

LEGAL ANALYSIS OF THE CORONAVIRUS DISEASE PANDEMIC (COVID-19) AS A REASON FOR FORCE MAJEURE IN CONTRACT IMPLEMENTATION

by Candra Irawan

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LEGAL ANALYSIS OF THE CORONAVIRUS DISEASE PANDEMIC (COVID-19) AS A REASON FOR FORCE MAJEURE IN CONTRACT IMPLEMENTATION¹

Candra Irawan

Faculty of Law Bengkulu University, Indonesia

Introduction

The Covid-19 pandemic is a national and international disaster that has a negative impact on business activities. Based on the report of the International Monetary Fund (IMF), the global economy has fallen to the brink of crisis. 95% of countries in the world are estimated to experience contraction and negative economic growth. It is estimated to have caused a global economic loss of 12 trillion US dollars (approximately Rp 168,000 trillion, Rp 14,000).² Indonesia's economic losses in 2020 due to the Covid-19 pandemic reached IDR 1,356 trillion (equivalent to 8.8% of Indonesia's GDP). This happened because the Covid-19 pandemic reduced population cessation which had a negative impact on all sectors, including state revenues.³

The business sector was deeply affected and even lost due to the Covid-19 pandemic, as from the following description: (1) Hotels and tourism. It has caused more than 2,000 hotels and 8,000 restaurants to close. As a result, the potential for lost income during January to April 2020 is IDR 70 trillion; (2) Aviation industry. There was a decrease in the number of users of flight and airport services (up to 45%). The losses suffered by airlines from four major airports (Jakarta, Bali, Medan, and Surabaya) reached around USD 812 million; (3) Meetings, Incentives, Conferences, Exhibitions (MICE). It is estimated that the loss reached Rp 7 trillion. It was recorded that around 96.43% of events in 17 provinces had to be postponed, and another 84.20% were cancelled; (4). Bars and restaurants forced to close; (5) Cinemas and concerts; (6) Sports, various sporting events are canceled or postponed; (7) Malls and retail; (8) Consumer Electronics; (9) Automotive industry. If Honda and Yamaha stop production, the potential loss is around Rp. 2 billion for IKM members of APEK (Association of Engineering Entrepreneurs Karawang).⁴

The COVID-19 pandemic has hampered the implementation of many business contracts, which resulted in a default from one party (wanprestasi).⁵ In order to avoid a claim for compensation, the party who is in default submits the Covid-19 pandemic as the reason that a force majeure situation has occurred.

The Indonesian government considers that the wider coverage area affected by the COVID-19 disaster, the increasing number of victims and property losses, also has implications for the broad socio-economic aspects of Indonesia. The World Health Organization (WHO) has declared COVID-19 as a Global Pandemic on March 11, 2020, then The Indonesian government issues a Presidential Decree No. 11 of 2020 concerning the Determination of Corona Virus Disease 2019 Public Health Emergency, Presidential Decree Number 12 of 2020 concerning the Designation of Non-Natural Disasters Spreading Corona Virus Disease 2019 (Covid-19) as a

¹This paper was presented at the Bencoolen International Conference on law studies (BICOLS) 2021, on Thursday, October 28, 2021.

²<https://www.wartaekonomi.co.id/read309848/dampak-pandemi-covid-19-terhadap-perekonomian-dunia-infografis>, Accessed 14/10/2021.

³Fika Nurul Ulya, *Due to Covid-19, 2020 Economic Losses Reached Rp. 1.356 Trillion*, <https://money.kompas.com/read/2021/04/29/143647026/akibat-covid-19-kerugian-ekonomi-tahun-2020-capai-rp-1356-triliun?page=all>, Accessed 10/10/2021.

⁴<https://www.idxchannel.com/infografis/sembilan-sektor-paling-parah-kena-dampak-no2-rugi-hingga-usd812-juta>, Accessed 14/10/2021.

⁵Default is regulated in Article 1343 of the Civil Code (KUHP), a condition where there is a breach of contract in the execution of a contract that should be carried out and is the responsibility of the party concerned. Including default, are: (1) not doing something that was agreed to be carried out; (2) carry out something that was agreed upon, but it is not carried out as agreed; (3) doing something that was agreed upon but carried out late; and (4) do something that according to the contractual content is not allowed to do.

National Disaster. This decision becomes an excuse for parties who are unable to carry out the contents of the contract as force majeure. The question is what is the procedure in contract law so that the Covid-19 pandemic can be used as an excuse for force majeure?

Discussion

Regulations that provide explanations regarding force majeure, found in: (1) Civil Code (KUHPer) Articles 1244, 1245, 1444 and 1445. Force majeure is a state of coercion that results in one party being unable to fulfill the required performance specified in the contract. Then the party concerned is released from claims for compensation, fees and interest, and/or liability; (2) Law of the Republic of Indonesia Number 2 of 2017 concerning Construction Services Article 47 paragraph (1) letter j that a construction contract needs to contain compelling circumstances, events that arise against the will and ability of the parties that cause harm to one party. In the elucidation of the article it is explained that coercive circumstances include: (a) absolute coercive circumstances, namely that the parties may not exercise their rights and obligations; (b) a state of coercion that is not absolute (relative), namely that it is still possible for the parties to exercise their rights and obligations. The risks caused by compelling circumstances can be agreed upon by the parties, including through insurance institutions.⁶

Contracts that comply with contract law standards must contain a force majeure clause. The business contract aims to anticipate if one of the parties fails to carry out the contents of the contract due to a situation beyond the expectations and capabilities of the parties, which frees the party concerned from claims for compensation from the other party.⁷ The problem lies in the aspect of clarity and firmness of the formulated clauses, it does not cause different interpretations between the contracting parties. The potential cause for conflict.

The following is an example of the formulation of a force majeure clause: (1) force majeure in this cooperation agreement are events that are beyond the ability of the parties that can affect the performance and execution of the work of the parties, namely: a. Natural disasters (earthquakes, landslides, storms, and floods); b. War, revolution, treason, riots, rebellion, riots and chaos, fire; and c. State of coercion declared by the government. Mechanisms that must be carried out that force majeure has occurred: a. The second party notifies the first party or vice versa that a coercive situation has occurred; b. The first party declares in writing to the second party or vice versa that there has been a coercive situation; c. If within 7 (seven) days from the occurrence of the coercive situation the first party does not make a statement as referred to in letter b, then the second party has the right to file a coercive situation to the first party to obtain written approval; d. If within 3 x 24 (three times twenty-four) hours from the receipt of notification of the second party to the first party regarding the coercive situation, the first party does not provide an answer, then the first party is deemed to have agreed to the occurrence of the coercive situation; e. The second party immediately reports the progress of the work when the situation is urgent, after being checked by the first party; and f. The payment of the first party to the second party is calculated

⁶It is further explained in the Regulation of the Minister of Public Works and Public Housing of the Republic of Indonesia Number 14 of 2020 concerning Standards and Guidelines for Procurement of Construction Services through Providers Article 1 Number 47, Regulation of the Government Goods/Services Procurement Policy Institute Number 12 of 2021 concerning Guidelines for the Implementation of the Procurement of Goods/Services Government Services Through Providers. Force Majeure is a condition that occurs outside the will of the parties to the contract that cannot be predicted beforehand so that the obligations contained in the contract cannot be fulfilled. Including Force Majeure, among others: a. natural disasters; b. non-natural disasters; c. social disaster; d. strike; e. fire; f. other industrial disturbances as stated through a joint decision of the Minister of Finance and related technical ministers.

⁷Agus Yudha Hernoko, *Force Majeur Clause or Hardship Clause-Problematics in Business Contract Design*, Perspective Journal, Volume XI Number 3 of 2006 July Edition, <https://media.neliti.com/media/publications/159380-ID-none.pdf>, Accessed 09/09/2021.

after the second party has completed its obligations;⁸ (2) Force majeure is a condition in which a customer is prevented from carrying out his or her performance due to unexpected circumstances or events at the time it was made, such circumstances or events cannot be accounted for to the customer, while the customer is not in a state of bad faith. Force majeure circumstances can be used as a reason for the exemption of compensation due to non-performance of the agreement or contract. In the event of force majeure, the customer is required to make a written statement or notification regarding the force majeure situation experienced to the bank. Banks are required to stipulate attachments of evidence from the police/authorized agency that must be provided by customers regarding reporting of force majeure events; (3) Any delay of failure by either party hereto in the performance hereunder shall be excused if and to the extent caused by occurrences beyond the parties control including but not limited to acts of God, strikes or & labor disturbances, war, sabotage, unavailability of materials or equipment and any other causes of a like nature which cannot be controlled by either party.⁹

The formulation of the force majeure clause is clear and regulated in accordance with applicable regulatory standards. The difference lies in the detailed explanation that mentions the type and form of force majeure. A part from these differences, as long as it can be proven clearly, the party who is unable to carry out the performance in accordance with the contents of the contract can be released from the demands for the implementation of the performance and compensation by following the procedures stipulated in the contract. A person must be able to prove that the event that occurred was not due to his fault, must meet unexpected elements, cannot be prevented by the party who has to fulfill obligations or carry out the agreement, and beyond the fault of that party (Supreme Court Decision Number 409K/Sip/1983 dated 25 October 1984).¹⁰ The Supreme Court of the Republic of Indonesia (MARI) stated that the elements of force majeure include: a. unexpected events; b. cannot be accounted for to the debtor; c. there is no bad faith from the debtor; d. the existence of unintended circumstances by the debtor; e. the situation prevents outstanding debtors; f. if the achievement is carried out it will be subject to a ban; g. circumstances beyond the fault of the debtor; h. the debtor does not fail to perform (deliver goods); i. the incident cannot be avoided by anyone (both debtors and other parties); j. the debtor is not proven guilty or negligent.¹¹

The problem that occurs is if the force majeure clause formulated in the contract does not provide space for the COVID-19 pandemic as a type of force majeure or the clause formulation is too general so that it can lead to different interpretations from the parties. One party considers COVID-19 pandemic as a reason for force majeure but the other does not accept it as a reason for force majeure to occur.

In the event that the clause is clearly formulated, such as with the formulation force majeure in this cooperation agreement are events that are beyond the ability of the parties that can affect the performance and execution of the work of the parties, namely: a....b....c. forced circumstances declared by the government, the COVID-19 pandemic can legally be used as an excuse as force majeure.¹² The legal basis is: (1) Presidential Decree No. 11 of 2020 concerning

⁸Cooperation Contract Between PT. Pameterindo Edukatama Aneka with the Geospatial Information Agency on Atlas Verification and Printed Map Production of PT. Pameterindo Edukatama Aneka, <https://jdih.go.id/files/217/6874>, Accessed 07/10/2021.

⁹Raihana, *The Role of Foreign Joint Ventures in Technology Transfer, Thesis, Faculty of Law, Islamic University of Indonesia*, <https://dspace.uui.ac.id/bitstream/handle/123456789/9231/RTB%20301.pdf?sequence=1&isAllowed=y>, Accessed 15/10/2021.

¹⁰Rahmat S.S. Soemadipradja, *Legal Explanation Regarding Coercive Circumstances (Terms of cancellation of the agreement due to force majeure)*, https://putusan3.mahkamahagung.go.id/restatement/download_file/11e9b3876b28a24ea393313833363231/pdf/11e9b3876b28a09683cd313833363231.html, Diakses 07/10/2021.

¹¹*ibid*

¹²Product Development and Education Division of the Sharia Banking Department of the Financial Services Authority, Murabahah Sharia Banking Product Standards, <https://www.ojk.go.id/kanal/syariah/berita->

the Determination of Public Health Emergency of Corona Virus Disease 2019, and (2) Presidential Decree Number 12 of 2020 concerning the Designation of Non-Natural Disasters for the Spread of Corona Virus Disease 2019 (Covid-19) as a National Disaster.

The force majeure situation can be declared by only one party, but still follows the procedure that has been formulated in the contract clause. Starting from a written notification from one of the parties stating that force majeure has occurred to the other party. The other party will give a response, in the form of acceptance or rejection. There is room for negotiation to reach an agreement that COVID-19 pandemic is included in the force majeure category, is absolute or relative,¹³ or the parties are in a stalemate resulting in a dispute (dispute).

Referring to the Criminal Code, Law of the Republic of Indonesia Number 2 of 2017 concerning Construction Services, Decision of the Supreme Court Number 409K/Sip/1983 dated October 25, 1984, the procedure that should be carried out to make the COVID-19 pandemic the reason for the occurrence of force majeure and efforts to minimize the emergence of disputes (disputes) between the parties, namely: (1) Ensuring that there is no bad ethics from either party or the parties based on the legal relationship that has existed since the signing of the contract, implementation of the contract until the occurrence of the COVID-19 pandemic which is used as the reason for force majeure ; (2) The party who argues that a force majeure has occurred shall notify the other party in writing which is well documented and the other party is given a certain time to provide the answer (for example, within 3 working days, 7 working days to 14 working days) from the receipt of the force majeure notification; (3) If within the time specified in accordance with the agreement (for example, within 3 working days, 7 working days to 14 working days) from the receipt of the notification of the force majeure, the other party does not provide a written answer, then the party concerned is declared to have agreed. that a force majeure has occurred.

In the event that Covid-19 pandemic is accepted as the reason for force majeure, the legal implications of the contract that have been made for the parties are: (1) If the force majeure makes it impossible for one of the parties to carry out their performance at all (absolute force majeure), then the contract declared terminated (discontinued); (2) If the force majeure causes one of the parties to be able to carry out their performance (relative force majeure), then the contract is suspended (delayed performance) and the fulfillment of the performance can be carried out after the relative force majeure is declared to have ended; (3) If the force majeure causes one party to suffer a loss, the other party is exempted from the claim for compensation because there was no mistake on the part of the party who was supposed to carry out the performance.¹⁴

Conclusion

[dan-kegiatan/publikasi/Documents/Pages/Buku-Standar-Produk-Perbankan-Syariah-Murabahah/Buku%20Standar%20Produk%20Murabahah.pdf](#), Accessed 15/10/2021.

¹³Based on the KUHP several factors that affect force majeure there are three elements that must be met for a state of coercion, namely: a. Not meeting achievements; b. There are reasons that lie beyond the debtor's fault; c. The causative factors cannot be predicted beforehand and cannot be accounted for by the debtor. If a force majeure occurs and meets elements a and c, then this force majeure/overmacht is called absolute overmacht or objective coercive circumstances. The basis is the impossibility of fulfilling achievements because the object is lost / destroyed. If there is a force majeure that satisfies elements b and c, this situation is called relative or subjective coercion. The basis is the difficulty of fulfilling achievements because there are events that prevent the debtor from taking action. The coercive situation that hinders the fulfillment of achievements must be about the achievement itself, because we cannot say there is a coercive situation if the situation occurs later, Daryl John Rasuh, Legal Studies of Force Majeure According to Article 1244 and Article 1245 of the Civil Code, <https://ejournal.unsrat.ac.id/index.php/lexprivatum/article/view/11366/10955>, Accessed 11/10/2021.

¹⁴Peni Jati Setyowati, Legal Consequences of the Covid-19 Pandemic as a Medical Non-Natural Disaster in Establishing Force Majeure in Indonesia, *Kosmik Law Vol. 21 No. 1* (2021), <http://jurnalnasional.ump.ac.id/index.php/KOSMIK/article/view/9407/3982>, Diakses 15/10/2021.

The good ethics of the parties to find solutions to the difficulty of carrying out the achievements or not making it possible to carry out the achievements stipulated in the contract as a result of the COVID-19 pandemic. So it is necessary to discuss it properly and constructively so that there will be no disputes (disputes) through documented correspondence and negotiations to find the best solution that can be accepted by the parties. The author believes that the COVID-19 pandemic can be the reason that there has been a force majeure that has a negative impact on the Indonesian economy and hampers business activities. Confirmed by the policy of the Government of Indonesia through Presidential Decree No. 11 of 2020 concerning the Determination of Corona Virus Disease 2019 Public Health Emergency, and Presidential Decree Number 12 of 2020 concerning the Designation of Non-Natural Disasters for the Spread of Corona Virus Disease 2019 (Covid-19) as National Disasters.

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