskipun tanpa perbuatan pembeli maka penjual wajib membayar kepada pembeli itu apa yang melebihi uang harga pembelian itu (KUHPerd. 1207; 1494-4^o, 1497)

1499. Penjual wajib mengembalikan kepada pembeli atau menyuruh orang yang mengadakan penuntutan hak melalui hukum (uitwinning) untuk mengembalikan segala sesuatu yang telah dikeluarkan oleh pembeli untuk pembetulan dan perbaikan yang perlu pada barang yang bersangkutan.

Jika penjual telah menjual barang orang lain dengan itikad buruk, maka ia wajib mengembalikan segala biaya yang telah dikeluarkan si pembeli , bahkan juga biaya yang dikeluarkannya semata-mata untuk memperindah atau mengubah bentuk barangnya. (KUHPerd. 575,579,581, 1207, 1364, 1471, 1508.)

1500. Jika hanya sebagian barang itu dituntut, sedangkan bagian itu dalam hubungan dengan keseluruhannya adalah sedemikian penting sehingga pembeli takkan membeli barang itu seandainya bagian itu tidak ada, maka ia dapat meminta pembatalan pembeliannya, asal ia memajukan tuntutan untuk itu dalam satu tahun setelah hari putusan atas penuntutan hak melalui hukum memeproleh kekuatan hukum yang pasti (KUHPerd. 1454, 1511.)

1501. Dalam hal adanya hukuman untuk menyerahkan sebagian barang yang dijual itu, bila jual-beli tidak dibatalkan, pembeli harus diberi ganti rugi untuk bagian yang diserahkan, menurut harga taksiran sewaktu ia diharuskan menyerahkan sebagian dari barangnya itu, tetapi tidak menurut perimbangan dengan seluruh harga pembelian, entah barang yang dijual itu telah naik atau telah turun harganya. (KUHPerd. 1584, 1496, 1500.)

1502. Jika ternyata, bahwa barang yang dijual itu dibebani dengan pengabdian-pengabdian, pekarangan (erfdienstbaarheden) tetapi hal itu tidak diberitahukan kepada pembeli sedangkan pengabdian-pengabdian pekarangan itu sedemikian penting sehingga dapat diduga bahwa pembeli tidak akan melakukan pembelian kecuali jika ia memilih menerima ganti rugi (KUHPerd. 1266, 1492, 1496, 1505.)

1503. Jaminan terhadap suatu penuntutan hak menurut hukum (uitwinning) berakhir, jika pembeli membiarkan diri dihukum oleh hakim dengan suatu putusan yang sudah mempunyai kekuatan hukum yang pasti tanpa memanggil penjual

dan penjual itu membuktikan bahwa ada alasan untuk menolak gugatan tersebut. (KUHPerd. 1496, 1865: Rv 70c)

1504. Penjual harus menanggung barang itu terhadap cacat tersembunyi, yang sedemikian rupa sehingga barang itu tidak dapat dipergunakan untuk tujuan yang dimaksud, atau yang demikian mengurangi pemakaian sehingga seandainya pembeli mengetahui cacat itu, ia sama sekali tidak akan membelinya atau tidak akan membelinya selain dengan harga yang kurang. (KUHPerd. 1322, 1491, 1507, 1511 dst., 1522, 1733)

1505. Penjual tidak wajib menjamin barang terhadap cacat yang kelihatan dan dapat diketahui sendiri oleh si pembeli (KUHPerd. 1495, 1502.)

1506. Ia harus menjamin barang terhadap cacat yang tersembunyi, meskipun ia sendiri tidak mengetahui adanya cacat itu, kecuali jika dalam hal demikian ia telah meminta diperjanjikan bahwa ia tidak wajib menanggung sesuatu appun (KUHPerd. 1494 dst., 1507, 1552.)

1507. Dalam hal-hal yang tersebut dalam pasal 1504 dan 1506, pembeli dapat memilih akan mengembalikan barangnya sambil menuntut kembali uang harga pembelian atau akan tetap memiliki barang itu sambil sebagian dari uang harga pembelian, sebagaimana ditentukan oleh hakim setelah mendengar ahli tentang hal itu. (Rv. 136)

1508. Jika penjual telah mengtahui cacat-cacat barang maka ia hanya wajib mengembalikan uang harga pembelian dan mengganti biaya untuk penyelenggaraan pembelian dan penyerahan sekedar itu dibayar oleh pembeli (KUHPerd. 1496.)

1510. Jika barang yang mengandung cacat-cacat tersembunyi itu musnah karena cacat-cacat itu, maka kerugian dipikul oleh penjual yang terhadap pembeli wajib mengembalikan uang harga pembelian dan mengganti segala kerugian lain yang disebut dalam kedua pasal yang lalu; tetapi kerugian yang

disebabkan kejadian yang tak disengaja, harus dipikul oleh pembeli. (KUHPerd. 1444 dst., 1496.0

1511. Tuntutan yang didasarkan atas cacat yang dapat menyebabkan pembatalan pembelian, harus diajukan oleh pembeli dalam waktu yang pendek, menurut sifat cacat itu, dan dengan mengindahkan kebiasaan-kebiasaan di tempat persetujuan pembelian dibuat (AB 15; KUHPerd. 1454. 1500, 1507)

1512. Tuntutan itu tidak dapat diajukan dalam hal penjualan-penjualan yang dilakukan atas kuasa hakim. (Rv. 472, 521.)

Bagian 3. Kewajiban Pembeli

1513. Kewajiban utama pembeli adalah membayar harga pembelian pada waktu dan di tempat yang ditetapkan dalam persetujuan (KUHPerd. 1139, 1182, 1382 dst., 1460, 1478, 1516; KUHD 98).

1514. Jika pada waktu membuat persetujuan tidak ditetapkan hal-hal itu pembeli harus membayar di tempat dan pada waktu penyerahan (KUHPerd. 1393, 1477.)

1515. Pembeli biarpun tidak ada suatu perjanjian yang tegas, wajib membayar bunga dari harga pembelian jika barang yang dijual dan diserahkan memberi hasil atau pendapatan lain. (KUHPerd. 1250)

1516. Jika dalam menguasai barang itu pembeli diganggu oleh suatu tuntutan hukum yang berdasarkan hipotek atau suatu tuntutan untuk memperoleh kembali barang tersebut atau jika pembeli mempunyai suatu alasan yang patut untuk khawatir akan diganggu dalam penguasaannya maka ia dapat menangguhkan pembayaran harga pembelian sampai penjual menghentikan gangguan tersebut, kecuali jika penjual memilih memberikan jaminan, atau jika telah diperjanjikan bahwa pembeli wajib

membayar tanpa mendapat jaminan atas segala gangguan (KUHPerd. 1198, 1478, 1492 dst., 1543; KUHD 23 dst.)

1517. Jika pembeli tidak membayar harga pembelian maka penjual dapat menuntut pembatalan jual-beli itu menurut ketentuan-ketentuan pasal 1266 dan 1267. (KUHPerd 1139-3^o, 1141, 1144 dst., 1481; KUHD 230 dst., F.36 dst.)

1518. Meskipun demikian, dalam hal penjualan barang-barang dagangan dan perabot rumah, pembatalan pembelian untuk kepentingan penjual terjadi demi hukum dan tanpa peringatan setelah lewat waktu yang ditentukan untuk mengambil barang yang dijual (KUHPerd. 515, 1266, 1427.)

Bagian 4. Hak Membeli Kembali

(Bdk. Dg. S. 1937-585, Ord. Atas Klausula Emas 1937.)

1519. Kekuasaan untuk membeli kembali barang yang telah dijual, timbul karena suatu perjanjian, yang tetap memberi hak kepada penjual untuk mengambil kembali barang yang dijualnya dengan mengembalikan uang harga pembelian asal dan memberikan penggantian yang disebut dalam pasal 1532. (KUHPerd. 1169, 1265, 1524,)

1520. Hak untuk membeli kembali tidak boleh diperjanjikan untuk waktu yang lebih lama dari lima tahun.

Jika hak tersebut diperjanjikan untuk waktu yang lebih lama, maka waktu itu diperpendek sampai menjadi lima tahun.

1521. Jangka waktu yang ditentukan harus diartikan secara mutlak dan tidak boleh diperpanjang oleh hakim; bila penjual lalai memajukan tuntutan untuk membeli kembali dalam tenggang waktu yang telah ditentukan maka pembeli tetap menjadi pemilik barang yang telah dibelinya. (KUHPerd. 1258, 1577.)

1522. Jangka waktu ini berlaku untuk kerugian tiap orang bahkan untuk kerugian anak-anak yang belum dewasa tanpa mengurangi hak mereka untuk menuntut penggantian kepada orang yang bersangkutan jika ada alasan untuk itu. (KUHPerd. 307, 385, 1987.)

1523. Penjual suatu barang tak bergerak yang telah meminta diperjanjikan hak untuk membeli kembali barang yang dijualnya boleh menggunakan haknya terhadap seorang pembeli kedua, meskipun dalam persetujuan kedua tidak disebutkan janji tersebut. (KUHperd. 1340, 1342, 1471, 1577, 1977.)

1524. Barangsiapa membeli dengan perjanjian membeli kembali meperoleh segala hak penjual sebagai penggantinya ia dapat menggunakan hak kedaluwarsa, baik terhadap pemilik sejati maupun terhadap siapa saja yang mengira punya hak hipotek atau hak lain atas barang yang dijual itu. (KUHPerd. 1577, 1952.)

1525. Terhadap para kreditur kepada penjual ia dapat menggunakan hak istimewa untuk melaksanakan tuntutan hak melalui hukum (KUHPerd. 1200, 1833.)

1526. Jika seseorang yang dengan perjanjian membeli kembali telah membeli suatu bagian dari suatu barang tak bergerak yang belum terbagi setelah terhadapnya diajukan suatu gugatan untuk pemisahan dan pembagian menjadi pembeli dari seluruh barang tersebut maka ia dapat mewajibkan si penjual untuk mengoper seluruh barang tersebut bila orang ini hendak menggunakan hak beli kembali. (KUHPerd. 573.)

1527. Jika berbagai orang secara bersama-sama dan dalam suatu persetujuan menjual suatu barang yang menjadi hak mereka bersama maka masing-masing hanya dapat menggunakan haknya untuk membeli kembali sekedar mengenai bagiannya. (KUHPerd. 1296, 1529.)

1528. Hak yang sama terjadi bila sesorang yang sendirian menjual suatu barang, meninggalkan beberapa ahli waris.

Masing-masing di antara para ahli waris itu hanya boleh menggunakan hak membeli kembali atas jumlah sebesar bagianya. (KUHPerd. 1083, 1299, 1529.)

1529. Tetapi, dalam hal termaksud dalam kedua pasal yang lalu, pembeli dapat menuntut supaya semua orang yang turut menjual atau yang turut menjadi ahli waris dipanggil untuk bermupakat tentang pembelian kembali barang yang bersangkutan seluruhnya; dan jika mereka tidak mencapai kesepakatan maka tuntutan membeli kembali harus ditolak.

1530. Jika penjualan suatu barang kepunyaan berbagai orang tidak dilakukan oleh mereka bersama-sama untuk seluruhnya melainkan masing-masing menjual sendiri-sendiri bagiannya maka masing-masing dapat sendiri-sendiri menggunakan haknya untuk membeli kembali bagian yang menjadi haknya; dan pembeli tidak boleh memaksa siapa pun yang menggunakan haknya secara demikian untuk mengoper barang yang bersangkutan seluruhnya.

1531. Jika pembeli meninggalkan beberapa orang ahli waris maka hak membeli kembali tidak dapat dipergunakan terhadap masing-masing dari mereka selain untuk jumlah sebesar bagianya, baik dalam hal harta peninggalan yang belum dibagi maupun dalam hal harta peninggalan yang sudah dibagi di antara para ahli waris.

Namun jika harta peninggalan itu sudah dibagi dan barang yang dijual itu jatuh ke tangan salah seorang dari para ahli waris itu, maka tuntutan untuk membeli kembali dapat diajukan terhadap ahli waris untuk seluruhnya (KUHPerd. 1296 dst.)

1532. Penjual yang menggunakan perjanjian membeli kembali tidak saja wajib mengembalikan seluruh uang harga pembelian semula, melainkan juga mengganti semua biaya biaya menurut hukum yang telah dikeluarkan waktu menyelenggarakan pembelian serta penyerahannya begitu pula biaya yang perlu untuk

pembetulan-pembetulan, dan biaya yang menyebabkan barang yang dijual bertambah harganya yaitu sejumlah tambahannya itu.

Ia tidak dapat memperoleh penguasaan atas barang yang dibelinya kembali, selain setelah memenuhi segala kewajiban ini.

Bila penjual memperoleh barangnya kembali akibat perjanjian membeli kembali, maka barang itu harus diserahkan kepadanya bebas dari semua beban dan hipotek yang diletakkan atasnya oleh pembeli namun ia wajib menepati persetujuan sewa yang dengan itikad baik telah dibuat oleh pembeli (KUHPerd. 500, 576, 762, 772, 780, 793, 817, 1265, 1577.)

Bagian 5. Ketentuan-ketentuan Khusus Mengenai Jual-beli Piutang Dan Hak-hak Tak Berwujud Yang Lain

1533. Penjualan suatu piutang meliputi segala sesuatu yang melekat padanya seperti penanggungan hak istimewa dan hipotek. (KUHPerd. 501, 613, 963, 1481 dst., 1538, KUHD 113, 176, 194.)

1534. Barangsiapa menjual suatu piutang atau suatu hak yang tak berujud lainnya harus menanggung bahwa hak-hak itu benar ada pada waktu diserahkan biarpun penjual dilakukan tanpa janji penanggungan. (KUHPerd. 1491 dst., 1495 dst., 1537; KUHD 70)

1535. Ia tidak bertanggung jawab atas kemampuan debitur, kecuali jika ia mengikatkan dirinya untuk itu tetapi dalam demikian pun ia hanya bertanggung jawab untuk jumlah harga pembelian yang telah diterimanya.

1536. Jika ia telah berjanji untuk menanggung cukup mampunya debitur, maka janji ini harus diartikan sebagai janji mengenai kemampuannya pada waktu itu, dan bukan mengenai

keadaan di kemudian hari, kecuali jika dengan tegas dijanjikan sebaliknya (KUHPerd. 1535)

1537. Barangsiapa menjual suatu warisan tanpa memberi keterangan tentang barang demi barang tidaklah diwajibkan menanggung apa-apa selain kedudukannya sebagai ahli waris. (KUHPerd. 1084, 1118, 1334.0

1538. Jika ia menikmati hasil suatu barang atau telah menerima suatu jumlah sebesar suatu piutang yang termasuk warisan tersebut ataupun telah menjual beberapa barang dari harta peninggalan itu maka ia diwajibkan menggantinya, jika tidak dengan tegas diperjanjikan lain.(KUHPerd. 1482, 1533)

1539. sebaliknya pembeli diwajibkan mengganti kepada si penjual itu segala sesuatu yang oleh orang itu telah dikeluarkan untuk membayar utang-utang dan beban warisan pula untuk melunasi apa yang dapat ditagih si penjual itu selaku orang yang memegang suatu piutang terhadap warisan itu, kecuali jika diperjanjikan sebaliknya (KUHPerd. 1100,1338, 1436.)

1540. Bila sebelumnya penyerahan suatu piutang yang telah dijual debitur membayar utangnya kepada penjual, maka hal itu cukup untuk membebaskan debitur (KUHPerd. 613, 1459.)

BAB VI. TUKAR- MENUKAR

1541. Tukar-menukar ialah suatu persetujuan dengan mana kedua belah pihak mengikatkan diri untuk saling memberikan suatu barang secara timbal balik sebagai ganti suatu barang lain (KUHPerd. 1080, 1457 dst.)

1542. Segala sesuatu yang dapat dijual dapat pula jadi pokok persetujuan tukar-menukar. (KUHPerd. 1471, 1546)

1543. Jika pihak yang satu telah menerima barang yang ditukarkan kepadanya, dan kemudian ia membuktikan bahwa pihak yang lain bukan pemilik barang tersebut maka ia tidak dapat dipaksa untuk menyerahkan barang yang telah ia janjikan dari

pihaknya sendiri, melainkan hanya untuk mengembalikan barang yang telah diterimanya. (KUHPerd. 1471, 1478, 1516)

1544. Barangsiapa karena suatu tuntutan hak melalui hukum (uitwinning) terpaksa melepaskan barang yang diterimanya dalam suatu tukar-menukar dapat memilih akan menuntut penggantian biaya, kerugian dan bunga dari pihak lawannya atau akan menuntut pengembalian barang yang telah ia berikan (KUHPerd. 1234, 1266 dst., 1474, 1480, 1492 dst., 1496-1^o, 1500 dst, 1517.)

1545. Jika barang tertentu, yang telah dijanjikan untuk ditukar musnah di luar kesalahan pemiliknya maka persetujuan dianggap gugur, dan pihak yang telah memenuhi persetujuan dapat menuntut kembali barang yang telah ia berikan dalam tukar-menukar.(KUHPerd. 1237, 1460.0

1546. Untuk lain-lainnya ,aturan-aturan tentang persetujuan jual-beli berlaku terhadap persetujuan tukar-menukar (KUHPerd. 1457 dst.)

Annex II

Academic Draft of the Bill of Obligations

Annex II**Konsep RUU Tentang Hukum Perikatan^{*)}**

Berdasarkan uraian dalam Bab I sampai dengan Bab XI, maka disusunlah Naskah RUU tentang Hukum Perikatan seperti di bawah ini.

UNDANG-UNDANG REPUBLIK INDONESIA
NO. TAHUN

TENTANG
PERIKATAN UMUM

DENGAN RAHMAT TUHAN YANG MAHA ESA .

PRESIDEN REPUBLIK INDONESIA

Menimbang : a. Bahwa tujuan pembangunan nasional adalah memajukan kesejahteraan umum dan mencerdaskan kehidupan bangsa guna mewujudkan masyarakat adil dan makmur yang merata material dan spiritual berdasarkan Pancasila.

^{*)} See Badan Pembinaan Hukum Nasional, Departemen Kehakiman RI:
Naskah Akademik Peraturan Perundang-undangan tentang Hukum
Perikatan, Jakarta, 1993/1994 pp 35-37

- Bahwa Hukum Perikatan adalah salah satu lembaga yang mengatur hubungan hukum yang terjadi antara orang yang satu dengan orang yang lain di bidang harta kekayaan. Dengan semakin pesatnya kemajuan di bidang sosial, ekonomi yang didukung oleh kemajuan ilmu pengetahuan dan teknologi, maka akan semakin banyak permasalahan yang timbul dalam penerapan perikatan di masyarakat.
 - Bahwa peraturan perundang-undangan yang mengatur mengenai perikatan umum yang ada saat ini masih berasal dari peninggalan kolonial Belanda, oleh karena itu banyak ketentuan yang tidak sesuai lagi dengan kebutuhan dan perkembangan masyarakat dan ilmu pengetahuan.
- :
- Bahwa untuk meningkatkan pembinaan Hukum Perikatan sesuai dengan perkembangan kehidupan rakyat dan bangsa Indonesia serta hubungan internasional dengan negara lain dipandang perlu menetapkan ketentuan mengenai perikatan umum dalam undang-undang.

- Mengingat :
1. Pasal 5 ayat (1) dan Pasal 20 ayat (1) Undang – undang Dasar 1945
 2. Ketetapan MPR-RI No. II/MPR/1993 tentang Garis – garis Besar Haluan Negara.

Dengan persetujuan

Dewan Perwakilan Rakyat Republik Indonesia

MEMUTUSKAN

Menetapkan :

Undang-undang Tentang Perikatan

BAB I

KETENTUAN UMUM

Pasal 1

Dalam undang-undang ini yang dimaksud dengan :

- a. Perikatan : adalah suatu hubungan hukum yang terjadi di antara dua orang atau lebih yang terletak di dalam harta kekayaan, dimana pihak yang satu berhak atas prestasi dan pihak lainnya wajib memenuhi prestasi itu.
- b. Perjanjian : adalah suatu peristiwa dimana seorang berjanji kepada orang lain untuk melaksanakan sesuatu.

- c. Benda : adalah segala sesuatu yang dapat menjadi objek hak milik, yang meliputi barang-barang yang berwujud dan hak.
- d. Si berpiutang : adalah orang yang berhak menuntut (kreditur)
- e. Si berutang : adalah orang yang wajib memenuhi tuntutan. (debitur)
- f. Prestasi : adalah sesuatu benda yang dapat dituntut.
- g. Kerugian : adalah kerusakan benda-benda kepunyaan si kreditur yang diakibatkan oleh kelalaian si debitur.
- h. Kelalaian : adalah sesuatu keadaan dimana si berutang (debitur) tidak melakukan apa yang dijanjikannya.

BAB II

Bagian Pertama

Tentang Perikatan Pada Umumnya

Pasal 1

Suatu perikatan dilahirkan dari perjanjian atau dari undang-undang dan hukum yang tidak tertulis.

Pasal 2

Suatu perikatan menimbulkan kewajiban untuk menyerahkan sesuatu, untuk berbuat sesuatu, atau tidak berbuat sesuatu.

Pasal 3

Sesuatu yang tidak dapat dinilai dengan uang, dapat juga dituntut berdasarkan suatu perikatan.

Bagian Kedua

Kewajiban-kewajiban dalam Perikatan

Pasal 4

Seseorang yang berdasarkan suatu perikatan diwajibkan menyerahkan benda, wajib merawatnya sebaik-baiknya seperti terhadap barang milik sendiri sampai saat penyerahan terlaksana.

Pasal 5

Seseorang yang diwajibkan memberikan suatu benda yang hanya ditetapkan jenisnya tidak diwajibkan memberikan benda dari mutu yang paling tinggi, tetapi juga tidak boleh memberikan benda dari mutu yang paling rendah.

Pasal 6

Dalam kewajiban menyerahkan hak milik atas suatu benda mengandung kewajiban memberikan surat-surat bukti hak milik beserta segala apa yang diperlukan untuk peralihan pemilikan atas benda itu.

Pasal 7

Seseorang yang diwajibkan menyerahkan sejumlah uang yang ditetapkan dalam mata uang asing, dapat menyerahkan sejumlah uang rupiah yang nilainya sama menurut nilai tukar pada saat penyerahan itu dilakukan.

Bagian Ketiga Tentang Ingkar janji dan Akibat-akibatnya

Pasal 8

Seseorang yang karena kelalaiannya tidak memenuhi kewajibannya, wajib mengganti segala kerugian yang diakibatkan tidak terpenuhinya kewajiban tersebut.

Pasal 9

- a. Seseorang adalah lalai apabila ia, setelah ditegur untuk memenuhi kewajibannya, tetap tidak memenuhinya.
- b. Teguran dapat dilakukan dengan cara yang cukup jelas menyatakan keinginan si berpiutang bahwa ia menghendaki pemenuhan perikatannya.
- c. Teguran tidak diperlukan apabila : (a) saat pemenuhan telah ditetapkan atau menurut perikatan si berutang akan dianggap lalai setelah lewatnya waktu yang ditetapkan; (b) si berutang telah melakukan perbuatan yang tidak boleh dilakukannya menurut perikatan; dengan melakukan perbuatan tersebut, si berutang dengan sendirinya adalah lalai.

Pasal 10

- (1) Dalam kerugian yang dapat digugat oleh si berpiutang, termasuk kehilangan keuntungan sebagai akibat tidak dipenuhinya perikatan.
- (2) Adanya kerugian dan berapa besarnya, wajib dibuktikan oleh si berpiutang.

Pasal 11

Suatu perikatan untuk membayar sejumlah uang, kerugian yang disebabkan karena terlambatnya pembayaran ditetapkan oleh yang berwenang, dihitung mulai tanggal digugatnya pembayaran itu di muka pengadilan, tanpa pembebasan pembuktian kepada si berpiutang tentang ada dan besarnya kerugian yang dideritanya.

Pasal 12

- (1) Si berutang dibebaskan dari pembayaran ganti rugi apabila ia dapat membuktikan bahwa tidak atau terlambat dilaksanakannya perikatan itu disebabkan karena suatu hal yang sama sekali tidak terduga dan tidak dapat dipertanggungjawabkan kepadanya.
- (2) Begitu pula si berutang dibebaskan dari pembayaran ganti kerugian, apabila ia dapat membuktikan bahwa si berpiutang sendiri juga melakukan suatu kelalaian.

Pasal 13

Apabila si berpiutang menolak pemenuhan perikatan yang ditawarkan oleh si berutang, maka segala akibat dari penolakan itu yang merugikan si berutang harus ditanggung oleh si berpiutang.

Pasal 14

- (1) Suatu perikatan untuk memberikan suatu benda tertentu yang sudah tersedia, apabila tidak dipenuhi secara suka rela, dapat dimintakan pelaksanaannya kepada hakim.
- (2) Dalam suatu perikatan untuk berbuat sesuatu yang dengan mudah dapat juga dilakukan oleh orang lain, si berpiutang dapat dikuasakan oleh hakim untuk mengusahakan sendiri pelaksanaannya atas biaya si berutang, dengan tidak mengurangi haknya untuk menuntut ganti rugi.
- (3) Demikian juga dalam suatu perikatan untuk tidak berbuat sesuatu, si berpiutang berhak menuntut penghapusan segala sesuatu yang telah dibuat berlawanan dengan perikatan dan ia dapat pula dikuasakan oleh hakim untuk pembatalan atau menyuruh membatalkan segala sesuatu tersebut atas biaya si berutang, dengan tidak mengurangi haknya untuk menuntut penggantian kerugian.

Pasal 15

- (1) Dalam hal suatu perikatan yang bersumber pada suatu perjanjian yang timbal balik , kelalaian si berutang merupakan alasan bagi si berpiutang untuk menuntut pembatalan perjanjiannya.
- (2) Meskipun dalam perjanjian yang menetapkan bahwa kelalaian si berpiutang akan berakibat batalnya perjanjian

demi hukum, namun pembatalan tersebut tetap harus dimintakan kepada hakim.

- (3) Hakim selalu berwenang untuk menilai berat ringannya kelalaian dan jika itu dianggapnya terlampau ringan dibandingkan dengan besarnya kerugian yang akan menimpa diri si berutang kalau perjanjian dibatalkan, ia dapat menolak tuntutan pembatalan itu. Hakim bahkan berwenang untuk, menurut keadaan dan atas permintaan si berutang, memberikan suatu jangka waktu yang pantas untuk memenuhi kewajibannya.

Si berpiutang selalu dapat memilih, apakah ia, jika masih dapat dilakukan, akan menuntut pemenuhan perjanjian atau minta pembatalannya, yang masing-masing dapat disertai ganti rugi.

Bagian Keempat

Tentang Perikatan Bersyarat

Pasal 16

Suatu perikatan adalah bersyarat, manakala ia digantungkan pada suatu peristiwa yang masih akan datang dan belum tentu akan terjadi, baik dengan cara menangguhkan lahirnya perikatan sampai terjadinya peristiwa termaksud, maupun dengan cara membatalkan perikatan apabila terjadi peristiwa tersebut.

Pasal 17

Semua syarat yang bertujuan melakukan sesuatu yang tidak mungkin dilaksanakan, sesuatu yang bertentangan dengan kesusilaan, ketertiban umum, atau sesuatu yang dilarang oleh undang-undang adalah batal demi hukum.

Pasal 18

- (1) Jika suatu perikatan digantungkan pada syarat bahwa suatu peristiwa akan terjadi didalam suatu waktu tertentu, maka syarat dianggap tidak ada, manakala waktu tersebut telah lewat tanpa terjadinya peristiwa termaksud.
- (2) Jika waktu tidak ditentukan, maka syarat tersebut setiap waktu dapat dipenuhi dan baru dianggap tidak ada kalau sudah ada kepastian, bahwa peristiwa termaksud tidak akan terjadi.

Pasal 19

- (1) Jika suatu perikatan digantungkan pada suatu syarat bahwa suatu peristiwa didalam suatu waktu tertentu tidak akan terjadi, syarat tersebut telah terpenuhi apabila waktu tersebut lampau dengan tidak terjadinya peristiwa itu.
- (2) Syarat telah terpenuhi, jika sebelum waktu tersebut lampau sudah ada kepastian bahwa peristiwa termaksud tidak akan terjadi; tetapi jika tidak ditetapkan suatu waktu, syarat itu dipenuhi setelah ada kepastian bahwa peristiwa termaksud tidak akan terjadi.

Pasal 20

Suatu syarat dianggap telah terpenuhi, jika si berutang yang terikat karenanya telah menghalang-halangi terpenuhinya syarat tersebut.

Pasal 21

- (1) Suatu perikatan dengan suatu syarat tangguh adalah suatu perikatan yang lahirnya digantungkan pada suatu peristiwa yang masih akan datang dan belum akan terjadi, atau yang lahirnya digantungkan pada suatu peristiwa yang sudah terjadi.

- (2) Dalam hal yang pertama, perikatan tidak dapat dilaksanakan sebelum peristiwa telah terjadi, tetapi dalam hal yang kedua perikatan sudah mulai berlaku sejak saat ia dilahirkan.

Pasal 22

- (1) Jika perikatan digantungkan pada suatu syarat menanggguhkan, maka barang yang menjadi pokok perikatan tetap menjadi tanggungan si berutang, yang hanya diwajibkan menyerahkannya apabila syarat telah terpenuhi.

- (2) Jika benda tersebut sama sekali musnah di luar kesalahan si berutang, maka hapuslah perikatan.

- (3) Jika benda merosot harganya di luar kesalahan si berutang, maka si berpiutang boleh memilih apakah ia akan memutuskan perikatan atau menuntut penyerahan bendanya dalam keadaan sebagaimana adanya, dengan tiada pengurangan atas harga yang telah dijanjikan.
Jika benda merosot harganya karena kesalahan si berutang, maka si berpiutang berhak memutuskan perikatan atau menuntut penyerahan bendanya dalam keadaan dimana benda itu berada, dengan penggantian kerugian.

Pasal 23

- (1) Suatu syarat batal adalah suatu syarat yang apabila terpenuhi, menghentikan berlakunya perikatan dan mengembalikan segala sesuatu kembali kepada keadaan semula, seakan-akan perikatan itu tidak pernah ada.
- (2) Si berutang mewajibkan si berpiutang mengembalikan apa yang telah diterimanya dari si berutang, apabila peristiwa yang dimaksudkan terjadi.

Bagian Kelima

Tentang Perikatan dengan Ketentuan Waktu

Pasal 24

Perikatan dengan ketentuan waktu adalah suatu perikatan yang pelaksanaannya ditentukan dengan lamanya suatu waktu.

Pasal 25

Berlainan dengan suatu syarat, yang sifatnya tidak pasti, suatu penentuan waktu adalah mengenai suatu hal yang pasti akan terjadi.

Pasal 26

Suatu ketentuan waktu ada yang menangguhkan pelaksanaan suatu perikatan dan ada yang mengakhiri berlakunya suatu perikatan.

Pasal 27

Apa yang dibayar pada suatu waktu yang ditentukan, tidak dapat ditagih sebelum waktu itu tiba, tetapi apa yang telah dibayar sebelum waktu itu tiba, tidak boleh diminta kembali.

Pasal 28

Si berutang tidak lagi dapat menarik manfaat dari suatu penentuan waktu, jika ia telah dinyatakan pailit atau jika karena kesalahan jaminan yang telah diberikan bagi si berpiutang merosot harganya.

Bagian Keenam

Tentang Perikatan Manasuka atau Boleh Pilih

Pasal 29

Dalam suatu perikatan manasuka, si berutang dibebaskan jika ia menyerahkan salah satu dari dua prestasi atau lebih yang disebutkan dalam perikatan, tetapi ia tidak dapat memaksa si berpiutang untuk menerima sebagian dari barang yang satu dan sebagian dari barang yang lainnya.

Pasal 30

Hak untuk memilih prestasi sebagaimana dimaksud dalam Pasal 29 ada pada si berutang, jika hal itu tidak secara tegas telah diberikan kepada si berpiutang.

Pasal 31

Apabila salah satu dari prestasi-prestasi yang diperjanjikan tidak dapat menjadi pokok perikatan meskipun dibuat secara manasuka, maka perikatan itu menjadi perikatan biasa.

Pasal 32

Suatu perikatan manasuka berubah menjadi perikatan biasa, jika salah satu dari benda yang diperjanjikan hilang atau karena kesalahan si berutang tidak lagi dapat diserahkan . Harga benda yang telah musnah atau tidak dapat diserahkan itu tidak boleh ditawarkan sebagai ganti bendanya. Jika benda-benda tersebut hilang dan si berutang bersalah tentang hilangnya salah satu benda, maka ia harus membayar harga benda yang hilang terakhir.

Pasal 33

- (1) Jika dalam hal-hal yang disebutkan dalam Pasal 32 di atas diserahkan kepada si berpiutang untuk memilih dan hanya salah satu benda yang hilang, maka jika itu terjadi di luar kesalahan si berutang, si berpiutang harus mendapat benda yang masih ada; jika hilangnya salah satu benda itu terjadi karena kesalahan si berutang, maka si berpiutang bebas untuk memilih penyerahan barang yang masih ada atau harga barang yang telah hilang.
- (2) Jika benda-benda yang diperjanjikan musnah, maka si berpiutang dapat menuntut pembayaran harga salah satu dari benda-benda tersebut menurut pilihannya, bila musnahnya benda-benda itu, bahkan musnahnya salah satu benda saja telah terjadi karena kesalahan si berutang.

Bagian Ketujuh
Tentang Perikatan Tanggung-menanggung

Pasal 34

- (1) Perikatan tanggung-menanggung terjadi apabila beberapa orang berutang diwajibkan melakukan suatu prestasi bersama-sama. Salah satu dari mereka itu dapat dituntut untuk memenuhi seluruh perikatan. Pemenuhan oleh salah satu itu membebaskan semua yang berutang lainnya terhadap si berpiutang.
- (2) Si berpiutang dalam suatu perikatan tanggung-menanggung dapat menagih prestasi dari salah seorang yang berutang menurut pilihannya, tanpa adanya kemungkinan bagi orang ini untuk meminta supaya prestasi diperoleh, meskipun prestasi tersebut karenanya sifatnya dapat dipecah-pecah atau dibagi-bagi.

Pasal 35

Tiada perikatan dianggap tanggung-menanggung, kecuali hal itu dinyatakan secara tegas atau ditetapkan dalam suatu peraturan perundang-undangan.

Pasal 36

Dalam hal si berpiutang sudah menagih piutangnya dari salah seorang yang berutang, maka hak si berpiutang tidak hilang untuk menagih dari orang-orang yang berutang lainnya.

Pasal 37

- (1) Jika barang yang harus diserahkan musnah karena kesalahan satu atau beberapa orang yang berutang secara tanggung-menanggung atau setelah orang-orang itu dinyatakan lalai, maka orang yang turut berutang lainnya tidak bebas dari kewajiban untuk membayar harga barang tersebut, hanya mereka tidak diwajibkan membayar ganti rugi.
- (2) Si berpiutang hanya dapat menuntut ganti rugi dari orang-orang yang berutang yang bersalah tentang musnahnya barang atau yang lalai dalam pemenuhan perikatan.

Pasal 38

Penuntutan pembayaran bunga yang dilakukan terhadap salah satu dari orang-orang yang berutang tanggung-renteng, berakibat bahwa bunga itu juga berlaku terhadap semua orang yang berutang lainnya.

Pasal 39

Percampuran utang yang terjadi antara si berpiutang dan salah satu dari orang yang berutang tanggung-renteng, tidak berakibat hapusnya perikatan selain hanya terhadap bagian si berutang yang bersangkutan.

Pasal 40

Si berpiutang yang telah menyetujui pemecahan piutangnya terhadap salah satu orang yang berutang, tetap memiliki piutangnya yang tanggung-renteng terhadap orang yang berutang lainnya, tetapi dikurangi bagian si berutang yang telah dibebaskan dari perikatan tanggung-menanggung itu.

Pasal 41

Pembaharuan utang yang terjadi antara si berpiutang dengan salah seorang yang berutang secara tanggung-menanggung berakibat hapusnya seluruh perikatan tanggung-menanggung.

Pasal 42

Suatu perikatan tanggung-menanggung antara yang berutang terhadap si bepiutang dengan sendirinya dapat dipecah-pecahkan antara orang-orang yang berutang itu, dan mereka masing-masing tidak terikat untuk lebih dari bagian masing-masing.

Pasal 43

- (1) Seorang diantara yang berutang dalam suatu perikatan tanggung menanggung yang telah melunasi seluruh utang tidak dapat menuntut kembali dari orang berutang yang lainnya lebih dari jumlah bagian meraka masing-masing.
- (2) Jika salah seorang dari mereka tidak mampu untuk membayar, maka kerugian yang disebabkan karena itu harus dipikul bersama-sama oleh orang berutang lainnya dan si berutang yang telah melunasi utang tersebut, menurut perimbangannya bagian masing-masing.

Pasal 44

Jika si berpiutang telah membebaskan salah seorang yang berutang dari perikatan tanggung-menanggung, sedangkan satu atau beberapa orang berutang lainnya jatuh dalam keadaan tidak mampu, maka bagian orang-orang tidak mampu ini harus dipikul

bersama-sama oleh orang berutang lainnya menurut perimbangan bagian masing-masing, termasuk mereka yang belum itu dibebaskan dari perikatan tanggung-menanggung.

Pasal 45

Apabila pokok perikatan tanggung-menanggung itu hanya mengenai salah satu diantara para yang berutang, maka mereka masing-masing dapat tanggung-menanggung terhadap si berutang tetapi diantara yang berutang sendiri masing-masing hanya dianggap sebagai penanggung utang.

Bagian Kedelapan

Tentang Perikatan yang Dapat Dipecah-pecah Dan yang Tidak Dapat Dipecah-pecah.

Pasal 46

- (1) Suatu perikatan yang dapat dipecah-pecah adalah suatu perikatan yang penyerahan barangnya atau pelaksanaan prestasi dapat dipecah-pecah, baik secara nyata maupun secara perhitungan.
- (2) Suatu perikatan yang tidak dapat dipecah-pecah adalah suatu perikatan yang penyerahan benddannya atau pelaksanaan prestasi tidak dapat dipecah-pecah, baik secara nyata maupun secara perhitungan.

Pasal 47

Suatu perikatan tidak dapat dipecah-pecah, jika barang atau pembuatan itu menurut maksudnya perikatan tidak boleh diserahkan atau dilaksanakan sebagian demi sebagian meskipun

barang atau perbuatan yang dimasudkan karena sifatnya dapat dipecah-pecah.

Pasal 48

Diantara si berutang dan si berpiutang, suatu perikatan yang dapat dipecah-pecah harus dilaksanakan seakan - akan perikatan itu tidak dapat dipecah-pecah; hal dapat dipecah-pecahnya perikatan itu hanya berlaku terhadap para ahli waris kedua belah pihak, yang tidak boleh menagih piutangnya atau tidak diwajibkan membayar utangnya selain untuk bagian masing-masing sebagai ahli waris si berpiutang maupun si berutang.

Pasal 49

(1) Asas yang ditetapkan dalam pasal yang lalu dikecualikan terhadap para ahli waris si berutang :

1. dalam hal utang itu suatu utang dengan jaminan hipotik.
2. manakala yang terutang adalah suatu barang yang telah ditentukan.
3. terhadap suatu utang dimana si berpiutang boleh memiliki antara berbagai benda, sedang salah satu adalah benda yang tidak dapat dipecah-pecah.
4. jika menurut perjanjian hanya salah satu ahli waris saja yang diwajibkan melaksanakan perikatannya.
5. jika baik karena sifat perikatan maupun sifat benda yang menjadi pokok perikatan, atau dari maksud yang

terkandung dalam perjanjian tersebut, ternyata dengan jelas bahwa utang itu tidak akan dapat diangsur.

- (2) Dalam ketiga hal yang pertama, ahli waris yang menguasai benda yang harus diserahkan atau benda yang dijadikan jaminan hipotik, dapat dituntut untuk membayar seluruh utang, yang dapat dilaksanakan atas benda yang harus diserahkan atau atas benda yang dijadikan jaminan hipotik tersebut, dengan tidak mengurangi haknya untuk penggantian kepada para ahli waris lainnya.
- (3) Dalam hal yang keempat, ahli waris yang diwajibkan melunasi utang seorang saja, dalam hal kelima setiap ahli waris dapat dituntut untuk membayar seluruh utang, dengan tidak mengurangi hak mereka untuk meminta penggantian kepada para ahli waris lainnya.

Pasal 50

- (1) Tiap orang dari mereka yang bersama-sama memikul suatu utang yang tidak dapat dipecah-pecah, dapat dituntut untuk membayar seluruh utang itu, meskipun perikatannya tidak dibuat secara tanggung-menanggung.
- (2) Hal yang sama berlaku bagi para ahli warisnya.

Pasal 51

- (1) Tiap ahli waris si berpiutang dapat menuntut pelaksanaan suatu perikatan yang tidak dapat dipecah-pecah, untuk seluruhnya.

- (2) Tiada seorang ahli waris pun dibolehkan memberikan pembebasan seluruh utang maupun menerima harga benda sebagai ganti bendanya yang terutang.
- (3) Jika hanya salah satu ahli waris memberikan pembebasan utangnya atau menerima harga benda yang terutang, maka para ahli waris lainnya tidak dibolehkan menuntut penyerahan benda yang tidak dapat dipecah-pecahkan itu, kecuali dengan memperhitungkan bagian ahli waris yang telah memberikan pembebasan utang atau menerima harga benda.

Bagian Kesembilan

Tentang Perikatan dengan Ancaman Hukuman

Pasal 52

Suatu ketentuan hukuman adalah suatu ketentuan sedemikian rupa dengan mana seorang untuk jaminan pelaksanaan suatu perikatan, diwajibkan melakukan sesuatu, manakala perikatan itu tidak dipenuhi.

Pasal 53

Batalnya perikatan pokok berakibat batalnya ketentuan hukuman, tetapi batalnya ketentuan hukuman tidak sekali-kali berakibat batalnya perikatan pokok.

Pasal 54

Daripada menurut hukuman terhadap si berutang yang tidak memenuhi janji, si berpiutang boleh menuntut dipenuhinya perikatan pokok.

Pasal 55

- (1) Hukuman yang telah ditetapkan dimaksudkan sebagai penggantian kerugian yang diderita oleh si berpiutang karena tidak dipenuhinya perikatan pokok.
- (2) Si berpiutang tidak boleh bersama-sama menuntut dipenuhinya perikatan pokok dan menuntut hukumannya, kecuali apabila hukuman ini ditetapkan semata-mata untuk terlambatnya pemenuhan perikatan.

Pasal 56

Baik perikatan pokok memuat maupun tidak memuat sesuatu penentuan waktu untuk melaksanakan perikatan, hukuman tidak dikenakan kecuali apabila orang yang terikat untuk menyerahkan sesuatu atau berbuat sesuatu lalai.

Pasal 57

Hukuman dapat diubah oleh hakim, jika perikatan pokok untuk sebagian telah dipenuhi oleh si berutang.

BAB III

Bagian Kesatu

Tentang Berakhirnya Perikatan

Pasal 58

Perikatan dapat berakhir karena :

- Pembayaran;
- Penawaran pembayaran tunai diikuti dengan penyimpanan atau penitipan;
- Pembaharuan utang;
- Perjumpaan utang atau kompensasi;
- Percampuran utang;
- Musnahnya barang yang terutang;
- Kadaluwarsa;
- Berakhirnya suatu syarat yang telah ditentukan dalam perjanjian itu sendiri.

Bagian Kedua Tentang Pembayaran

Pasal 59

Suatu perikatan dapat dipenuhi oleh setiap orang yang berkepentingan seperti orang yang turut berutang atau penanggung, dan dapat dipenuhi juga oleh pihak ketiga yang tidak berkepentingan, asal ia bertindak atas nama dan untuk melunasi utang si berpiutang, atau apabila ia bertindak atas namanya sendiri asal ia tidak menggantikan hak-hak si berpiutang.

Pasal 60

Suatu perikatan untuk berbuat sesuatu tidak dapat dipenuhi oleh pihak ketiga bertentangan dengan kemauan si berpiutang.

Pasal 61

Orang yang membayar haruslah pemilik mutlak benda yang dibayarkan dan berhak memindahkan benda itu agar pembayaran yang dilakukan itu sah. Meskipun demikian, pembayaran suatu jumlah uang atau benda lain yang dapat habis, tidak dapat diminta kembali dari seorang yang dengan itikad baik telah menghabiskan benda yang telah dibayarkan itu, sekalipun pembayaran itu telah dilakukan oleh orang yang bukan pemilik atau orang yang tidak cakap memindah-tangankan barang tersebut.

Pasal 62

Pembayaran harus dilakukan kepada si berpiutang atau kepada seorang yang dikuasakan olehnya atau kepada seorang yang dikuasakan oleh hakim atau oleh undang-undang untuk menerima pembayaran dari si berutang. Pembayaran yang dilakukan kepada seorang yang tidak berwenang untuk menerima bagi si berutang adalah sah apabila si berpiutang telah menyetujuinya.

Pasal 63

Pembayaran yang dilakukan dengan itikad baik kepada seorang yang memegang surat piutangnya adalah sah.

Pasal 64

Pembayaran yang dilakukan kepada si berpiutang yang tidak cakap, untuk menerimanya adalah tidak sah, kecuali yang berutang membuktikan bahwa yang berkepentingan itu sungguh-sungguh mendapat manfaat dari pembayaran itu.

Pasal 65

Si berpiutang tidak dapat dipaksa menerima pembayaran benda lain daripada benda yang terutang, meskipun benda yang ditawarkan itu sejenis, bahkan harganya lebih tinggi.

Pasal 66

Si berutang tidak dapat memaksa si berpiutang menerima pembayaran utangnya sebagian demi sebagian meskipun utang itu dapat dibagi-bagi, kecuali apabila diperjanjikan terlebih dahulu.

Pasal 67

Si berutang benda tertentu dibebaskan apabila ia menyerahkan benda tersebut dalam keadaan yang sama dengan waktu benda itu diterimanya asal kekurangan-kekurangan yang mungkin terdapat pada benda tersebut tidak disebabkan karena kesalahan atau kelalaiannya maupun karena kesalahan atau kelalaian orang-orang yang menjadi tanggungannya.

Pasal 68

Pembayaran harus dilakukan di tempat yang ditetapkan dalam perjanjian. Jika dalam perjanjian tidak ditetapkan suatu tempat, maka pembayaran benda tertentu harus dibayarkan di tempat benda itu berada sewaktu perjanjian dibuat, sedangkan uang dan benda-benda lain yang terutang dibayarkan di tempat tinggal si berpiutang.

Pasal 69

Mengenai pembayaran sewa, tunjangan ganti kerugian dan segala apa yang harus dibayarkan tiap tahun atau tiap waktu tertentu yang lebih pendek, maka dengan adanya tiga surat tanda

pembayaran yang merupakan pembuktian pembayaran tiga angsuran berturut-turu, terbitlah suatu persangkaan bahwa angsuran-angsuran yang terlebih dahulu telah dibayar lunas, kecuali kalau dibuktikan sebaliknya.

Pasal 70

Biaya yang harus dikeluarkan untuk melakukan pembayaran , harus dipikul oleh si berutang.

Pasal 71

Seorang yang mempunyai berbagai utang berhak pada waktu melakukan pembayaran untuk menyatakan utang yang mana hendak dibayarkan.

Pasal 72

- (1) Jika seorang mempunyai berbagai utang kepada seseorang, maka suatu pembayaran tanpa menyebutkan untuk utang mana itu dilakukan, harus dianggap untuk melunasi salah satu utang yang dapat ditagih.
- (2) Jika tidak semua utang dapat ditagih, pembayaran harus dianggap untuk melunasi utang yang sudah dapat ditagih, meskipun utang yang terdahulu itu kurang memberatkan daripada utang-utang yang lain.

Pasal 73

Dalam hal utang-utang itu sama sifatnya, pembayaran harus dianggap dilakukan untuk utang yang paling tua.

Jika utang-utang itu dalam segala hal sama, maka pembayaran harus dianggap dilakukan untuk semuanya menurut imbalan jumlah masing-masing.

Pasal 74

Subrogasi atau pergantian hak-hak si berutang oleh pihak ketiga yang membayar kepada si berpiutang terjadi baik dengan perjanjian atau undang-undang.

Pasal 75

Penggantian terjadi dengan perjanjian apabila si berpiutang dengan menerima pembayaran dari pihak ketiga itu pada waktu pembayaran dengan tegas menetapkan bahwa orang itu akan menggantikan semua hak si berpiutang terhadap si berutang.

Dalam hal seperti tersebut dalam ayat yang lalu, si berpiutang diwajibkan menyerahkan semua bukti yang dimilikinya untuk menguatkan hak-hak tersebut kepada pihak yang melakukan pembayaran itu.

Pasal 76

Dengan tidak mengurangi apa yang ditetapkan dalam peraturan perundang-undangan lain, penggantian terjadi berdasarkan undang-undang.

- (1) Untuk seorang yang melunasi suatu utang kepada seorang yang berpiutang lainnya, yang berdasarkan hak-hak istimewanya atau hipotik mempunyai suatu hak yang lebih tinggi; sedangkan ia sendiri orang yang berpiutang.

- (2) Untuk seorang pembeli suatu benda tidak bergerak, yang memakai uang harga benda tersebut untuk melunasi orang-orang yang berpiutang kepada siapa benda itu telah diikatkan dalam hipotik.
- (3) Untuk seorang yang bersama-sama dengan orang lain atau untuk orang lain yang diwajibkan membayar suatu utang dan berkepentingan melunasi utang tersebut.
- (4) Untuk seorang hali waris yang membayar utang-utang warisan dengan uangnya sendiri, sedangkan ia menerima suatu warisan dengan hak istimewa untuk mengadakan pencatatan tentang keadaan harta peninggalannya.

Pasal 77

Subrogasi yang ditetapkan dalam pasal-pasal yang lalu, terjadi baik terhadap orang-orang yang berutang maupun terhadap para penanggung utang mereka.

Subrogasi tersebut tidak dapat mengurangi hak-hak si berpiutang jika mereka hanya membayar sebagian. Dalam hal yang demikian, mengenai kekurangannya ia dapat melaksanakan hak-haknya secara didahului terhadap si berutang yang hanya membayar sebagian kepadanya.

Bagian Ketiga

Tentang Penawaran Pembayaran Tunai diikuti dengan Penitipan.

Pasal 78

- (1) Jika si berpiutang menolak pembayaran, maka si berutang dapat melakukan penawaran pembayaran tunai utangnya,

dan kalau si berpiutang menolaknya, menitipkan uang atau benda yang terutang kepada pengadilan.

- (2) Penawaran yang seperti itu yang diikuti dengan penitipan membebaskan si berutang dan baginya berlaku sebagai pembayaran, asal penawaran itu telah dilakukan menurut undang-undang.
- (3) Apa yang dititipkan menurut cara tersebut dalam ayat 1 dan 2 menjadi tanggungan si berpiutang.

Pasal 79

Supaya penawaran itu sah, disyaratkan :

- (1) dilakukan kepada si berpiutang atau orang yang berhak menerimanya.
- (2) diajukan oleh orang yang berhak membayarnya.
- (3) penawaran itu mengenai semua uang pokok dan bunga yang dapat ditagih.
- (4) jika ada suatu ketetapan waktu yang telah dibuat untuk kepentingan si berpiutang waktu itu telah tiba.
- (5) syarat perjanjian utang telah terpenuhi.
- (6) penawaran dilakukan di tempat yang disebutkan dalam perjanjian, dan jika tempat itu tidak disebutkan, kepada si berpiutang sendiri di tempat tinggal yang sesungguhnya atau di tempat tinggal yang telah dipilihnya.
- (7) penawaran dilakukan oleh seorang notaris atau juru sita disertai dua orang saksi.

Pasal 80

Untuk sahnya penitipan tidak diperlukan izin hakim, asal :

- (1) didahului oleh pemberitahuan kepada si berpiutang tentang hari, jam dan tempat benda yang ditawarkan akan disimpan.
- (2) si berutang telah melepaskan benda yang ditawarkan dan menitipkan kepada panitera dari pengadilan yang berwenang mengadilinya jika timbul sengketa, disertai bunga sampai pada hari penitipan.
- (3) oleh notaris atau juru sita yang disertai dua orang saksi dibuat berita acara yang menerangkan ujud mata uang yang ditawarkan dengan tentang penolakan si berpiutang atau bahwa si berpiutang tidak datang untuk menerima dan tentang dilakukan penitipan.
- (4) Jika si berpiutang tidak datang untuk menerima benda yang ditawarkan, berita acara penitipan itu diberitahukan kepadanya dengan peringatan untuk mengambil apa yang dititipkan.

Pasal 81

Biaya yang dikeluarkan untuk melakukan penawaran, pembayaran dan penitipan, jika perbuatan-perbuatan itu telah dilakukan menurut ketentuan undang-undang harus dipikul oleh si berpiutang.

Pasal 82

Selama apa yang dititipkan tidak diambil oleh si berpiutang, si berutang dapat mengambilnya kembali; jika terjadi yang demikian orang-orang yang turut berutang dan para penanggung utang tidak dibebaskan.

Pasal 83

Apabila si berutang sendiri telah memperoleh putusan hakim yang memperoleh kekuatan hukum yang tetap, yang menyatakan sah penawaran pembayaran yang dilakukan, ia tidak dapat lagi mengambil kembali apa yang dititipkan untuk kerugian kawan-kawan berutangnya dan penanggung utang, biarpun dengan izin si berutang.

Pasal 84

Orang yang turut berutang dan para penanggung utang itu dibebaskan juga, jika si berpiutang semenjak hari diberitahukannya penitipan, telah melewatkhan waktu satu tahun tanpa menyangkal sahnya penitipan itu.

Pasal 85

Si berpiutang yang telah mengizinkan benda yang dititipkan itu diambil kembali oleh si berutang setelah penitipan dikuatkan dengan putusan hakim yang telah memperoleh kekuatan hukum yang tetap tidak dapat lagi menggunakan sesuatu hak istimewa atau hipotik yang melekat pada piutang tersebut, untuk mendapat pembayaran piutangnya.

Pasal 86

Jika yang harus dibayar itu sesuatu benda yang harus diserahkan di tempat benda itu berada, maka si berutang harus memperingatkan si berpiutang dengan perantaraan pengadilan supaya mengambilnya. Jika setelah dilakukan peringatan si berpiutang tidak mengambilnya,

maka si berutang dapat diizinkan oleh hakim untuk menitipkan benda itu di tempat lain.

Bagian Keempat
Tentang Pembaharuan Utang

Pasal 87

Pembaharuan utang terjadi apabila :

- (1) Yang berutang membuat suatu perjanjian utang baru untuk si berpiutang sebagai ganti utang lama yang hapus karenanya;
- (2) Ditunjuk orang lain yang berutang untuk menggantikan si berutang yang lama dibebaskan oleh si berpiutang dari perikatannya;
- (3) Ditunjuk orang lain yang berutang untuk menggantikan si berutang yang lama sebagai akibat perjanjian baru.

Pasal 88

Kehendak untuk mengadakan pembaharuan utang harus ternyata dengan tegas dari perbuatannya.

Pasal 89

Pembaharuan utang dengan menunjuk orang lain yang berutang untuk menggantikan si berutang yang lama dapat dilaksanakan tanpa bantuan si berutang yang lama.

Pasal 90

Hak-hak istimewa yang melekat pada piutang lama tidak pindah pada piutang baru yang menggantikannya.

Bagian Kelima

Tentang Perjumpaan Utang atau Kompensasi

Pasal 91

Jika dua orang mempunyai utang secara timbal balik, maka terjadi perjumpaan utang yang menghapuskan utang-utang itu satu sama lain untuk jumlah yang sama.

Pasal 92

Perjumpaan itu terjadi apabila salah satu pihak mengatakan kehendaknya untuk menjumpakan utangnya dengan piutangnya terhadap pihak lain.

Pasal 93

Perjumpaan hanya terjadi antara dua utang yang kedua-duanya berupa sejumlah uang atau benda yang sejenis yang dapat dihabiskan dan jumlahnya pasti atau dapat ditetapkan serta dapat ditagih seketika.

Pasal 94

Suatu penundaan pembayaran yang diberikan kepada seseorang tidak menghalangi suatu perjumpaan utang.

Pasal 95

Perjumpaan utang terjadi tanpa membeda-bedakan dari sumber mana utang-piutang antara kedua belah pihak itu dilahirkan, kecuali :

- (1) apabila dituntut pengembalian suatu barang yang ditetapkan atau dipinjamkan;
- (2) terhadap suatu benda yang bersumber kepada kewajiban memberikan suatu tunjangan nafkah;
- (3) terhadap suatu utang yang bersumber pada suatu perbuatan melawan hukum.

Pasal 96

- (1) Seorang penanggung utang boleh menjumpakan apa yang wajib dibayar oleh si berpiutang kepada si berutang, tetapi yang berutang tidak boleh menjumpakan apa yang wajib dibayar oleh si berpiutang kepada penanggung utang.
- (2) Si berutang dalam suatu perjanjian tanggung-menanggung tidak diperbolehkan menjumpakan apa yang wajib dibayar oleh si berpiutang kepada salah seorang kawan yang berutang.

Bagian Keenam Tentang Percampuran Utang

Pasal 97

Percampuran utang terjadi demi hukum dan menghapuskan utang apabila kedudukan si berpiutang dengan orang yang berutang menjadi satu, dipegang oleh satu orang.

Pasal 98

- (1) Percampuran utang yang terjadi pada yang berutang berlaku juga bagi keuntungan para penanggung utangnya.
- (2) Percampuran utang yang terjadi pada penanggung utang tidak mengakibatkan hapusnya utang pokok.
- (3) Percampuran utang yang terjadi pada salah satu dari mereka berutang secara tanggung-menanggung tidak membawa keuntungan bagi kawan-kawannya berutang, selain hanya untuk bagian utang yang telah dipikulnya.

Bagian Ketujuh Tentang Pembebasan Utang

Pasal 99

- (1) Apabila si berpiutang menyatakan kehendaknya untuk membebaskan yang berutang dari semua kewajiban, maka hapuslah perikatannya.
- (2) Pembebasan suatu utang harus dibuktikan dan tidak boleh hanya dipersangkakan.

Pasal 100

Pengembalian tanda bukti utang asli secara sukarela oleh si berpiutang kepada yang berutang merupakan suatu bukti tentang

pembebasan utangnya, bahkan juga terhadap orang-orang lain yang turut berutang secara tanggung-menanggung.

Pasal 101

Pembebasan utang untuk kepentingan salah satu dari beberapa orang yang berutang secara tanggung-menanggung, membebaskan semua orang lainnya yang berutang, kecuali jika si berpiutang dengan tegas menyatakan hendak mempertahankan hak-haknya terhadap orang-orang tersebut terakhir ini, dalam hal mana ia tidak dapat menagih hutangnya selain setelah dikurangi dengan bagian orang yang telah dibebaskan.

Pasal 102

Pengembalian barang yang telah diberikan sebagai gadai tidak cukup untuk dijadikan bukti tentang pembebasan utangnya.

Pasal 103

- (1) Pembebasan utang yang diberikan kepada yang berutang membebaskan para penanggung utang.
- (2) Pembebasan utang yang diberikan kepada penanggung utang tidak membebaskan yang berutang.
- (3) Pembebasan utang yang diberikan kepada salah seorang penanggung utang tidak membebaskan para penanggung lainnya.

Bagian Kedelapan

Tentang Musnahnya Barang yang Terutang

Pasal 104

- (1) Jika barang yang menjadi pokok suatu perjanjian musnah, maka hapuslah perikatannya, asal musnahnya barang itu diluar kesalahan yang berutang dan terjadi sebelum ia dinyatakan lalai menyerahkannya.
- (2) Bahkan meskipun yang berutang telah lalai menyerahkan barangnya, sedangkan ia tidak menanggung terhadap kejadian-kejadian yang tidak terduga, perikatan itu hapus juga jika barang itu akan musnah dengan cara yang sama ditangan yang berutang seandainya sudah diserahkan kepadanya.

Pasal 105

Jika benda yang terutang musnah diluar kesalahan yang berutang, maka yang berutang diwajibkan menyerahkan hak atau tuntutan itu kepada si berpiutang, jika ia mempunyai sesuatu hak atau tuntutan ganti rugi mengenai barang tersebut.

BAB IV TENTANG PERJANJIAN

Pasal 106

Suatu perjanjian adalah suatu perbuatan hukum dengan mana satu orang atau lebih mengikatkan dirinya terhadap satu orang lain atau lebih.

Pasal 107

Suatu perjanjian dapat dibuat atas beban atau dengan cuma-cuma. Suatu perjanjian dengan cuma-cuma adalah suatu perjanjian dengan mana pihak yang satu memberikan suatu keuntungan kepada pihak lain, tanpa menerima suatu manfaat bagi dirinya sendiri.

Suatu perjanjian atas beban adalah suatu perjanjian yang mewajibkan masing-masing pihak memberikan sesuatu, berbuat sesuatu atau tidak berbuat sesuatu.

Pasal 108

Pada umumnya suatu janji hanya dapat dibuat untuk dirinya sendiri.

Pasal 109

Jika suatu janji dibuat untuk keuntungan pihak ketiga, maka pihak ketiga hanya memperoleh hak yang dijanjikan apabila yang bersangkutan menyatakan kehendaknya untuk itu.

Pasal 110

Perjanjian berlaku selain untuk pihak yang mengikatkan diri, juga untuk para ahli warisnya dan orang-orang yang mendapatkan hak dari padanya.

Pasal 111

Syarat-syarat sah perjanjian adalah :

1. Kesepakatan mereka yang mengikatkan diri berdasarkan kebebasan dengan memperhatikan asas keseimbangan.

2. Para pihak cakap membuat perjanjian.
3. Hal yang diperjanjikan jelas dan tertentu.
4. Isi perjanjian tidak bertentangan dengan undang-undang kesusilaan, kepatutan, ketertiban umum, dan kewajiban.

Pasal 112

Kesepakatan cacat jika terjadi dengan kepaksaan, kekilafan atau penipuan. Dalam hal ini pihak yang rugikan dapat mengajukan pembatalan perjanjian.

Pasal 113

Orang-orang yang belum dewasa dan mereka yang berada di bawah pengampuan tidak cakap untuk membuat perjanjian dan harus diwakili oleh orang tua, wali atau pengampu mereka.

Pasal 114

Mereka yang tidak cakap dapat menuntut pembatalan perjanjian yang diperbuatnya, kecuali undang-undang menyatakan lain.

Pasal 115

Yang dapat menjadi pokok perjanjian adalah benda yang dapat diperdagangkan, benda yang sekarang ada dan kemudian hari akan ada.

Pasal 116

Perjanjian yang tidak mempunyai hal tertentu dan isi yang bertentangan dengan hukum, kepastasan, kepatutan dan ketertiban umum.

Pasal 117

- (1) Semua perjanjian yang dibuat secara sah berlaku sebagai undang-undang bagi mereka yang membuatnya.
- (2) Perjanjian tidak dapat ditarik kembali, selain dengan sepakat mereka yang mengikatkan diri atau karena alasan yang diperbolehkan undang-undang.
- (3) Perjanjian harus dilaksanakan dengan itikad baik.
- (4) Dalam hal timbul suatu perubahan keadaan yang mendasar yang sifatnya begitu rupa sehingga secara fundamental mempengaruhi hubungan antara para pihak, maka barulah perjanjian semacam itu dapat dinyatakan gugur oleh hakim atau dapat memberikan hak kepada salah satu pihak untuk merundingkan kembali persetujuan mereka.

Pasal 118

Pada umumnya suatu perjanjian tidak terikat pada bentuk tertentu, kecuali undang-undang menyatakan lain.

BAB V
PENGURUSAN KEPENTINGAN ORANG LAIN SECARA SUKARELA

Pasal 119

- (1) Apabila seseorang secara sukarela, tanpa mendapat kuasa telah mengurus kepentingan orang lain, dengan atau tanpa pengetahuan orang yang bersangkutan, maka ia diwajibkan meneruskan dan menyelesaikan pengurusan itu sampai orang yang berhak itu dapat mengurus sendiri kepentingannya tersebut.
- (2) Segala kewajiban yang timbul dari akibat pengurusan tersebut dipikul olehnya, sebagaimana halnya jika ia telah mendapat kuasa secara tegas untuk mengurus kepentingan itu.

Pasal 120

Apabila orang yang diurus kepentingannya meninggal sebelum pengurusan itu diselesaikan, maka orang yang melakukan pengurusan secara sukarela wajib meneruskan pengurusannya sampai para ahli warisnya dapat mengambil alih pengurusan tersebut.

Pasal 121

Pengurusan tersebut harus dilakukan dengan itikad baik dan minat yang sama seperti mengurus kepentingannya sendiri.

Pasal 122

- (1) Apabila orang yang melakukan pengurusan itu diwajibkan mengganti kerugian yang ditimbulkan karena kesalahan atau kelalaian dalam melakukan pengurusan tersebut, atas permintaannya dapat diberikan kepadanya keringanan oleh hakim yang berwenang.
- (2) Apabila kerugian timbul diluar kesalahan pihak yang mengurus, maka ia tidak dapat dituntut ganti rugi.

Pasal 123

Setiap orang yang diurus kepentingannya dengan baik oleh orang lain secara sukarela tanpa kuasa wajib memenuhi semua perikatan yang dibuat atas namanya, mengganti kerugian atas dasar segala perikatan yang dibuat dan pengeluaran yang telah dikeluarkan oleh orang lain sepanjang dilakukan dengan itikad baik.

Pasal 124

Orang yang mengurus kepentingan orang lain secara sukarela tanpa kuasa tidak berhak menuntut upah.

BAB VI TENTANG PEMBAYARAN TIDAK WAJIB

Pasal 125

- (1) Tiap pembayaran memperkirakan adanya suatu utang.
- (2) Segala apa yang telah dibayarkan secara tidak diwajibkan, dapat dituntut kembali.

- (3) Namun demikian, segala pembayaran yang dimaksudkan untuk memenuhi suatu kewajiban moril, tidak dapat dituntut kembali.

Pasal 126

Barang siapa secara khilaf atau secara sadar telah menerima sesuatu yang tidak wajib dibayarkan kepadanya, diwajibkan mengembalikan apa yang tidak wajib dibayarkan itu kepada dari siapa ia telah menerimanya.

Pasal 127

- (1) Jika seorang yang secara khilaf mengira bahwa ia berutang, membayar utang, maka ia berhak menuntut kembali dari si berpiutang apa yang telah dibayarkannya itu.
- (2) Namun demikian hak itu hilang, jika si berpiutang, sebagai akibat pembayaran tersebut, telah memusnahkan surat pengakuan berutangnya, dengan tidak mengurangi hak orang yang telah membayar itu untuk menuntutnya kembali dari orang yang sungguh-sungguh berutang.

Pasal 128

- (1) Siapa yang dengan itikad buruk telah menerima suatu yang tidak wajib dibayarkan kepadanya, diwajibkan mengembalikannya dengan segala bunga dan hasil, terhitung sejak diterimanya pembayaran itu, dengan tidak mengurangi kewajiban mengganti kerugian jika barang yang diterimanya itu merosot harganya.

- (2) Jika barangnya musnah meskipun itu terjadi diluar kesalahannya, ia diwajibkan membayar harganya, dengan disertai penggatian kerugian, kecuali ia dapat membuktikan bahwa benda itu akan musnah juga, seandainya benda tersebut berada ditangan orang kepada siapa ia seharusnya dikembalikan.

Pasal 129

- (1) Siapa yang dengan itikad baik telah menjual sesuatu yang diterimanya sebagai pembayaran yang tidak diwajibkan, cukup memberikan kembali harganya.
- (2) Jika ia dengan itikad baik telah memberikan dengan cuma-cuma dengan orang lain, maka ia tidak usah mengembalikan sesuai apa.

Pasal 130

- (1) Orang yang menerima kembali benda tersebut diwajibkan mengganti segala pengeluaran yang perlu, yang telah diperlukan untuk menyelamatkan benda tersebut, bahkan juga kepada orang yang dengan itikad buruk telah memiliki benda itu.
- (2) Orang yang menguasai bendanya, berhak mempertahankannya dalam kekuasaannya sekian lama hingga pengeluaran-pengeluaran tersebut telah diganti.

BAB VII

PERBUATAN MELANGGAR HUKUM

Pasal 131

- (1) Perbuatan melawan hukum adalah tiap pelanggaran hak orang lain dan perbuatan dan kelalaian yang bertentangan dengan kewajiban menurut undang-undang atau dengan suatu kepututan yang harus diindahkan dalam pergaulan masyarakat menurut hukum tidak tertulis, kecuali jika ada dasar yang membenarkan.
- (2) Barang siapa melakukan suatu perbuatan melawan hukum yang dapat dipertanggungjawabkan, diwajibkan memberi ganti rugi kepada pihak yang menderita akibat perbuatannya.
- (3) Pelakunya dapat dipertanggungjawabkan atas sesuatu perbuatan melawan hukum apabila hal itu adalah karena kesalahannya atau karena sesuatu sebab yang menurut undang-undang atau menurut pendapat yang berlaku dalam masyarakat adalah merupakan tanggung jawabnya.

Pasal 132

Apabila suatu perbuatan melanggar hukum juga merupakan suatu tindak pidana, maka diadakannya suatu tuntutan pidana terhadap si pelaku tidak sekali-kali menghilangkan hak bagi pihak yang dirugikan untuk mengajukan tuntutan perdatanya untuk memperoleh ganti rugi yang dideritanya.

Pasal 133

Jika beberapa orang bersama-sama melakukan perbuatan melawan hukum, maka mereka bertanggung jawab secara tanggung menanggung terhadap akibat perbuatan itu.

Pasal 134

Seorang tidak hanya bertanggung jawab untuk kerugian yang disebabkan karena perbuatannya sendiri, tetapi juga untuk kerugian yang disebabkan karena perbuatan orang yang menjadi tanggugannya, atau disebabkan oleh benda yang dimiliki atau yang berada di bawah pengawasannya, atau disebabkan oleh hewan yang dimiliki atau yang dipeliharanya. Tangguung jawab itu berakhir jika ia membuktikan bahwa ia tidak dapat mencegah perbuatan yang menjadi tanggungjawabnya itu.

Pasal 135

Dalam meninggalnya seorang karena suatu pembunuhan dengan sengaja atau akibat kesalahan orang lain, maka suami atau istri yang ditinggalkan, anak atau orang tua si korban, yang lazimnya mendapat nafkah dari si korban berhak menuntut ganti rugi.

Pasal 136

Menyebabkan luka atau cacatnya sesuatu anggota badan memberikan hak kepada si korban untuk, selain menuntut penggantian biaya penyembuhan, juga menuntut ganti rugi yang disebabkan oleh luka atau cacat tersebut.

Pasal 137

Tuntutan perdata tentang penghinaan adalah untuk mendapat gati rugi serta pemulihan kehormatan dan nama baik bagi pihak yang merasa dihina.

Pasal 138

Suami atau istri dan keluarga sedarah dalam garis lurus dari seseorang yang meninggal dunia dapat menuntut ganti rugi menurut kepututan atau atas kerugian yang bukan kerugian harta, apabila orang yang meninggal dunia itu, sewaktu ia masih hidup, dinodai pribadinya karena pelanggaran atas kehormatan dan nama baiknya atau hal yang semacam itu.

BAB VIII**KETENTUAN PERALIHAN****Pasal 139**

Dengan berlakuknya undang-undang ini maka semua peraturan pelaksaan yang berlaku berdasarkan Hukum Perikatan Buku Ketiga BW dinyatakan tetap berlaku sepanjang tidak bertentangan atau belum diganti dengan yang baru berdasarkan undang-undang ini.

BAB IX**KETENTUAN PENUTUP****Pasal 140**

- (1) Undang-undang ini mulai berlaku pada tanggal diundangkan
- (2) Dengan berlakunya undang-undang ini maka Hukum Perikatan Buku Ketiga Titel 1-4 Stb. 1847 No. 23 dinyatakan tidak berlaku lagi.

Agar supaya setiap orang mengetahuinya, memerintahkan mengundangkan Undang-undang ini dengan penempatannya dalam Lembaran Negara Republik Indonesia.

Disahkan di Jakarta

Pada tanggal.....

Annex III

The UNIDROIT Principles of International Commercial Contracts.

Annex III**THE UNIDROIT PRINCIPLES OF INTERNATIONAL
COMMERCIAL CONTRACTS *****PREAMBLE**

(Purpose of the Principles)

These Principles set forth general rules for international commercial contracts.

They shall be applied when the parties have agreed that their contract be governed by them.

They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.

They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law.

They may be used to interpret or supplement international uniform law instruments.

They may serve as a model for national and international legislators.

CHAPTER 1 - GENERAL PROVISIONS**ARTICLE 1.1**

(Freedom of contract)

* From Michael Joachim Bonell : An International Restatement of Contract Law, 2nd ed, Transnational Publishers, Inc. New York, 1997, pp 217-292.

The parties are free to enter into a contract and to determine its content.

ARTICLE 1.2

(No form required)

Nothing in these principles requires a contract to be concluded in or evidenced by writing. It may be proved by any means, including witnesses.

ARTICLE 1.3

(Binding character of contract)

A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles.

ARTICLE 1.4

(Mandatory rules)

Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law.

ARTICLE 1.5

(Exclusion or modification by the parties)

The parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles.

ARTICLE 1.6

(Interpretation and supplementation of the Principles)

(1) In the interpretation of these principles, regard is to be had to their international character and to their purposes including the need to promote uniformity in their application.

(2) Issues within the scope of these Principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying general principles.

ARTICLE 1.7

(Good faith and fair dealing)

(1) Each party must act in accordance with good faith and fair dealing in international trade.

(2) The parties may not exclude or limit this duty.

ARTICLE 1.8

(Usages and practices)

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.

ARTICLE 1.9

(Notice)

(1)Where notice is required it may be given by any means appropriate to the circumstances.

(2)A notice is effective when it reaches the person to whom it is given.

(3)For the purpose of paragraph (2) a notice "reaches" a person when given to that person only or delivered at that person's place of business or mailing address.

(4)For the purpose of this article "notice" includes a declaration, demand, request or any other communication of intention.

ARTICLE 1.10

(Definitions)

In these principles

- "Court" includes an arbitral tribunal;
- Where a party has more than one place of business the relevant "place of business" is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;
- "Obligor" refers to the party who is to perform an obligation and "obligee" refers to the party who is entitled to performance of that obligation.
- "Writing" means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form.

CHAPTER 2 – FORMATION

ARTICLE 2.1

(Manner of formation)

A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.

ARTICLE 2.2

(Definition of offer)

A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

ARTICLE 2.3

(Withdrawal of offer)

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

ARTICLE 2.4

(Revocation of offer)

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before it has dispatched an acceptance.

(2) However, an offer cannot be revoked

- a. if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

- b. if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

ARTICLE 2.5
(Rejection of offer)

An offer is terminated when a rejection reaches the offeror.

ARTICLE 2.6
(Mode of acceptance)

(1)A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2)An acceptance of an offer becomes effective when the indication of assent reaches the offeror.

(3)However, if, by virtue of the offeror as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective when the act is performed.

ARTICLE 2.7
(Time of acceptance)

An offer must be accepted within the time the offeror has fixed or, if no time is fixed, within a reasonable time having regard to the circumstances, including the rapidity of the means of communication employed by the offeror. An oral offer must be

accepted immediately unless the circumstances indicates otherwise.

ARTICLE 2.8

(Acceptance within a fixed period of time)

(1)A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by means of instantaneous communication begins to run from the moment that the offer reaches the offeree.

(2)Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

ARTICLE 2.9

(Late acceptance. Delay in transmission)

(1)A late acceptance is nevertheless effective as an acceptance if without undue delay the offeror so informs the offeree or gives notice to that effect.

(2)If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an

acceptance unless, without undue delay, the offeror informs the offeree that it considers the offer as having lapsed.

ARTICLE 2.10

(Withdrawal of acceptance)

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

ARTICLE 2.11

(Modified acceptance)

(1)A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2)However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects to the discrepancy. If the offeror does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

ARTICLE 2.12

(Writings in confirmation)

If a writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the contract contains additional or different terms, such terms become part of the contract, unless they

materially alter the contract or the recipient, without undue delay, objects to the discrepancy.

ARTICLE 2.13

(Conclusion of contract dependent an agreement on specific matters or in a specific form)

Where in the course of negotiations one of the parties insists that the contract is not concluded until there is agreement on specific matters or in specific form, no contract is concluded before agreement is reached on those matters or in that form.

ARTICLE 2.14

(Contract with terms deliberately left open)

(1)If the parties intend to conclude a contract, the fact that they intentionally leave a term to be agreed upon in further negotiations or to be determined by a third person does not prevent a contract from coming into existence.

(2)The existence of the contract is not affected by the fact that subsequently

- a. the parties reach no agreement on the term; or
 - b. the third person does not determine the term,
- provided that there is an alternative means of rendering the term definite that is reasonable in the circumstances, having regard to the intention of the parties.

ARTICLE 2.15

(Negotiations in bad faith)

(1)A party is free to negotiate and is not liable for failure to reach an agreement .

(2)However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.

(3)It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

ARTICLE 2.16

(Duty of confidentiality)

Where information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or to use it improperly for its own purposes, whether or not a contract is subsequently concluded. Where appropriate, the remedy for breach of that duty may include compensation based on the benefit received by the other party.

ARTICLE 2.17

(Merger clauses)

A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing.

ARTICLE 2.18

(Written modification clauses)

A contract in writing which contains a clause requiring any modification or termination by agreement to be in writing

may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has acted in reliance on that conduct.

ARTICLE 2.19

(Contracting under standard terms)

(1) When one party or both parties use standard terms in concluding a contract, the general rules on formation apply, subject to Article 2.20 – 2.22.

(2) Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party.

ARTICLE 2.20

(Surprising terms)

(1) No term contained in standard terms which is of such character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.

(2) In determining whether a term is of such a character regard is to be had to its content, language and presentation.

ARTICLE 2.21

(Conflict between standard terms and non-standard terms)

In case of conflict between a standard term and a term which is not a standard term the latter prevails.

ARTICLE 2.22

(Battle of forms)

Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or letter and without undue delay informs the other party, that it does not intend to be bound by such a contract.

CHAPTER 3 - VALIDITY

ARTICLE 3.1

(Matters not covered)

These Principles do not deal with invalidity arising from

- a. lack of capacity;
- b. lack of authority;
- c. immorality or illegality.

ARTICLE 3.2

(Validity of mere agreement)

A contact is concluded, modified or terminated by the mere agreement of the parties, without any further requirement.

ARTICLE 3.3

(Initial impossibility)

(1)The mere fact that at the time of the conclusion of the contract the performance of the obligation assumed was impossible does not affect the validity of the contract.

(2)The mere fact that at the time of the conclusion of the contract a party was not entitled to dispose of the assets to

which the contract relates does not affect the validity of the contract.

ARTICLE 3.4

(Definition of mistake)

Mistake is an erroneous assumption relating to facts or to law existing when the contract was concluded.

ARTICLE 3.5

(Relevant mistake)

(1)A party may only avoid the contract for mistake if, when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been known, and

- a. the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or
- b. the other party had not at the time of avoidance acted in reliance on the contract.

(2)However, a party may not avoid the contract if

- a. it was grossly negligent in committing the mistake; or
- b. the mistake relates to a matter in regard to which the risk of mistake was assumed or having regard the circumstances, should be borne by the mistaken party.

ARTICLE 3.6

(Error in expression or transmission)

An error occurring in the expression or transmission of a declaration is considered to be a mistake of the person from whom the declaration emanated.

ARTICLE 3.7

(Remedies for non-performance)

A party is not entitled to avoid the contract on the ground of mistake if the circumstances on which that party relies afford, or could have afforded, a remedy for non-performance.

ARTICLE 3.8

(Fraud)

A party may avoid the contract when it has been led to conclude the contract by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, according to reasonable commercial standard of fair dealing, the latter party should have disclosed.

ARTICLE 3.9

(Threat)

A party may avoid the contract when it has been led to conclude the contract by the other party's unjustified threat which, having regard to the circumstances, is so imminent and serious as to leave the first party no reasonable alternative. In particular, a threat is unjustified if the act or omission with

which a party has been threatened is wrongful in itself, or it is wrongful to use it as a means to obtain the conclusion of the contract.

ARTICLE 3.10

(Gross disparity)

(1)A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to

- a. the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill; and
- b. the nature and purpose of the contract.

(2)Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing.

(3)A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that party informs the other party of its request promptly after receiving such notice and before the other party has acted in reliance on it. The provisions of Article 3.13(2) apply accordingly.

ARTICLE 3.11

(Third person)

(1)Where fraud, threat, gross disparity or a party's mistake is imputable to, or is known or ought to be known by, a

third person for whose acts the other party is responsible, the contract may be avoided under the same conditions as if the behavior or knowledge had been that of the party itself.

(2)Where fraud, threat or gross disparity is imputable to a third person for whose acts the other party is not responsible, the contract may be avoided if that party knew or ought to have known of the fraud, threat or disparity, or has not at time of avoidance acted in reliance on the contract.

ARTICLE 3.12

(Confirmation)

If the party entitled to avoid the contract expressly or impliedly confirms the contract after the period of time for giving notice of avoidance has begun to run, avoidance of the contract is excluded.

ARTICLE 3.13

(Loss of right to avoid)

(1)If a party is entitled to avoid the contract for mistake but the other party declares itself willing to perform or performs the contract as it was understood by the party entitled to avoidance, the contract is considered to have been concluded as the latter party understood it. The other party must make such a declaration or render such performance promptly after having been informed of the manner in which the party entitled to avoidance had understood the contract and before that party has acted in reliance on a notice of avoidance.

(2)After such a declaration or performance the right to avoidance is lost and any earlier notice of avoidance is ineffective.

ARTICLE 3.14

(Notice of avoidance)

The right of a party to avoid the contract is exercised by notice to the other party.

ARTICLE 3.15

(Time limits)

(1)Notice of avoidance shall be given within a reasonable time, having regard to the circumstances, after the avoiding party knew or could not have been unaware of the relevant facts or became capable of acting freely.

(2)Where an individual term of the contract may be avoided by a party under Article 3.10, the period of time giving notice of avoidance begins to run when that term is asserted by the other party.

ARTICLE 3.16

(Partial avoidance)

Where a ground of avoidance affects only individual terms of the contract, the effect of avoidance is limited to those terms unless, having regard to the circumstances, it is unreasonable to uphold the remaining contract.

ARTICLE 3.17

(Retroactive effect of avoidance)

(1)Avoidance takes effect retroactively.

(2)On avoidance either party may claim restitution of whatever it has supplied under the contract or the part of it

avoided, provided that it concurrently makes restitution of whatever it has received under the contract or the part of it avoided or, if it cannot make restitution in kind, it makes an allowance for what it has received.

ARTICLE 3.18

(Damages)

Irrespective of whether or not the contract has been avoided, the party who knew or ought to have known of the ground for avoidance is liable for damages so as to put the other party in the same position in which it would have been if it had not concluded the contract.

ARTICLE 3.19

(Mandatory character of the provisions)

The provisions of this Chapter are mandatory. Except insofar as they relate to the binding force of mere agreement, initial impossibility or mistake.

ARTICLE 3.20

(Unilateral declarations)

The provisions of this Chapter apply with appropriate adaptations to any communication of intention addressed by one party to the other.

CHAPTER 4 – INTERPRETATION

ARTICLE 4.1

(Intention of the parties)

(1)A contract shall be interpreted according to the common intention of the parties.

(2)If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

ARTICLE 4.2

(Interpretation of statement and other conduct)

(1)The statements and other conduct of a party shall be interpreted to that party's intention if the other party knew or could not have been unaware of that intention.

(2)If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.

ARTICLE 4.3

(Relevant circumstances)

In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including

- a. preliminary negotiations between the parties;
- b. practices which the party have established between themselves;
- c. the conduct of the parties subsequent to the conclusion of the contract;
- d. the nature and purpose of the contract;
- e. the meaning commonly given to terms and expression in the trade concerned;
- f. usages.

ARTICLE 4.4

(Reference to contract or statement as a whole)

Terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear.

ARTICLE 4.5

(All terms to be given effects)

Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect.

ARTICLE 4.6

(Contra proferentem rule)

If contract terms supplied by one party are unclear, an interpretation against that party is preferred.

ARTICLE 4.7

(Linguistic discrepancies)

Where a contract is drawn up in two or more language versions which are equally authoritative there is, in case of discrepancy between the versions, a preference for the interpretation according to a version in which the contract was originally drawn up.

ARTICLE 4.8

(Supplying an omitted term)

(1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their

rights and duties, a term which is appropriate in the circumstances shall be supplied.

(2) In determining what is an appropriate term regard shall be had, among other factors, to

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- a. the intention of the parties;
- b. the nature and purpose of the contract;
- c. good faith and fair dealing;
- d. reasonableness.

CHAPTER 5 - CONTENT

ARTICLE 5.1

(Express and implied obligations)

The contractual obligations of the parties may be express or implied.

ARTICLE 5.2

(Implied obligations)

Implied obligations stem from

- a. the nature and purpose of the contract;
- b. practices established between the parties and usages;
- c. good faith and fair dealing;
- d. reasonableness.

ARTICLE 5.3

(Co-operation between the parties)

Each party shall co-operate with the other party when such co-operation may reasonably be excepted for the performance of that party's obligations.

ARTICLE 5.4

(Duty to achieve a specific result
Duty of best efforts)

(1) To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.

(2) To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances.

ARTICLE 5.5

(Determination of kind of duty involved)

In determining the extent to which obligation of a party involves a duty of best efforts in the performance of an activity or a duty to achieve a specific result, regard shall be had, among other factors, to

- a. the way in which the obligation is expressed in the contract;
- b. the contractual price and other terms of the contract;
- c. the degree of risk normally involved in achieving the expected result;
- d. the ability of the other party to influence the performance of the obligation.

ARTICLE 5.6

(Determination of quality of performance)

Where the quality of performance is neither fixed by, nor determinable from, the contract a party is bound to render a performance of a quality that is reasonable and not less than average in the circumstances.

ARTICLE 5.7

(Price determination)

(1)Where a contract does not fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have made reference to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned or, if no such price is available, to a reasonable price.

(2)Where the price is to be determined by one party and that determination is manifestly unreasonable, a reasonable price shall be substituted notwithstanding any contract term to the contrary.

(3)Where the price is to be fixed by a third person, and that person cannot or will not do so, the price shall be a reasonable price.

(4)Where the price is to be fixed by reference to factors which do not exist or have ceased to exist or to be accessible, the nearest equivalent factor shall be treated as a substitute.

ARTICLE 5.8

(Contract for an indefinite period)

A contract for an indefinite period may be ended by either party by giving notice a reasonable time in advance.

CHAPTER 6 – PERFORMANCE

SECTION 1 : PERFORMANCE IN GENERAL

ARTICLE 6.1.1

(Time of performance)

A party must perform its obligations:

- a. if a time is fixed by or determinable from the contract, at that time;
- b. if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the other party is to choose a time;
- c. in any other case, within a reasonable time after the conclusion of the contract.

ARTICLE 6.1.2

(Performance at one time or in installments)

In cases under Article 6.1.1(b) or (c), a party must perform its obligations at one time if that performance can be rendered at one time and the circumstances do not indicate otherwise.

ARTICLE 6.1.3

(Partial performance)

(1)The obligee may reject an offer to perform in part at the time performance is due, whether or not such offer is coupled with an assurance as to the balance of the performance, unless the obligee has no legitimate interest in so doing.

(2)Additional expenses caused to the obligee by partial performance are to be borne by the obligor without prejudice to any other remedy.

ARTICLE 6.1.4

(Order of performance)

(1)To the extent that the performances of the parties can be rendered simultaneously, the parties are bound to render them simultaneously unless the circumstances indicate otherwise.

(2)To the extent that the performance of only one party requires a period of time, that party is bound to render its performance first, unless the circumstances indicate otherwise.

ARTICLE 6.1.5

(Earlier performance)

(1)The obligee may reject an earlier performance unless it has no legitimate interest in so doing.

(2)Acceptance by a party of an earlier performance does not affect the time for the performance of its own obligations if that time has been fixed irrespective of the performance of the other party's obligations.

(3)Additional expenses caused to the obligee by earlier performance are to be borne by the obligor, without prejudice to any other remedy.

ARTICLE 6.1.6

(Place of performance)

(1)If the place of performance is neither fixed by, nor determinable from, the contract, a party is to perform :

a. a monetary obligation, at the obligee's place of business;

b. any other obligation, at its own place of business;

(2)A party must bear any increase in the expenses incidental to performance which is caused by a change in its place of business subsequent to the conclusion of the contract.

ARTICLE 6.1.7

(Payment by cheque or other instrument)

(1)Payment may be made in any form used in the ordinary course of business at the place for payment.

(2)However, an obligee who accepts, either by virtue of paragraph (1) or voluntarily, a cheque, any other order to pay or a promise to pay, is presumed to do so only on condition that it will be honoured.

ARTICLE 6.1.8

(Payment by funds transfer)

(1)Unless the obligee has indicated a particular account, payment may be made by a transfer to any of the financial institutions in which the obligee has made it known that it has an account.

(2)In case of payment by a transfer the obligation of the obligor is discharged when the transfer to the obligee's financial institution becomes effective.

ARTICLE 6.1.9

(Currency of payment)

(1) If a monetary obligation is expressed in a currency other than that of the place for payment, it may be paid by the obligor in the currency of the place for payment unless

- a. that currency is not freely convertible; or
- b. the parties have agreed that payment should be made only in the currency in which the monetary obligation is expressed.

(2) If it is impossible for the obligor to make payment in the currency in which the monetary obligation is expressed, the obligee may require payment in the currency of the place for payment, even in the case referred to in paragraph (1)(b).

(3) Payment in the currency of the place for payment is to be made according to the applicable rate of exchange prevailing there when payment is due.

(4) However, if the obligor has not paid at the time when payment is due, the obligee may require payment according to the applicable rate of exchange prevailing either when payment is due or at the time of actual payment.

ARTICLE 6.1.10

(Currency not expressed)

Where a monetary obligation is not expressed in a particular currency, payment must be made in the currency of the place where payment is to be made.

ARTICLE 6.1.11
(Costs of performance)

Each party shall bear the costs of performance of its obligation.

ARTICLE 6.1.12
(Imputation of payment)

(1) An obligor owing several monetary obligations to the same obligee may specify at the time of payment the debt to which it intends the payment to be applied. However, the payment discharges first any expenses, then interest due and finally the principal.

(2) If the obligor makes no such specification, the obligee may, within reasonable time after payment, declare to the obligor the obligation to which it imputes the payment, provided that the obligation is due and undisputed.

(3) In the absence of imputation under paragraph (1) or (2), payment is imputed to that obligation which satisfies one of the following criteria and in the order indicated;

- a. an obligation which is due or which is the first to fall due;
- b. the obligation for which the obligee has least security;
- c. the obligation which is the most burdensome for the obligor;
- d. the obligation which has arisen first.

If none of the preceding criteria applies, payment is imputed to all obligations proportionally.

ARTICLE 6.1.13

(Imputation of non-monetary obligations)

Article 6.1.12 applies with appropriate adaptations to the imputation of performance of non-monetary obligations.

ARTICLE 6.1.14

(Application for public permission)

Where the law of State requires a public permission affecting the validity of the contract or its performance and neither that law nor the circumstances indicate otherwise

- a. if only one party has its place of business in that State, that party shall take the measure necessary to obtain the permission;
- b. in any other case the party whose performance requires permission shall take the necessary measures.

ARTICLE 6.1.15

(Procedure in applying for performance)

(1)The party required to take the measures necessary to obtain the permission shall do so without undue delay and shall bear any expenses incurred.

(2)That party shall whenever appropriate give the other party notice of the grant or refusal of such permission without undue delay.

ARTICLE 6.1.16

(Permission neither granted nor refused)

(1)If, notwithstanding the fact that the party responsible has taken all measures required, permission is neither granted nor refused within an agreed period or, where no period has been agreed, within a reasonable time from the conclusion of the contract, either party is entitled to terminate the contract.

(2)Where the permission affects some terms only, paragraph (1) does not apply if, having regard to the circumstances, it is reasonable to uphold the remaining contract even if the permission is refused.

ARTICLE 6.1.17

(Permission refused)

(1)The refusal of a permission affecting the validity of the contract renders the contract void. If the refusal affects the validity of some terms only, only such terms are void if, having regard to the circumstances, it is reasonable to uphold the remaining contract.

(2)Where the refusal of a permission renders the performance of the contract impossible in whole or in part, the rules on non-performance apply.

SECTION 2 : HARDSHIP**ARTICLE 6.2.1**

(Contract to be observed)

Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.

ARTICLE 6.2.2

(Definition of hardship)

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

- a. the events occur or become known to the disadvantaged party after the conclusion of the contract;
- b. the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
- c. the events are beyond the control of the disadvantaged party; and
- d. the risk of the events was not assumed by the disadvantaged party.

ARTICLE 6.2.3

(Effects of hardship)

(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.

(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.

(4) If the court finds hardship it may, if reasonable,

- a. terminate the contract at a date and on terms to be fixed; or
- b. adapt the contract with a view to restoring its equilibrium.

CHAPTER 7 – NON-PERFORMANCE

SECTION 1 : NON-PERFORMANCE IN GENERAL

ARTICLE 7.1.1

(Non-performance defined)

Non-performance is failure by a party to perform any of its obligations under the contract, including defective performance or late performance.

ARTICLE 7.1.2

(Interference by the other party)

A party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission or by another event as to which the first party bears the risk.

ARTICLE 7.1.3
(Withholding performance)

(1)Where the parties are to perform simultaneously, either party may withhold performance until the other party tenders its performance.

(2)Where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed.

ARTICLE 7.1.4
(Cure by non-performing party)

(1)The non-performing party may, at its own expense, cure any non-performance, provided that

- a. without undue delay, it gives notice indicating the proposed manner and timing of the cure;
- b. cure is appropriate in the circumstances;
- c. the aggrieved party has no legitimate interest in refusing cure; and
- d. cure is effected promptly.

(2)The right to cure is not precluded by notice of termination.

(3)Upon effective notice of cure, rights of the aggrieved party that are inconsistent with the non-performing party's performance are suspended until the time for cure has expired.

(4)The aggrieved party may withhold performance pending cure.

(5)Notwithstanding cure, the aggrieved party retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.

ARTICLE 7.1.5

(Additional period for performance)

(1) In a case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance

(2) During the additional period the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages but may not resort to any other remedy. If it receives notice from the other party that the latter will not perform within that period, or if upon expiry of that period due performance has not been made, the aggrieved party may resort to any of the remedies that may be available under this Chapter.

(3) Where in case of delay in performance which is not fundamental the aggrieved party has given notice allowing an additional period of time of reasonable length, it may terminate the contract at the end of that period. If the additional period allowed is not of reasonable length it shall be extended to a reasonable length. The aggrieved party may in its notice provide that if the other party fails to perform within the period allowed by the notice the contract shall automatically terminate.

(4) Paragraph (3) does not apply where the obligation which has not been performed is only a minor part of the contractual obligation of the non-performing party.

ARTICLE 7.1.6

(Exemption clauses)

A clause which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonable expected

may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract.

ARTICLE 7.1.7

(Force majeure)

(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.

(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.

(4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

SECTION 2 : RIGHT TO PERFORMANCE

ARTICLE 7.2.1

(Performance of monetary obligation)

Where a party who is obliged to pay money does not do so, the other party may require payment.

ARTICLE 7.2.2

(Performance of non-monetary obligation)

Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless

- a. performance is impossible in law or in fact;
- b. performance or, where relevant, enforcement is unreasonably burdensome or expensive;
- c. the party entitled to performance may reasonably obtain performance from another source;
- d. performance is of an exclusively personal character; or
- e. the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance.

ARTICLE 7.2.3

(Repair and replacement of defective performance)

The right to performance includes in appropriate cases the right to require repair, replacement, or other cure of defective performance. The provisions of Article 7.2.1 and 7.2.2 apply accordingly.

ARTICLE 7.2.4

(Judicial penalty)

(1) Where the court orders a party to perform, it may also direct that this party pay a penalty if it does not comply with the order.

(2) The penalty shall be paid to the aggrieved party unless mandatory provisions of the law of the forum provide otherwise. Payment of the penalty to the aggrieved party does not exclude any claim for damages.

ARTICLE 7.2.5
(Change of remedy)

(1) An aggrieved party who has required performance of non-monetary obligation and who has not received performance within a period fixed or otherwise within a reasonable period of time may invoke any other remedy.

(2) Where the decision of a court for performance of a non-monetary obligation cannot be enforced, the aggrieved party may invoke any other remedy.

SECTION 3 : TERMINATION

ARTICLE 7.3.1
(Right to terminate the contract)

(1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.

(2) In determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether

- a. the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;
- b. strict compliance with the obligation which has not been performed is of essence under the contract;
- c. the non-performance is intentional or reckless;

- d. the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;
- e. the non-performance party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.

(3) In case of delay the aggrieved party may also terminate the contract if the other party fails to perform before the time allowed it under Article 7.1.5 has expired.

ARTICLE 7.3.2

(Notice of termination)

(1) The right of a party to terminate the contract is exercised by notice to the other party.

(2) If performance has been offered late or otherwise does not conform to the contract the aggrieved party will lose its right to terminate the contract unless it gives notice of the other party within a reasonable time after it has or ought to have become aware of the offer or of the non-conforming performance.

ARTICLE 7.3.3

(Anticipatory non-performance)

Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract.

ARTICLE 7.3.4

(Adequate assurance of due performance)

A party who reasonably believes that there will be a fundamental non-performance by the other party may demand adequate assurance of due performance and may meanwhile withhold its own performance. Where this assurance is not provided within a reasonable time the party demanding it may terminate the contract.

ARTICLE 7.3.5

(Effects of termination in general)

(1)Termination of the contract releases both parties from their obligation to effect and to receive future performance.

(2)Termination does not preclude a claim for damages for non-performance.

(3)Termination does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination.

ARTICLE 7.3.6

(Restitution)

(1)On termination of the contract either party may claim restitution of whatever it has supplied, provided that such party concurrently makes restitution of whatever it has received. If restitution in kind is not possible or appropriate allowance should be made in money whenever reasonable.

(2)However, if performance of the contract has extended over a period of time and the contract is divisible, such restitution can only be claimed for the period after termination has taken effect.

SECTION 4 : DAMAGES**ARTICLE 7.4.1**

(Right to damages)

Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under these Principles.

ARTICLE 7.4.2

(Full compensation)

(1)The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm.

(2)Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress.

ARTICLE 7.4.3

(Certainty of harm)

(1)Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty.

(2)Compensation may be due for the loss of chance in proportion to the probability of its occurrence.

(3)Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.

ARTICLE 7.4.4
(Foreseeability of harm)

The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance.

ARTICLE 7.4.5
(Proof of harm in case of replacement transaction)

Where the aggrieved party has terminated the contract and has made a replacement transaction within a reasonable time and in a reasonable manner it may recover the difference between the contract price and the price of the replacement transaction as well as damages for any further harm.

ARTICLE 7.4.6
(Proof of harm by current price)

(1) Where the aggrieved party has terminated the contract and has not made a replacement transaction but there is a current price for the performance contracted, it may recover the difference between the contract price and the price current at the time the contract is terminated as well as damages for any further harm.

(2) Current price is the price generally charged for goods delivered or services rendered in comparable circumstances at the place where the contract should have been performed or, if there is no current price at that place, the current price at such other place that appears reasonable to take as a reference.

ARTICLE 7.4.7

(Harm due in part to aggrieved party)

Where the harm is due in part to an act or omission of the aggrieved party or to another event as to which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties.

ARTICLE 7.4.8

(Mitigation of harm)

(1)The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps.

(2)The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.

ARTICLE 7.4.9

(Interest for failure to pay money)

(1)If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment whether or not the non-payment is excused.

(2)The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.

(3)The aggrieved party is entitled to additional damages if the non-payment caused it a greater harm.

ARTICLE 7.4.10

(Interest on damages)

Unless otherwise agreed, interest on damages for non-monetary obligations accrues as from the time of non-performance.

ARTICLE 7.4.11

(Manner of monetary redress)

(1)Damages are to be paid in a lump sum. However, they may be payable in installments where the nature of the harm makes this appropriate.

(2)Damages to be paid in installments may be indexed.

ARTICLE 7.4.12

(Currency in which to assess damages)

Damages are to be assessed either in the currency in which the monetary obligation was expressed or in the currency in which the harm was suffered, whichever is more appropriate.

ARTICLE 7.4.13

(Agreed payment for non-performance)

(1)When the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm.

(2)However, notwithstanding any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances.