

CAN COVID-19 BE CONSTRUED AS A FORCE MAJEURE IN THE AGREEMENT?

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Abstract

The COVID-19 not only affects human health but also spreads to business sectors in Indonesia. The government has issued several regulations in response to COVID-19, for instance, companies are required to operate at a minimum operation level. Furthermore, due to COVID-19 and government requirements, numerous performances in agreement are either delayed or cancelled. Given the above, the issue of COVID-19 as a force majeure is also increasingly discussed. However, before declaring COVID-19 as a force majeure, the parties should consider the governing law of the agreement, the conditions, and the clause of force majeure in the agreement. Recently, the Bengkulu District Court also made a decision on the Case No. 3/Pdt.G.S./2020 in which the defendant argued that its performance could not be held due to COVID-19. Hence, this study will discuss the concept of force majeure under Indonesian law and whether COVID-19 fulfil this concept.

Keywords: COVID-19, force majeure, agreement

A. Introduction

On 11 March 2020, The World Health Organization (WHO) officially announced the COVID-19 ("**COVID-19**") outbreak as a global pandemic.¹ Although there has been numerous debates and discussions about the term pandemic in media and scientific publications. According to WHO, a pandemic is the worldwide spread of a new disease. Global pandemic arises when the disease has spread over multiple

countries or continents and COVID-19 is one of the examples.²

COVID-19 is an infectious disease caused by a newly discovered corona virus. It affects human health also adversely affects all businesses in the world, including Indonesia. For instance, in the beginning of March, the Indonesia Tour Guide Association (HPI) Regional Head for East Nusa Tenggara (NTT), Agustinus Bataona, stated that there

¹ Gloria Setyvani Putri, "WHO Resmi Sebut Virus Corona COVID-19 sebagai Pandemi Global," Kompas, <https://www.kompas.com/sains/read/2020/03/12/083129823/who-resmi-sebut-virus-corona-COVID-19-sebagai-pandemi-global> (accessed 12 June 2020).

² World Health Organization, "What is Pandemic?", World Health Organization, https://www.who.int/csr/disease/swineflu/frequently_asked_questions/pandemic/en/ (accessed 12 June 2020).

were approximately 45,000 tourists had cancelled their plans to visit major destinations in the region from January to May.³

In response to the occurrence of COVID-19, the government has issued Presidential Decree No. 11 of 2020 on Stipulation of Public Health Emergencies for Corona Virus Disease 2019 (COVID-19) ("**Presidential Decree No. 11/2020**"), Presidential Decree No. 12 of 2020 on the Declaration of a Non-Natural Disaster from the Spread of Corona Virus Disease 2019 as a National Disaster ("**Presidential Decree No. 12/2020**"), and Government Regulation No. 21 of 2020 on Large-Scale Social Limitation to Accelerate the Management of Corona Virus Disease 2019 (COVID-19) ("**GR No. 21/2020**") as an immediate response to the pandemic. Presidential Decree No. 11/2020 states COVID-19 as type of disease that causes Public Health Emergency⁴ and Presidential Decree No. 12/2020 states that the spread of corona virus as a national disaster.⁵ On

the other hand, GR 21/2020 focuses on limitation on large-scale social interactions, particularly as a countermeasure to the spread of COVID-19.⁶

As a follow up to the regulations above, in April and May 2020, cities in Indonesia, such as Jakarta, Bogor, Depok, Tangerang and Bekasi, applied the large-scale social limitation ("**PSBB**"). Furthermore, the government urged all businesses and organizations (excluded 11 sectors) to close their offices. Companies were required to operate at a minimum operation level which caused many employees were required to work at home and others became victims of unemployment. The most affected sectors by this pandemic are transportation, tourism, food, and manufacturing.⁷

The spread of COVID-19 and the PSBB policy causes the performance of a party to be either delayed or cancelled. Regardless of travel and import limitations, supply and demand issues, and/or the absence of human resources, more businesses find

³ Jakarta Post, "COVID-19 impacts across Indonesia's business sectors: A recap", Jakarta Post, <https://www.thejakartapost.com/news/2020/03/30/COVID-19-impacts-across-indonesias-business-sectors-a-recap.html> (accessed 12 June 2020).

⁴ Presidential Decree No. 11 of 2020 on Stipulation of Public Health Emergencies for Corona Virus Disease 2019 (Keputusan Presiden No. 11 Tahun 2020 tentang Penetapan Kedaruratan Kesehatan Masyarakat Corona Virus Disease 2019).

⁵ Presidential Decree No. 12 of 2020 on The Declaration of a Non-Natural Disaster from The Spread Of Corona Virus Disease 2019 as a National Disaster (Keputusan Presiden No. 12 Tahun 2020 tentang Keputusan Presiden tentang Penetapan Bencana Nonalam Penyebaran Corona Virus Disease 2019 (COVID-19) sebagai Bencana Nasional).

⁶ Government Regulation No. 21 of 2020 on Large-Scale Social Limitation to Accelerate the Management of Corona Virus Disease 2019, art. 1. (Peraturan Pemerintah Nomor 21 Tahun 2020 Pembatasan Sosial Berskala Besar Dalam Rangka Percepatan Penanganan Corona Virus Disease 2019).

⁷ Rakha Fahreza Widyandana, "Dampak Corona, Ini 6 Sektor yang Paling Terpengaruh Jika Terjadi Lockdown", Merdeka, <https://www.merdeka.com/jatim/dampak-corona-ini-6-sektor-yang-paling-terdampak-jika-terjadi-lockdown-klm.html> (accessed 14 June 2020).

⁸ Dewi Savitri Reni and Syarifah Reihana Fakhry, "COVID-19 and Indonesia: Force Majeure and Other Considerations", SSEK, <https://www.ssek.com/blog/COVID-19-and-indonesia-force-majeure-and-other-considerations> (accessed 14 June 2020).

it difficult to continue to operate and meet their contractual obligations.⁸ These raise a number of issues regarding COVID-19 and its impact on existing agreements. One of the issues that is currently being discussed is related to the concept and implementation of force majeure clauses, and the ability of defaulting parties to avoid liability.

Force majeure is an event that happens beyond an individual's control. The party who experiences force majeure may be excused from responsibilities arising from the non-fulfilment of contractual performance. The impact of force majeure is that both or one of the parties may be excused from its performance and they may also not be responsible to pay damages for its non-performance. This concept is recognized in the Articles 1244 and 1245 of the Indonesian Civil Code ("ICC").⁹

A number of parties said that the Presidential Decree No. 12/2020 could legitimize COVID-19 as a force majeure and could be used as an excuse to cancel an agreement. However, Mahfud MD stated that the presumption of the Presidential Decree No. 12/2020 as the basis for cancelling an agreement, especially business contracts is a mistake.

COVID-19 as a non-natural disaster may not be immediately used as an excuse for the cancellation of an agreement by the reason of force majeure.¹⁰

Based on various issues above, this study will elaborate the following subject: Whether COVID-19 meet the concept of force majeure under Indonesian Law?

B. Research Method

Based on the issues above, this study use the normative jurisdictional approach.¹¹ Data collected is secondary data, which means that the data were already exists, the form and content of the data has already been compiled by the previous author and it may be obtained without being bound by time and place.¹²

C. Discussions

1. Agreement

a. The Definition and Conditions of an Agreement

1) ICC

Based on the Article 1313 of the ICC, an agreement is an act of pursuant to which one or more individuals bind themselves to one another.¹³ Furthermore, under ICC, an agreement must fulfil the following requisites to be valid:¹⁴

a) Consent of the Parties

Consent means agreement on all the

⁹ Indonesian Civil Code, art. 1244-1245. (Kitab Undang-Undang Hukum Perdata)

¹⁰ Mochamad Januar Rizki, "Penjelasan Prof Mahfud Soal Force Majeure Akibat Pandemi Corona", Hukumonline, <https://www.hukumonline.com/berita/baca/lt5ea11ca6a5956/penjelasan-prof-mahfud-soal-i-forcemajeure-i-akibat-pandemi-corona/> (accessed 17 October 2020).

¹¹ Sri Mamudji et al., *Metode Penelitian dan Penulisan Hukum* (Jakarta: Fakultas Hukum Universitas Indonesia, 2005), p. 9.

¹² Soerjono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: UI-Press, 2015), p. 12.

¹³ Indonesian Civil Code, art. 1313. (Kitab Undang-Undang Hukum Perdata).

¹⁴ *Ibid.*, art. 1320.

main content of the agreement between both parties.

b) Have Legal Capacity to Enter an Obligation

The contracting parties required to have legal capacity according to the law. Based on the Article 1329 ICC, every person has the capacity unless the law states otherwise. For example, according to Article 1330 of ICC, minors and those who are under guardianship don't have the capacity to make an agreement.

**c) There Must be a Specific Subject Matter
d) There Must be a Permitted Cause**

It means that the content of the agreement must contain a permitted cause. There are two conditions, subjective condition, in which such regulation reserved for parties who entered the agreement, the other condition is called objective condition because it refers to the agreement itself.¹⁵

2) Legal Doctrine

In this regard, Subekti said that an agreement is an event when one person promise to another or when two people promise one another to do something.¹⁶

b. The Principles of Agreement

1) The Principle of Freedom of Contract

Indonesian Law recognizes the principle of freedom of contract and such agreements are irrevocable unless by

mutual consent, or pursuant to reasons stipulated by law. This principle is explicitly stated in Article 1338 of the ICC.¹⁷

The principle of freedom of contract provides freedom for the parties to arrange the contents in several matters related to the agreement. The parties have the opportunity to determine all the clauses of the agreement, unless it will violate the laws, morality, or public order.¹⁸

2) The Principle of Pacta Sunt Servanda

This principle relates to the consequences of the agreement and is concluded in the sentence of "applies as a law for those who make it" in Article 1338 ICC. Thus, agreements made legally by the parties bind them as the law. Therefore, it means that an agreement that is duly and validly executed is legally binding.¹⁹

c. Event of Default

Based on Article 1243 of ICC, default is the debtor's failure to fulfil his obligations in accordance to the agreed agreement.²⁰ Subekti stated that the event of default may be implemented in four conditions, namely:²¹

- 1) The promise is broken by the debtor;
- 2) Debtor performs its promise, but does not correspond to the promised;
- 3) Debtor performs its promise, but not in timely manner; and
- 4) Debtor does some action which violates

¹⁵ Subekti, *Hukum Perjanjian* (Jakarta: Intermesa, 2005), p. 1.

¹⁶ *Ibid.*

¹⁷ Indonesian Civil Code, art. 1338. (Kitab Undang-Undang Hukum Perdata)

¹⁸ Ahmad Budi Cahyono and Surini Ahlan Sjarif, *Mengenal Hukum Perdata* (Depok: Gitama Jaya, 2008), p. 134.

¹⁹ Munir Fuady, *Hukum Kontrak: Buku Kesatu* (Bandung: Citra Aditya Bakti, 2015), p. 30.

²⁰ Ahmad Budi Cahyono and Surini Ahlan Sjarif, *Mengenal Hukum Perdata* (Depok: Gitama Jaya, 2008), p. 141.

²¹ Subekti, *Hukum Perjanjian* (Jakarta: Intermesa, 2005), p. 45.

the agreement.

The legal consequences for the event of default are for the debtor to pay compensation, in the form of costs, damages and interest, that is suffered by counterparty,²² the cancellation of the agreement,²³ the risk being transferred to the debtor since the default occurred,²⁴ and paying the court fee.²⁵

2. Force Majeure

As a follow up from event of default, debtor may prepare a plea with a variety of legal basis, one of which is to indicate that its performance may be excused due to force majeure.²⁶

a. Definition of Force Majeure

1) ICC

Although force majeure mentioned in ICC, it does not provide any details of the definition of force majeure.

2) Law No. 2 of 2017 on Construction Service ("Law No. 2/2017")

Law No.2/2017 states that force majeure is an event that arises beyond anticipation and control of the parties that cause loss for one party.²⁷

3) Presidential Regulation No. 16 of 2018 on Procurement of Government Goods/Services ("PR No. 16/2018")

Attachment to PR No. 16/2018 also states force majeure as a condition that occurs beyond anticipation of the parties so that the obligations specified in the agreement may not be fulfilled.²⁸

However, the above regulations (Law No. 2/2017 and PR No. 16/2018) only apply to certain sectors (construction and procurement for goods and/or service).

4) Legal Doctrine

Subekti believes that when the debtor use force majeure as its plea, the debtor may prove that the failure to perform was caused by other factors that were completely unpredictable, and the debtor could not do any necessary action to prevent it. In other words, the reasons of the debtor's non-performance or the delay on its performance was not caused by the debtor's fault.²⁹

b. The Conditions of Force Majeure

Munir Fuady stated his opinion based on articles in the ICC on force majeure and draw conclusion of the conditions of a force majeure are, namely:³⁰

- 1) The event that caused the force majeure must be unexpected by the parties;³¹
- 2) The party who has to carry out the

²² Indonesian Civil Code, art. 1234. (Kitab Undang-Undang Hukum Perdata)

²³ *Ibid.*, art. 1266.

²⁴ *Ibid.*, art. 1237.

²⁵ *Herziene Indonesisch Reglement*, art. 181 (1).

²⁶ Indonesian Civil Code, art. 1244-1245. (Kitab Undang-Undang Hukum Perdata)

²⁷ Law No. 2 of 2017 on Construction Services, art. 47. (Undang-Undang No. 2 Tahun 2017 tentang Jasa Konstruksi)

²⁸ Presidential Regulation No. 16 of 2018 on Procurement of Government Goods/Services, art. 1(52). (*Peraturan Presiden No. 16 Tahun 2018 tentang Pengadaan Barang/Jasa Pemerintah*)

²⁹ Subekti, *Hukum Perjanjian* (Jakarta: Intermedia, 2005), p. 55.

³⁰ Munir Fuady, *Hukum Kontrak: Buku Kesatu* (Bandung: Citra Aditya Bakti, 2015), p. 96-97.

³¹ Indonesian Civil Code, art. 1244. (Kitab Undang-Undang Hukum Perdata)

obligation (the debtor) may not be given responsibility for the event;³²

- 3) The event that caused the force majeure was beyond the debtor's fault;³³
- 4) The event that caused the force majeure was not a deliberate event by the debtor;³⁴ and
- 5) The debtor is not in a bad faith.³⁵

With respect to the fifth condition (The debtor is not in a bad faith), it means that any agreement must be performed by the parties in good faith.³⁶ In this regard, J. Satrio believes that good faith demands the agreement to respect appropriateness and propriety in the society.³⁷ Subekti, also believes that good faith demands the agreement to respect appropriateness and propriety.³⁸ Therefore, under Indonesian law, a contracting party must ensure that they performed in good faith in order to persuade the panel of judges to declare some circumstances as force majeure.

Moreover, Suharnoko also stated that despite the vagueness of the definition of appropriateness and propriety, good faith in agreement may be viewed in the form of notification and request for rescheduling

and restructuring.³⁹ Therefore, before declaring an event as a force majeure, there are several points as mentioned above that needed to be put into consideration.

c. The Scope of Force Majeure

1) Law No. 4 of 2009 on Mineral and Coal Mining ("Law No. 4/2009")

Law No.4/2009 states that events that may be declared as force majeure are war, civil disorder, rebellion, epidemic, earthquake, flood, fire, and natural disaster beyond human capability.⁴⁰

2) Legal Doctrine

According to Subekti, force majeure considered as an absolute, if there is no other possible way to carry out the agreement, for example the items have been destroyed because of the natural disasters. On the other hand, force majeure considered as a relative, which is in the form of a situation where the agreement may still be able to be implemented, but with a very big sacrifice from one of the parties. For example, prohibition by the government to distribute the items from a place, therefore, it needs a different transportation with a possible increase in cost to distribute the items.⁴¹

³² *Ibid.*

³³ *Ibid.*, art. 1545.

³⁴ *Ibid.*, art. 1553 jo. art. 1245.

³⁵ *Ibid.*, art. 1244.

³⁶ *Ibid.*, art. 1339.

³⁷ J. Satrio, *Wanprestasi Menurut KUHPerdata, Doktrin, dan Yurisprudensi* (Bandung: Citra Aditya Bakti, 2014), p. 47.

³⁸ Subekti, *Hukum Perjanjian* (Jakarta: Intermesa, 1995), p. 41.

³⁹ Suharnoko, *Hukum Perjanjian Teori dan Analisis Kasus* (Jakarta: Prenadamedia Group, 2004), p. 73-74.

⁴⁰ Law No. 4 of 2009 on Mineral and Coal Mining, elucidation of art. 113 (1). (Undang-Undang No. 4 Tahun 2009 tentang Pertambangan Mineral dan Batubara)

⁴¹ Subekti, *Pokok-Pokok Hukum Perdata* (Jakarta: Intermesa, 1982), p. 150.

d. The Consequences of Force Majeure

1) Law No. 4/2009

Law No. 4/2009 states that the consequences of force majeure are the suspension of mining activities or agreements.⁴²

2) PR No. 16/2018

Under PR No.16/2018, the occurrence of force majeure may result in the cancellation of the agreement or the change in the agreement.⁴³

3) Legal Doctrine

Sri Soedewi Masjchoen who cited from Dr. H.F.A Vollmar, distinguishes the consequences of force majeure based on its temporary or permanent nature. If it is temporary, then force majeure may only be delayed and its obligation will arise again as soon as the force majeure no longer exists. However, if the obligation is no longer meaningful to the creditor, the agreement may be cancelled. For example, a taxi was ordered to take a passenger to the station, because there was a traffic accident, the taxi could not arrive on time, and when the traffic conditions were smooth again, the passenger could no longer catch up on the train schedule.⁴⁴

3. COVID-19 as a Force Majeure

As already mentioned above, the

Government of Republic of Indonesia has issued Presidential Decree No. 11/2020, Presidential Decree No. 12/2020 and GR No. 21/2020 as its immediate response to the escalation of COVID-19.

Furthermore, in the tax sector, Decree of Director General of Tax Number KEP-156/PJ/2020 on Tax Policies on the Spread of Corona Virus 2019 also explicitly declared the spread of the COVID-19 in Indonesia as a force majeure.⁴⁵

Regardless of the above regulations which declares COVID-19 as a force majeure, below are the necessary consideration of the contracting parties:

- 1) Governing law of the agreement;
- 2) The conditions of force majeure; and
- 3) The force majeure clause under the agreement.

the details of each points are as follow:

a. Governing Law of the Agreement

Pursuant to the freedom of contract principle under Indonesian law, contracting parties must comply with the agreement and the agreement will be regarded as the law as long as the agreement has fulfilled the four basic thresholds set out in Article 1320 of ICC, such as consent, capacity, a specific subject matter and permitted cause.

⁴² Law No. 4 of 2009 on Mineral and Coal Mining, art. 113. (Undang-Undang No. 4 Tahun 2009 tentang Pertambangan Mineral dan Batubara).

⁴³ Presidential Regulation No. 16 of 2018 on Procurement of Government Goods/Services, art. 55. (Peraturan Presiden No. 16 Tahun 2018 tentang Pengadaan Barang/Jasa Pemerintah).

⁴⁴ Sri Soedewi M. Sofwan, *Hukum Perdata, Hukum Perutangan, Bagian A* (Jogjakarta: Seksi Hukum Perdata Fakultas Hukum Universitas Gadjah Mada, 1980), p. 22. as quoted by Rahmat S.S. Soemadipradja, *Penjelasan Hukum Tentang Keadaan Memaksa* (Jakarta: Nasional Legal Reform Program, 2010), p. 11.

⁴⁵ Decree of Director General of Tax Number Kep-156/Pj/2020 of 2020 on Tax Policies in Correlation with the Spread of Corona Virus 2019, art. 1. (Keputusan Direktur Jenderal Pajak Nomor Kep-156/Pj/2020 Tahun 2020 Tentang Kebijakan Perpajakan Sehubungan dengan Penyebaran Wabah Virus Corona 2019)

Accordingly, under Indonesian law contracting parties are free to choose its governing law, which will affect the law applied to the agreement.

Furthermore, as mentioned above, this study will only discuss force majeure under Indonesia law perspective. Therefore, this explanation only applies to agreements with Indonesia law as its governing law.

b. The Conditions of Force Majeure

First thing first, the party must consider whether COVID-19 fulfilled the force majeure threshold sets out in the ICC (see our explanation on point 2b).

In essence, the conditions of force majeure are as follow:

- a) The event that caused the force majeure must be unexpected by the parties;⁴⁶
- b) The party who has to carry out the obligation (the debtor) may not be given responsibility for the event;⁴⁷
- c) The event that caused the force majeure was beyond the debtor's fault;⁴⁸
- d) The event that caused the force majeure was not a deliberate event by the debtor; and⁴⁹
- e) The debtor is not in a bad faith.⁵⁰

Given the threshold sets out in ICC on force majeure. Generally, COVID-19 may be categorized as force majeure (subject to terms of the agreement and good faith

of the debtor) with the following reasons:

- a) COVID-19 is an unprecedented event and no one is able to predict its occurrence or its effect, either to health or business; and
- b) The occurrence of COVID-19 may not be placed upon the debtor's responsibility.

In addition, the definition of the fifth condition (The debtor is not in a bad faith) is extremely vague, thus we suggest that the party must review and see if there is any special requirement under the agreement to establish some event as force majeure.

As to the consequences of COVID-19 as force majeure, as mentioned above, one of the consequences of force majeure is cancellation of the agreement. However, we are of the view that COVID-19 not necessarily cancel the agreement as COVID-19 only cause a delay of performance from the debtor.

Alternatively, COVID-19 could be used as a legal basis to request for rescheduling and restructuring. As Suharnoko stated before, rescheduling and restructuring may be considered as the debtor's good faith.⁵¹ The aim of rescheduling is to extend the maturity of the agreement.⁵² While restructuring usually gives debtors more relaxation, amongst others: (a) lowered interest rate, (b) nullification of interest rate, (c) nullification owed interest rate.⁵³

⁴⁶ Indonesian Civil Code, art. 124. (Kitab Undang-Undang Hukum Perdata)

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, art. 1545.

⁴⁹ *Ibid.*, art. 1553 jo. art. 1245.

⁵⁰ *Ibid.*, art. 1244.

⁵¹ Suharnoko, *Hukum Perjanjian Teori dan Analisis Kasus* (Jakarta: Prenadamedia Group, 2004), p. 73-74.

⁵² *Ibid.*

⁵³ *Ibid.*

Usually, a party has to send a written notification to the counterparty in order to establish an event as force majeure and further requests for rescheduling and restructuring.

Therefore, in general, COVID-19 may be constituted as force majeure, however, in order to fully assess this matter, we shall refer back to the agreement and analyse it.

c. Force Majeure Clause under the Agreement

Due to freedom of contract principle, in practice there are four possibilities that may arise, amongst others:⁵⁴

- a) Agreement includes COVID-19 as a force majeure
- b) Agreement has a force majeure clause but does not explain particular events that may be declared as force majeure;
- c) The agreement does not stipulate anything related to force majeure; and
- d) The party decide to exempt the force majeure in the agreement.

In light of the above, it is necessary to review the relevant agreement before declaring that the contracting parties are able to indicate COVID-19 as force majeure. Further explanation about force majeure will be discussed next.

1) Agreement Includes COVID-19 as a Force Majeure

Agreement explicitly states outbreak or lockdown by government as a force majeure

event, then COVID-19 or lockdown by the government may be used as a reason for force majeure.⁵⁵ If this is the case, a contracting party has an absolute legal basis to declare COVID-19 as force majeure.

2) Agreement has a Force Majeure Clause but does not Explain Particular Events that may be Declared as Force Majeure

Whether it is stated explicitly or explicitly in the agreement, which must be considered is the obligation, not just the event. Then, the event is also an unexpected event before the agreement is made. For example, if the obligation is a debt service obligation, then an outbreak (COVID-19) or lockdown may not be the reason to delay the payment obligation, because the debtor may still be able to transfer money through an ATM, unless the payment system is interrupted.⁵⁶

3) The Agreement does not Stipulate Anything Related to Force Majeure

In the event where the agreement does not explicitly stipulate regarding force majeure. It is Indonesian law principle that the agreement will be governed by ICC. Therefore, particularly related to force majeure, it will refer to 1244 and 1245 ICC.

4) The Party Decides to Exempt The Force Majeure in the Agreement

The debtor may still be able to argue with legal doctrines and/or Supreme

⁵⁴ Rahmat S.S. Soemadipradja, *Penjelasan Hukum Tentang Keadaan Memaksa* (Jakarta: Nasional Legal Reform Program, 2010), p. 71-99.

⁵⁵ Tri Harnowo, "Wabah Corona sebagai Alasan Force Majeur dalam Perjanjian", Hukumonline, <https://www.hukumonline.com/klinik/detail/ulasan/lt5e81ae9a6fc45/wabah-corona-sebagai-alasan-iforce-majeur-i-dalam-perjanjian/> (accessed 19 June 2020).

⁵⁶ *Ibid.*

Court decisions as reference in order to constitute COVID-19 as force majeure, despite the exemption of force majeure clause.

Decision No.409K/Sip/1983 dated 25 October 1984 which essentially held that:⁵⁷ (i) a force majeure event must fulfil the elements of a condition that is unforeseen and unpreventable by the party that is obliged to perform obligations under an agreement, and is not attributable to such party; and (ii) the force majeure event is caused by a disaster that could not have been prevented by such party. Therefore, having this in mind it is worth to note that broad events could be constituted as force majeure.

In addition, Rahmat S.S. Soemadipradja also supports the view that policies or regulations set by the government could be used to indicate force majeure,⁵⁸ where in this case might be GR 21/2020 which adversely affect the debtor's performance.

In view of the foregoing, the relevant law and regulations could be argued to help a contracting party to constitute these circumstances as force majeure. However, as mentioned in the above, that whether or not such a request is granted by the panel of judges, it is still the panel of judges' discretion.

4. Recent Case of COVID-19 as Force Majeure

Recently, one of Indonesia District Court (Bengkulu District Court) stressed

out the importance of good faith in arguing COVID-19 as force majeure.

Panel of Judges in Bengkulu District Court under Decision Case No. 3/Pdt.G.S/2020 ("**Case No. 3**") held an interesting decision.⁵⁹ The Background of Case No. 3 are as follow:

- a. The plaintiff and defendant conclude a finance agreement on 25 July 2019;
- b. As of October 2019, the defendant did not pay its due payment [before the occurrence of COVID-19 in Indonesia];
- c. The plaintiff send 3 demand letters to the defendant; and
- d. Defendant did not send any respond to any of the plaintiff's demand letter.

Accordingly, the plaintiff submitted a claim against the defendant in Bengkulu District Court.

The defendant argued in its plea that the defendant shall be excused to perform its obligation due to Government Regulation in Lieu of Acts No. 1 of 2020 on State Financial Policy and Financial System Stability for Handling Corona Virus Disease 2019 (COVID-19) Pandemic and/or in The Context of Facing Threats That Harm National Economy and/or The Financial System Stability. ("**GR No. 1/2020**")

Within the consideration of the panel of Judges stated that GR No. 1/2020 is not relevant as the defendant already not paid its due payment from October 2019.

In view of Case No. 3, we are able

⁵⁷ Indonesian Supreme Court, "Decision No.409K/Sip/1983."

⁵⁸ Rahmat S.S. Soemadipradja, *Penjelasan Hukum Tentang Keadaan Memaksa* (Jakarta: Nasional Legal Reform Program, 2010), p. 88.

⁵⁹ Bengkulu District Court, "Decision No. 3/Pdt.G.S/2020."

to identify that COVID-19 is not straight forward constituted as force majeure. Based on the previous explanation, the defendant must consider whether COVID-19 fulfilled the force majeure threshold sets out in the ICC. The conditions of force majeure are as follows:

- a. The Event that Caused the Force Majeure Must be Unexpected by the Parties;

In this case, the defendant or the debtor knew that the instalment loan had due and had not been paid starting on October 25, 2019.

- b. The Party Who has to carry out the Obligation (the Debtor) may not be Given Responsibility for the Event;

In this case, the debtor had an obligation to pay at the agreed time, which is from October 25, 2019.

- c. The Event that Caused the Force Majeure was Beyond the Debtor's Fault;

In this case, the debtor should have calculated the payment obligation he had to do, because the instalment loan had due and had not been paid starting on October 25, 2019, where the impact of COVID-19 had not yet occurred in Indonesia.

- d. The Event that Caused the Force Majeure was not a Deliberate Event by the Debtor; and

In this case, the defendant shall be deemed to deliberately suspend its obligation to pay the plaintiff, as the plaintiff had provided 3 (three) demand letters to the defendant, respectively

on 30 October 2019, 8 November 2019 and 13 November 2019. To the above, the defendant must pay its debt to the plaintiffs as of the first demand letter (30 October 2019).

- e. The Debtor is not in a Bad Faith.

In this case, the debtor is not in good faith, namely by using COVID-19 as a force majeure, whereas in this case the instalment loan is due in 25 October 2019.

Therefore, as stated by the panel of judges, there is no relevance between Case No. 3 and COVID-19. In order to declare COVID-19 as force majeure, a contracting party must prove that the cause of its breach of performance is solely by COVID-19. Furthermore, the panel of judges held the solely discretion to reject or grant COVID-19 as a force majeure with its own consideration.

D. Closing

COVID-19 gives a lot of impact around the world, especially in business. In response, the government of Republic of Indonesia issued numerous regulations. Such regulation provides many restrictions which may affect the debtor's performance. When the debtor's performance is affected by COVID-19, the debtor may use force majeure as its legal basis to be excused from performance. Force majeure is an event that happens beyond an individual's control. The party who experiences force majeure may be excused from responsibilities arising from the non-fulfilment of contractual performance.

Furthermore, in order to declare COVID-19 as force majeure, the contracting party must analyze the governing law of

the agreement, the force majeure clause under the agreement, and the conditions of force majeure.

Regardless the force majeure clause under the agreement (whether it is explicitly regulated or silent), a contracting party is still able to argue that all the restriction caused by COVID-19 established by the government as a force majeure.

Therefore, in general, COVID-19 may be constituted as force majeure given its unpredictability. Moreover, as sets out in Case No. 3, all conditions of force majeure and the relevance of COVID-19 to the performance is very important in indicating COVID-19 as force majeure.

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