

## CONTRACT RENEGOTIATION DUE TO THE COVID-19 PANDEMIC FROM THE HARDSHIP PERSPECTIVE

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### ABSTRACT

The Covid-19 pandemic is something that cannot be predicted beforehand when the agreement is in progress and the fact that the existence of the COVID-19 pandemic affects the implementation and fulfillment of obligations in the agreement. Force majeure and hardship are based on different ratios. The hardship clause is needed, for the reasons: it can be used as a basis for overcoming in case of problems or failure to contract (frustration), especially long-term contracts with a very high value. Specification this research is included in the category of legal research which is a descriptive specification analytical, which is a study that seeks to describe legal problems, the legal system, and review it or analyze it according to the needs of the research. The purpose of this study is to find the position of the possibility of using the principle of hardship in the contract law system in Indonesia.

**Keywords:** COVID-19 Pandemic, Contract, Renegotiation, Hardship, Force majeure.

### A. Introduction

The World Health Organization (WHO) has stated that COVID-19 was declared a Global Pandemic on March 11, 2020. The Indonesian government responded to this and issued Presidential Decree Number 11 of 2020 on March 31, 2020, regarding determining a health emergency Corona Virus Disease 2019 (COVID-19) community. The issuance of Presidential Decree Number 11 of 2020 because of the spread of COVID-19 has

been extraordinary, with the number of deaths continuing to increase and spread across regions and have an impact on political, economic, social, cultural, defense and security aspects, as well as the welfare of the people in Indonesia.<sup>1</sup>

With the increasing number of COVID-19 during the pandemic, the Indonesian government also issued a policy to regulate activities related to restrictions, namely Government Regulation Number 21 of 2020

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1 Indonesia, Keputusan Presiden Nomor 11 Tahun 2020 Tentang Penetapan Kedaruratan Kesehatan Masyarakat Corona Virus Disease 2019, Keppres No. 11 Tahun 2020 (Keppres PKKM Covid-19).

concerning Large-Scale Social Restrictions (PSBB) on March 31, 2020. Government Regulation Number 21 of 2020 in Article 1 states:

“In this government regulation, what is meant by Large-scale social restrictions are restrictions certain activities of the population in an area suspected of being infected with Corona Virus Disease 2019 (COVID-19) in such a way as to prevent the possibility of the spread of Corona Virus Disease 2019 (COVID-19).”<sup>2</sup>

Reducing the spread of the COVID-19 virus in Indonesia requires restrictions. After that, the government issued Presidential Decree Number 12 of 2020 concerning the Determination of Non-Natural Disasters Spreading COVID-19 as a National Disaster on April 13, 2020.

The President categorized the spread of COVID-19 as a non-natural disaster and referred to two laws as the basis for the implementation, namely:

- a. Law Number 24 of 2007, in Article 1 point 2 states the definition of “natural disaster”:  
“Natural disaster shall mean an event or a series of events caused by nature such as earthquake, tsunami,

volcanic eruption, flood, drought, typhoon, and landslide.”<sup>3</sup>

Then, Article 1 point 3 states the definition of “non-natural disaster”:

“Nonnatural disaster means a nonnatural event or a series of nonnatural events such as technological failure, modernization failure, and epidemic.”<sup>4</sup> Law Number 4 of 1984, in Article 1 letter a mentions the definition of “epidemic”:

“An outbreak of an infectious disease, hereinafter referred to as an epidemic, is the occurrence of an outbreak of an infectious disease in a society whose number of sufferers increases significantly more than the usual circumstances at a certain time and region and can cause disaster.”<sup>5</sup>

Article 1 point 19 of Law Number 24 of 2007, the government also states that the status of a disaster emergency is a situation set by the Government for a certain period of time on the recommendation of the Agency given the task of disaster management.<sup>6</sup> Thus, the National Agency for Disaster Countermeasure (BNPB) tasks with tackling disasters, also issued a letter from the Head of BNPB Number: 9.A of 2020 dated January 28, 2020, concerning

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2 Indonesia, Peraturan Pemerintah Tentang Pembatasan Sosial Berskala Besar Dalam Rangka Percepatan Penanganan Covid-19, PP No. 21 Tahun 2020, LN No. 91 Tahun 2020, TLN No. 6487, Pasal 1 (PP PSBB Dalam Rangka Percepatan Penanganan Covid-19).

3 Indonesia, Undang-Undang No. 24 Tahun 2007 Tentang Penanggulangan Bencana, LN No. 66 Tahun 2007, TLN No. 4723, Pasal 1 angka 2.

4 Ibid., Pasal 1 angka 3.

5 Indonesia, Undang-Undang No. 4 Tahun 1984 Tentang Wabah Penyakit Menular, LN No. 20 Tahun 1984, TLN No. 3273, Pasal 1 huruf a.

6 Indonesia, UU Penanggulangan Bencana, op. cit., Pasal 1 angka 19.

the Determination of the Status of Certain Emergency Disasters due to Corona Virus Disease Outbreaks in Indonesia jo. Letter of the Head of BNPB Number: 13.Aof2020 dated February 29, 2020, concerning the Extension of the Status of Certain Emergency Disasters due to Corona Virus Disease in Indonesia.<sup>7</sup> These two things are the basis for the issuance of Presidential Decree Number 12 of 2020 concerning the determination of non-natural disasters that spread COVID-19 as a national disaster.<sup>8</sup>

Presidential Decree Number 12 of 2020, which has determined the COVID-19 pandemic as a non-natural national disaster, has raised two opinions between the parties who confirm that the COVID-19 pandemic is a force majeure<sup>9</sup> and others who stated no reason for the imposition of force majeure. With Presidential Decree Number 12 of 2020, Mahfud MD has stated that it is not a basis for automatically canceling a contract, especially in a business contract, with the argument of force majeure. However, the issuance of this policy can be an entry point for renegotiation regarding matters regulated in the contract, where

the government's goal is to maintain conduciveness in the business world.<sup>10</sup>

Implementing PSBB has more influence on the obstruction of debtors because the implementation of PSBB can limit the space for debtors. The regulation has coercive power so that debtors are not free to run their business or business and do not get optimal income. The reduced income of the business actor as the debtor will indicate his inability to pay off his debts or fulfill achievements in business agreements. However, there are no unilaterally changes or cancelations in business agreements because of the COVID-19 pandemic that consequences implementation of PSBB.<sup>11</sup>

We cannot predict when the agreement is running, and the fact that the existence of the COVID-19 pandemic affects the implementation and fulfillment of obligations in the agreement. So, how can contract renegotiation be an alternative solution to hardship? Can the teachings of hardship be applied in the agreement about the emergence of this COVID-19 pandemic? This thing is interesting to study further. This

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7 Wardatul Fitri, "Implikasi Yuridis Penetapan Status Bencana Nasional Pandemi Corona Virus Disease 2019 (Covid-19) terhadap Perbuatan Hukum Keperdataan", *Jurnal Supremasi Hukum*, Vol. 9 No. 1, Juni 2020, p. 82.

8 Ibid.

9 "Force majeure is a teaching or legal concept that originates from Roman law (*vis motor cui resiti non protest*), which later developed widely in the treaty law of various countries". Agri Chairunisa Isradjuningias, "Force majeure (Overmacht) Dalam Hukum Kontrak (Perjanjian) Indonesia", *Veritas Et Justitia*, Vol. 1, No. 1, 2015, 136-158, p. 139.

10 Mochamad Januar Rizki, "Penjelasan Prof. Mahfud Soal Force majeure Akibat Pandemi Corona", accessed from <https://www.hukumonline.com/berita/a/penjelasan-prof-mahfud-soal-i-force-majeure-i-akibat-pandemi-corona-lt5ea11ca6a5956>, at the date of 18 Mei 2022.

11 Jodi Pratama dan Atik Winanti, "Force majeure dalam Kontrak Bisnis Akibat Pandemi Corona", *Nusantara: Jurnal Ilmu Pengetahuan Sosial*, Vol. 8 No. 2, Februari 2021, p. 267.

paper aims to review the application of the hardship concept or teachings in agreements due to the COVID-19 pandemic emergence.

## B. Research Method

This research is legal research with a normative approach method, namely an approach based on the applicable laws and regulations<sup>12</sup>. This research is in the legal research category, a descriptive-analytical specification. According to the research needs, this study seeks to describe legal problems and the legal system by either reviewing or analyzing them.<sup>13</sup> The data collection method uses secondary data from library research, namely by reading the applicable laws and regulations, literature books, and other documents related to discussing the issues.

Data analysis by processing data obtained from the field and library data then analyzed normative qualitative analysis.

Normative qualitative analysis obtains the data from the research results grouped and selected and then linked

to the problem to be investigated based on the quality and truth to conclude the problem at hand.

## C. Discussions

Examine the things that are important when using the reasons for the COVID-19 pandemic as a force majeure<sup>14</sup>, including:<sup>15</sup>

- a. Does the force majeure clause in the contract already regulate the COVID-19 pandemic?
- b. What are the definitions and limitations of force majeure that the parties in the contract have regulated?
- c. What is the causal relationship between the implementation of achievements and the determination of COVID-19 as a non-natural national disaster?
- d. Has the debtor had good intentions to fulfill the achievement that force majeure hindered?.

If it turns out that there is no special clause regarding the COVID-19 pandemic as force majeure in the agreement, then we need to examine whether this COVID-19 pandemic has fulfilled the elements of the force majeure arrangement in the Civil Code, namely Articles 1244<sup>16</sup> and 1245<sup>17</sup>,

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12 Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2017), p. 119.

13 Soerjono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: UI Press, 1986), p. 52.

14 Several terms are known about this force majeure, namely "*overmacht*" (Dutch) and "*vis major*" (Latin). In Indonesian it is translated as a state of coercion. In some laws and regulations it is also referred to as a state of force majeure. Riduan Syahrani defines a coercive situation as a condition that prevents the fulfillment of an engagement that frees a person from the obligation to reimburse costs, losses and interest. Riduan Syahrani, *Seluk Beluk dan Asas-asas Hukum Perdata* (Bandung: Alumni, 2006), p. 243.

15 Ibid., p. 270.

16 Article 1244 of the KUH Perdata, translated by R. Subekti and R. Tjitrosudibio, (Jakarta: Balai Pustaka, 2013), p. 355.

17 Article 1245 of the KUH Perdata, Ibid.

which described as follows:<sup>18</sup>

- a. The occurrence of the incident was against the will of the debtor. It is true that the COVID-19 pandemic has indeed occurred in all parts of the world where the parties to the agreement were unable to prevent the COVID-19 pandemic from occurring and this COVID-19 pandemic has also had a negative impact on several business sectors, from reduced income to business closures;
- b. Unpredictable events occur. In this case, the spread of the COVID-19 pandemic was fast enough to have an impact on the agreement that was made before the COVID-19 pandemic, could not predict the rapid spread of the virus;
- c. There is an obstacle for the debtor to carry out the performance. The application of PSBB allows to limit the space for debtors to fulfill certain achievements. If the debtor as a business actor continues to run his business to be able to fulfill his achievements, due to the PSBB policy, he will be subject to sanctions on the grounds that it will increase the spread of COVID-19;
- d. The obstruction of the debtor is not because there is an element

of error on the part of the debtor. When viewed in general terms, the implementation of the PSBB set by the Indonesian government certainly has an impact on the limited mobility and space for everyone so that it can also affect debtors in fulfilling their achievements;

- e. The risk of the debtor's inability to meet performance cannot be borne by the debtor. If it is proven that the debtor cannot fulfill his achievements due to being hindered by one of the impacts of the COVID-19 pandemic, then the debtor cannot be held responsible for his inability.

Thus, the COVID-19 pandemic can be force majeure. However, there is no reason for canceling the agreement because this situation is a relative or subjective force majeure where remain implementing actual achievement or it is not impossible to do so that can negotiate alternative solutions to renegotiate.<sup>19</sup> To assess whether as force majeure or not, it also depends on what form of obligation a party must carry out and the condition of the party who is obliged to do it. Even though the agreement has stipulated that a pandemic or non-natural disaster is a force majeure, it is not directly sufficient to declare the debtor experiencing force majeure because it still requires sufficient

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18 Velliana Tanaya dan Jessica Angeline Zai, "Penerapan Pembatasan Sosial Berskala Besar (PSBB) Akibat Pandemi Coronavirus Disease 2019 (Covid-19) Sebagai Force majeure dalam Kontrak", *Law Review*, Vol. 21 No. 1, Juli 2021, p. 107.

19 Annisa Dian Arini, "Pandemi Corona Sebagai Alasan Force majeure dalam Suatu Kontrak Bisnis", *Jurnal Supremasi Hukum*, Vol. 9 No. 1, Juni 2020, p. 54.

evidence related to its implementation and also fulfills the conditions for the imposition of force majeure.<sup>20</sup>

The debtor can still defend himself even though there is no force majeure provision related to a pandemic or non-natural disaster in the agreement because the provisions of Article 1339 of the Civil Code (KUH Perdata) stipulate that:

“Agreements shall bind the parties not only to that which is expressly stipulated, but also to that which, pursuant to the nature of the agreements, shall be imposed by propriety, customs, or the law.”<sup>21</sup>

Thus, if the determination of PSBB as a government policy has a direct impact and is proven to hinder the agreement's implementation on the debtor, in that case, it can still defend itself based on force majeure, even though the agreement does not regulate specifically the situation. According to Indonesian law, implementation of the force majeure doctrine carry out for law, not for agreement in the agreement, so even though the agreement does not state, the force majeure provisions can still be used if by law.<sup>22</sup>

Then whether Presidential Decree Number 12 of 2020 directly impacts the implementation of obligations or achievements of the debtor? In fact, Presidential Decree Number 12 of 2020 cannot specifically affect the obstruction of performance by debtors. Due to Presidential Decree Number 12 of 2020, emphasis is more on that the COVID-19 pandemic is a non-natural national disaster in contrast to Government Regulation Number 21 of 2020 regarding the PSBB, which has the power to limit the community's movement. It is still necessary to prove that the COVID-19 pandemic has indeed hindered the implementation of the achievements in the agreement. All answers again relate to the type of case of the respective agreement and require further proof.<sup>23</sup>

It is not uncommon for real problems completion in many business agreements to end up in a prolonged conflict. In this case, the parties must include anticipatory clauses in the contract to protect their business interests, such as the force majeure clause. If the clause does not contain special arrangements regarding force majeure, then the parties will be subject to the law, which is the legal choice of the parties.<sup>24</sup>

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20 Ibid., p. 49.

21 Indonesia, Kitab Undang-Undang Hukum Perdata, UU Nomor 1 Tahun 1946 (KUH Perdata), LN No. 23 Tahun 1947, Article 1339.

22 Jonsons Mangisih, et. al., “Tinjauan Yuridis Penetapan Bencana Nasional Non-Alam Penyebaran Covid-19 Sebagai Bencana Nasional Berdasarkan Keppres No. 12 Tahun 2020 Jo. Pasal 1245 KUH Perdata”, *Jurnal Hukum: Hukum Untuk Mengatur dan Melindungi Masyarakat*, Vol. 7 Special Issue, Februari 2021, p. 83.

23 Fredrik J. Pinakunary Law Offices, “Pandemi Covid19 dan Force majeure (Overmacht)”, accessed from <https://fjp-law.com/id/pandemi-covid-19-dan-force-majeure-overmacht/>, at the date of 18 Mei 2022.

24 Agus Yudha Hernoko, “Force majeure Clause atau Hardship Clause: Problematika dalam Perancangan Kontrak Bisnis”, *Jurnal Perspektif*, Vol. 11 No. 3, Juli 2006, p. 204.

## 1. Force majeure and Hardship Concept

Agreement is one source of engagement. The legal relationship and legal consequences between the parties will be born with the agreement or closing. Each party will be bound to carry out its rights and obligations by the agreement's contents. As referred to by the *pacta sunt servanda* principle in Article 1338 of the Civil Code (KUH Perdata), in principle, the parties consider the obligation to carry out the contents of the agreement is absolute, binding like a law.<sup>25</sup>

There are two possibilities in the implementation of the agreement, namely, implementation of the obligations as agreed, or vice versa, cannot fulfill the obligations due to certain causes. There are two parts to the non-performance of the obligations in the agreement: due to the debtor's fault or negligence and not the debtor's fault or negligence. It is the default if the debtor does not carry out the agreement due to his error or negligence. The debtor should pay fees as a punishment for default, losses, and interest to the creditor. On the other hand, in the event of failure to implement the agreement beyond the fault or negligence of the debtor, it is called force majeure or *overmacht*.

The teachings of hardship in the practice of international business contracts are the teachings related to the failure to implement the agreement beyond the fault or negligence of the debtor. Based on theory and practice, the concepts of force majeure and hardship look similar.<sup>26</sup> However, force majeure and hardship have different ratios, namely force majeure on impossibility and hardship on changing circumstances.<sup>27</sup>

Based on the rules in the Civil Code, events that hinder the debtor's performance must be an event that cannot be predicted, including the closing of the agreement. Besides, it is unpredictable that the incident also occurred beyond the debtor's fault and his control. Article 1244 of the Civil Code concludes that the incident in force majeure requires no bad faith from the debtor. In this case, the debtor cannot avoid the incident. As a result, it prevents them from fulfilling their achievements to the creditor. It requires the condition after the agreement's closing and before declaring the debtor negligent.<sup>28</sup> If this happens, it considers force majeure. However, the debtor must be able to prove that his non-performance is beyond his fault.

Besides force majeure, Other teachings are hardship or difficult

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25 Abdulkadir Muhammad, *Hukum Perjanjian* (Bandung: Alumni, 2006), p. 171.

26 Eppur Si Muove, "The Age of Uniform Law" (Rome: International Institute For The Unification Of Private Law, 2016), p. 64.

27 Michael Furmston, *Drafting Force majeure Clauses: Some General Guidelines*, (London: Lloyd's of London Press, 1995), p. 57.

28 R. M. Suryodiningrat, *Azas-azas Hukum Perikatan* (Bandung: Tarsito, 1995), p. 37.

circumstances. Organizations such as UPICCs have accommodated and developed hardship in practicing international contract law.<sup>29</sup> In contrast to force majeure, the Civil Code regulation has regulated it. Positive legal regulations have not adopted the hardship in Indonesia.

Definition of hardship is an event that occurs after the agreement's closing beyond the parties' control (unexpected or foreseen). Increasing the cost of implementing the agreement poses a risk of fundamental changes in the balance of the agreement so that it burdens the debtor, or vice versa, the decrease in implementation costs. Therefore agreement eliminates profits for creditors.<sup>30</sup> The concept of hardship is similar to force majeure, which is related to the occurrence of an event in the implementation of the agreement. It is unpredictable, beyond the control, and the parties' fault in the agreement. However, in contrast, to force majeure, hardship explicitly requires that the event's occurrence results in a fundamental change in the balance of the agreement.

Article 6.2.2 UPICCs states that there are three elements to determine the presence or absence of hardship, namely:<sup>31</sup>

- a. Fundamental alteration of equilibrium of the contract;
- b. An increase in the cost of performance;
- c. Decrease in value of the performance received by one party.

The hardship in the implementation of the agreement also has legal consequences. Article 6.2.3 UPICCs provide alternative solutions as follows:

- a. The aggrieved party has the right to request a renegotiation of the agreement with the other party. The request must be submitted as soon as possible, including the basis for renegotiation;
- b. A request for renegotiation does not automatically grant the right to terminate the execution of the agreement;
- c. If the renegotiation fails, the parties can submit it to the court. Courts may decide to:
  - 1) Terminate the agreement; or
  - 2) Change the agreement by restoring the balance.

In looking at hardship, there are 3 things that must be considered, namely:<sup>32</sup>

- a. Changes in the balance in the agreement fundamentally;
- b. The value of the execution of the contract is increasing by one party; and

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29 Herman Brahmana, et. al, "Eskalasi dan Force majeure Dalam Peraturan Perundang-undangan", *USU Law Journal*, Vol. 3, No. 2, 2015, 78-86, p. 79.

30 Agus Yudha Hernoko, *Hukum Perjanjian: Asas Proporsionalitas dalam Kontrak Komersial* (Yogyakarta: LaksBang Mediatama, 2008), p. 215.

31 UNIDROIT Principles for International Commercial Contracts 2016, "International Institute For The Unification Of Private Law" (Rome: UNIDROIT, 2016), p. 218.

32 Agus Yudho Hernoko, op. cit., p. 283.



c. The value of the contract execution is decreasing received by one of the parties.

Referring to this, it can be seen that the legal consequences of the occurrence of hardness are slightly different from force majeure. Where in force majeure, settlement proceedings carried out in court with the debtor's obligation prove the occurrence of events affecting the execution of the agreement is beyond his fault. While on the hardness, the emphasis of the settlement process is directed at the renegotiation process. The concept of hardness dictates that the parties remain bound to execute the agreement. The way is to renegotiate to restore the balance of the agreement, that is, a fair exchange of rights and obligations. Thus, the occurrence of hardship does not necessarily result in termination or cancellation of the agreement, but makes the fulfillment of the performance delayed. Practice in Indonesian courts, hardness is often equated with relative force majeure due to the delay in the implementation of the agreement.<sup>33</sup>

About the failure of the implementation of the agreement, in the practice of international business agreements, there is a development of teachings called arduous or difficult conditions. The concept of hardship is similar to force majeure, namely the occurrence

of events that affect the implementation of the agreement or the achievement fulfillment. It is also unpredictable, beyond the agreement's control and the parties' fault. Even so, hardship requires an event that fundamentally affects the agreement and changes the balance contained in the agreed agreement. So, can fail to fulfill achievements due to the COVID-19 pandemic also apply arduous teaching?.

The presence and the impact of the COVID-19 pandemic on the implementation of the agreement are beyond the parties' control. The emergence of the COVID-19 pandemic is something that the parties cannot predict, so this is not the parties' fault, including the debtor. The parties to the agreement do not have the power to regulate and control the arrival of a pandemic, so it is possible to use this as a basis for expressing hardship. If this is possible, the next step is to analyze whether this fundamentally affects the agreement and its implementation?.

In this regard, it needs to consider three steps, namely:<sup>34</sup>

First, in the force majeure discussion, the onset of the COVID-19 pandemic that affects the implementation of the agreement must be required to occur after the agreement's closing and before declaring the debtor negligent.

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33 Cinantya Prima Hapsari Sularto, "Tinjauan Terhadap Klausula Hardship Dalam Hukum Perjanjian Indonesia", Tesis Magister Kenotariatan, (Yogyakarta: Fakultas Hukum Universitas Gadjah Mada, 2012), p. 68.

34 Nindry Sulisty Widiastiani, "Pandemi Covid-19: Force majeure dan Hardship Pada Perjanjian Kerja", *Jurnal Hukum & Pembangunan* 51 No. 3 (2021): 698-719, p. 713.

It means that at the time of closing the contract, both creditors and debtors cannot predict or suspect the occurrence of the COVID-19 pandemic, which will impact the implementation of the parties' agreement. The pandemic that causes failure to fulfill agreement achievements by debtors is also absolutely required before declaring the debtor negligent. This inability to fulfill achievements due to COVID-19 appears before agreeing and regulating the fulfillment deadline. If the COVID-19 pandemic occurs after the agreement's closing and before declaring the debtor negligent, then the failure to implement the agreement can apply the hardship.

Second, it is still the same as the force majeure discussion, and it is worth noting whether the COVID-19 pandemic hinders debtors from achieving. It means that the existence of the COVID-19 pandemic directly impacts the situation faced by debtors in the context of their efforts to fulfill achievements as promised in the agreement. Again, the COVID-19 pandemic generally impacts the company's situation, but it may not affect the debtor in the context of carrying out his obligations in the agreement. If the pandemic does not affect the agreement's implementation, then hardship cannot be applied.

Moreover, third, the most important step related to the main conditions in the implementation of hardship is whether the existence of the intended event will fundamentally affect the implementation

of the agreement. Unlike in force majeure, which is sufficient in the analysis that the COVID-19 pandemic affects the fulfillment of the parties' achievements, in hardship, it requires that the impact of the COVID-19 pandemic on the agreement must be fundamental. It means to provide a change in the balance in the agreement. Article 6.2.2 of the UPICCs states that changes in the agreement balance are fundamentally related to the balance of achievement fulfillment between the parties, namely if there is an increase in performance cost. In the condition that the drastic increase in the cost of implementing the agreement causes the debtor not to fulfill, or it will experience a high loss if he fulfills as he will not experience in normal circumstances.

In this case, the COVID-19 pandemic has an impact on company income and fulfilling achievements, for example, in the form of payment of wages and other worker benefits. The increase in the cost of implementing the agreement is difficult to fulfill the payment of wages and other worker benefits. During the COVID-19 pandemic, the working relationship between employers and workers, which has an impact on company income, fulfilling achievements, for example, in the form of wages and other worker benefits, will be difficult because there is an increase in the cost of implementing the agreement. In nominal terms, the fulfillment of payment of wages and other benefits is indeed fixed, but due to the COVID-19 pandemic, the actual value

of the fulfillment costs increases. The increase in real value occurred because the company's income was affected by the COVID-19 pandemic. If so, the entrepreneur, as the debtor, is placed in a difficult situation (hardship).

In general, it is possible to apply the teachings of hardship in the event of a failure to fulfill achievements due to the COVID-19 pandemic. However, as is the case with the discussion on force majeure, the application of arduousness cannot be carried out as a general principle by striking all achievements during the COVID-19 pandemic. Applying hardship must be subjective by looking at the situation and conditions in each case. An analysis of the certainty that the presence of COVID-19 directly affects the fundamental balance of the agreement needs to be carried out. This is important, considering the COVID-19 pandemic, that not all affected the agreement's implementation and the fundamental balance. If it fulfills the requirements in the teachings of arduous, then arduous can be applied.

In the event of hardship, the legal consequences are open opportunities for the affected parties to apply for renegotiation. This renegotiation intends to arrange and re-agreed clauses of obligations that debtors find challenging to fulfill during difficult times. The goal

is to restore balance in the agreement. The cancellation of the agreement is not the main starting point in arduous renegotiation. Still, it adheres to the agreement's implementation with new clauses or conditions that make it easier for debtors who are in difficulty. Hardship adheres to the fact that the obligation to carry out the contents of the agreement is absolute.<sup>35</sup>

## **2. Covid-19 Pandemic As A Hardship Clause In Business Contracts**

The proof of the Covid-19 pandemic can be said to be Force Majeure will depend on how much the fundamental influence hinders the debtor in implementing the agreement and also how the form of Force Majeure clauses the parties contain in the agreement. The debtor must also be able to immediately notify the creditor of the reason he failed to fulfill the achievement in accordance with his time, because this incident is not a desire of the debtor, so in good faith the debtor informs the creditor before the risk of loss increases and can immediately find a solution to overcome the consequences arising from the non-fulfillment of the achievement agreement.<sup>36</sup>

In the situation that is happening when the debtor stops fulfilling its obligations, it must also be proven whether there is an element of error or intentional from the

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35 Abdulkadir Muhammad, Loc.cit.

36 Rizkyana Diah Pitaloka, "Penundaan Pemenuhan Prestasi pada Kontrak Bisnis di Masa Pandemi Covid-19", Jurnal Kertha Semaya, Vol. 9 No. 3, Oktober 2020, p. 466.

debtor, so that if it is proven that there is an element of error in the debtor, the debtor must be responsible for the risk of loss that occurs. Meanwhile, if the evidence of the debtor's defense is really proven and meets all the conditions for the imposition of Force Majeure, then he will be free from risk responsibility, but in essence the nature of The Force Majeure does not eliminate the debtor's obligation to fulfill the achievement, but only eliminates the obligation to pay interest or losses.<sup>37</sup>

As explained above, if it turns out that the condition of the Covid-19 pandemic is categorized as a relative or subjective Force Majeure, then this circumstance does not make it impossible for the debtor to fulfill his achievements, so that what can be done after renegotiation and is proven to have hindered the debtor in carrying out his achievements is that the debtor is given the opportunity to delay the fulfillment of Obligations or achievements in the agreement and also does not bear the risks resulting from non-fulfillment of achievements. If the situation has recovered, then the debtor is obliged to fulfill all his achievements that have been delayed fulfillment.<sup>38</sup>

In the end, if this matter reaches the realm of the court and the debtor has done proof of the Force Majeure circumstances experienced, the judge is also the one who determines how

the final decision so that those who can provide legal certainty are the judges of the court and the judge can also exceed the limitations that exist in the business agreement based on good faith.<sup>39</sup>

Based on this description, it can be seen that a business agreement is an agreement made by the parties in writing, the substance of which relates to commercial activities. Then, the issuance of Presidential Decree No. 12 of 2020 regarding the determination of Covid-19 as a non-natural national disaster has led to speculation that the Presidential Decree can be used as a Force Majeure against the non-implementation of an achievement during the Covid-19 pandemic. In fact, when examined, the points set forth in Presidential Decree No. 12 of 2020 does not directly affect to prevent the debtor from carrying out his achievements. Unlike the case with the determination of the PSBB which does have the power to limit the space for community movement. Until the determination of Presidential Decree No. 12 of 2020 cannot necessarily be used as Force Majeure but can open up opportunities for the parties to renegotiate their business agreements.

These renegotiation efforts can be in the form of rescheduling, restructuring or reconditioning (return requirements), in the hope of restoring the balance of rights

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37 Velliana Tanaya dan Jessica Angeline Zai, *op.cit.*, p. 111.

38 Rizkyana Diah Pitaloka, *op.cit.*, p. 461.

39 Velliana Tanaya dan Jessica Angeline Zai, *op.cit.*, p. 107.

and obligations in business agreements and can complement things that have not been regulated to adjust to the Covid-19 pandemic situation. Related to the principle of hardship, positive law in Indonesia until now has not recognized and has not regulated the principle of hardship, so in practice, clauses are usually inserted into an agreement and in solving problems related to hardship then prioritize the provisions set forth in the principle of force majeure, either intentionally or unintentionally.

In addition to force majeure, the courts in Indonesia in deciding cases related to the hardness can use the basis of good faith. In this case, good faith can be the basis for matters related to hardship, because in the event that one of the parties refuses to renegotiate so that it causes the value of the contract to be unbalanced due to a fundamental change in circumstances, the refusal can be considered contrary to good faith.

The adoption of the principle of hardship as one of the clauses in the agreement, especially agreements that have a long period of time with a very high value, is very important, it aims to overcome the difficulties in applying the principle of failure to contract (frustration) and the principle of force majeure. Therefore, the principle of hardness

itself can be interpreted as one of the alternative methods to resolve cases that have the characteristics of circumstances that fundamentally affect the balance of the contract, especially to commercial contracts that are in accordance with the principle of proportionality to divide the burden of exchanging rights and obligations equally.<sup>40</sup>

As a development of the hardship principle, in international law, this principle is essentially an exception to the principle of *pacta sunt servanda* (the agreement is legally binding). The agreement shall be executed by the parties as agreed, as long as the environment and circumstances at the time of making the agreement do not change for the future. So that with a change in circumstances and it turns out that the change affects the ability of the parties to carry out the agreement, then the party who is no longer able to carry out the agreement can declare to be no longer bound or out of the agreement and the agreement is no longer binding.<sup>41</sup>

Agreements made legally will bind the parties based on the principles of *pacta sunt servanda*, but in practice it is often found that the application of these principles often gives the opposite result from the target. Therefore, as an exception the obligation to fulfill a promise may be accepted if an extraordinary

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40 Ifada Qurrata A'yun Amalia dan Endang Prasetyawati, *Karakteristik Asas Proporsionalitas Dalam Pembentukan Klausul Perjanjian Waralaba*, Jurnal Hukum Bisnis Bonum Commune, Vol. 2, No. 2, Agustus 2019.

41 Harry Purwanto, *Keberadaan Asas Rebus Sic Stantibus dalam Perjanjian Internasional*, Jurnal Mimbar Hukum UGM, Edisi Khusus, November 2011, p. 108.

event has caused the obligation to be unfulfilled. Until this exception gave birth to the principle of *boiled sic stantibus*. In other words, the problem raised here is that there are two options, namely the rigid application of *pacta sunt servanda* to maintain the sanctity of the contract or the application of the *rebus sic stantibus* principle.<sup>42</sup>

The *rebus sic stantibus* principle has become part of the general legal principle, as well as other legal principles above and has also been embodied in the International positive law system. This principle is applicable when the agreement made by the parties is only binding as long as there is no fundamental change in the circumstances that occurred at the time the agreement was held.<sup>43</sup>

The hardship clause is addressed differently in countries with civil law traditions. This is because it is more subjective and has a great impact on the achievement of the implementation of a contract. In Indonesia, this doctrine is better known in international law (Agreement) and a little in insurance law. In Indonesian legislation, the existence of the *rebus sic stantibus* principle is recognized in Article 18 letter c of Law Number 24 of 2000 concerning international treaties. In Article 18 letter c it is stated that “an international agreement

is terminated when there are fundamental changes that affect the implementation of the agreement”. However, the law does not provide for restrictions on what the *rebus* principle of *sic stantibus* is.

The use of the principle cannot be applied to border contracts and the occurrence of changes in circumstances due to violations committed by the claimant. Indonesia has ratified the UNIDROIT Principles of International Commercial Contracts (U PICC) through Presidential Regulation No. 59 of 2008 as one of the efforts for legal harmonization or regulation in international contract law. In UNIDROIT there are principles, among others: the principle of *pacta sunt servanda* and the principle of *rebus sic stantibus*, where the term used is the hardness clause. Principles *Rebus Sic Stantibus* in section 2 under the title of Hardship, regarding the contract that must be obeyed (contract to be observed), there are two main provisions, namely:<sup>44</sup>

- a. The binding nature of the contract as a general rule; and
- b. Changes in relevant circumstances are only related to certain contracts (such as contracts that have not been executed or that are still valid and long-term).

The hardship clause is needed, for the reasons: it can be used as a basis for

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42 Suherman, *Perkembangan Asas Rebus Sic Stantibus (Perubahan Keadaan Yang Fundamental) Dalam Hukum Positif Di Indonesia*, Jurnal Yuridis, Vol. 3, No. 1, 2016, p. 5.

43 Ibid.

44 Taryana Soenandar, *Prinsip-Prinsip UNIDROIT sebagai Sumber Hukum Kontrak dan Penyelesaian Sengketa Bisnis Internasional*, (Jakarta: Sinar Grafika, 2006), p. 71.

overcoming in case of problems or failure to contract (frustration), especially long-term contracts with a very high value, more flexible and can accommodate the wishes of the parties in renegotiating, dividing the burden of exchanging rights and obligations in a balanced way so that the purpose of making the contract is achieved. The benchmark for the execution of a contract can be seen to what extent the parties properly exercise their rights and obligations.

### **3. Renegotiating the Implementation of Business Agreements during a Pandemic**

Basically, a business contract originates from the exchange of the different interests of the parties, so formulating a contractual relationship generally must begin with negotiations or negotiations.<sup>45</sup> Likewise, if there is a difference of opinion that occurs between them, the parties should also renegotiate to bring together the things the parties want together again. Negotiation is the interaction of the parties involved in a difference of goals or opinions to mutually try to resolve and mutually beneficial for all parties to find a common goal. In short, negotiation is a bargaining process through discussion or negotiation to resolve disputes.<sup>46</sup>

The renegotiation of business agreements during the COVID-19 pandemic aims at redressing the imbalance in implementing achievements. So that both parties obtain reasonable rights and obligations in good faith and cooperatively, maintain good and mutually beneficial relations with business partners, and support in a conducive business climate.<sup>47</sup> In the implementation of renegotiations, the parties should also be serious about following up on the results of the negotiations because the parties have mutually agreed upon, so each party should implement and implement it like an agreement.

Renegotiation can arrange the stipulated things, including rescheduling, restructuring (rearrangement), or reconditioning in good faith by both parties because the contract law in Indonesia adheres to an open system where all will return to the parties' agreement.<sup>48</sup> It takes good faith from both parties, debtors, and creditors, to make every effort to produce a win-win solution so that renegotiation is a good effort to jointly bear the risk to prevent harm or bias of the party.<sup>49</sup> The court will judge the truth of the existence of good faith in this business agreement because there are debtors who cannot pay their obligations during the COVID-19 pandemic. However, not a few debtors

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45 Ibid., p. 203.

46 Gunawan Nachrawi, *Hukum Kontrak Komersial* (Bandung: CV. Cendekia Press, 2020), p. 37.

47 Agus Yudha Hernoko, "Force majeure Clause..", p. 217.

48 Velliana Tanaya dan Jessica Angeline Zai, op. cit., p. 106.

49 Ibid., p. 111.

can still pay their obligations but do not want to pay.

This renegotiation effort will result in a decision to postpone the achievement fulfillment until normal conditions return temporarily. However, delaying the fulfillment of rights and obligations in the agreement in a balanced way contained in the agreement. For example, one party who should have paid the fee cannot also make the payment immediately due to the COVID-19 pandemic, which resulted in the obstruction of the construction of a building.<sup>50</sup>

One example of renegotiation efforts in business agreements is rescheduling related installments and extending the interest payments period. By taking advantage of the time given, the debtor can fulfill all his pending obligations after the situation returns to normal or not in force majeure. Then, attracting a third party as a guarantor for the risk from the consequences of a force majeure is one of the wise ways that can be a profitable solution for the debtor and creditor so that both parties will not bear the loss in the event of a force majeure in the future.<sup>51</sup>

Before submitting a request for a force majeure event in the implementation of achievements, there are also several

important things that the debtor must do, namely:<sup>52</sup>

- a. Notifications related to the occurrence of force majeure must be submitted in good faith while still trying to do proper and reasonable things to carry out obligations to minimize the risk arising from non-fulfillment of achievements in the agreement. Notifications follow a certain period since felt impact in writing;
- b. Appropriate legal references form the basis for force majeure statements;
- c. The Force majeure statement intends in good faith to change the agreement, not terminate the agreement if the object that is the debtor's obligation impossible to do;
- d. In the implementation of renegotiation, changes to the agreement shall be carried out by deliberation as far as possible to avoid settlement through the courts;
- e. Consult with practitioners and legal consultants to provide advice and legal options to the conditions of both parties in the agreement.

In carrying out negotiations, several types of methods generally occur between the parties during negotiations, including:<sup>53</sup>

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50 Andi Risma dan Zainuddin, "Tafsir Pandemi Covid-19 Sebagai Alasan Force majeure yang Mengakibatkan Pembatalan Perjanjian", *Jurnal Wawasan Yuridika*, Vol. 5 No. 1, Maret 2021, p. 109.

51 Inri Januar, op. cit., p. 192.

52 Putra PM Siregar dan Ajeng Hanifa Zahra, "Bencana Nasional Penyebaran Covid-19 sebagai Alasan Force majeure, Apakah Bisa?", accessed from <https://www.djkn.kemenkeu.go.id/artikel/baca/13037/BencanaNasional-Penyebaran-COVID-19-sebagai-Alasan-Force-Majeure-Apakah-Bisa.html>, at the date of 18 Mei 2022.

53 Ramziati, et. al., *Kontrak Bisnis: dalam Dinamika Teoritis dan Praktis* (Aceh: Unimal Press, 2019), p. 146.



- a. Competitive negotiation. It is a form of negotiation carried out on complex issues and tends to be challenging to find a point of agreement;
- b. Cooperative negotiation. It is a form of negotiation that does not consider the opposing negotiator as an enemy in a dispute but still considers it as a partner in cooperation to reach an agreement that benefits all parties. This form of negotiation pays excellent attention to the importance of good relations between the parties;
- c. Soft and hard negotiations. Namely, a form of negotiation that will result in a pseudo agreement where there is a winning party and a losing party. This type will benefit the tough side because the parties are prone to creating threats, while the soft side chooses to give in to prevent hostility or confrontation;
- d. Negotiation based on interests. Namely, a form of negotiation that chooses a middle ground between existing contradictions. This negotiation is an effort when tough negotiators meet to avoid deadlocks in implementing negotiations.

In carrying out renegotiation efforts, it is also necessary to do important things considered important as a form of sincerity and good faith from the parties to resolve existing differences of opinion. Consider several important steps as a start in negotiating, including:<sup>54</sup>

- a. Plan a negotiation by defining the things that are the problems to be overcome. The issues presented are in the form of several issues that are the main problem and some side issues that also influence the main problem;
- b. After describing several existing issues, the negotiator begins to sort and determine which issues are important and less important and whether these issues are indeed related or unrelated;
- c. Determine the issues to achieve by including why we want to achieve them. This reason is important because it relates to achieving values, principles, and interests;
- d. Open to consulting with negotiating partners to evaluate these critical issues to avoid fulfilling unrealistic and difficult wishes by exchanging lists or lists of several issues or interests to be negotiated.

The parties must comply with the following conditions for the renegotiation to continue effectively, namely:<sup>55</sup>

- a. The parties negotiate voluntarily with full awareness;
- b. Each party negotiating is a party that is indeed authorized to make decisions;
- c. Have the same desire to solve problems;
- d. The power is relatively balanced between the parties, so the parties

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54 Ibid., p. 149.

55 Agus Yudha Hernoko, "Force majeure Clause...", p. 218.

mutually depend on each other.

The advantages of choosing renegotiation as an effort to resolve a debate in the case of business cooperation, among others:<sup>56</sup>

- a. Finding common goals and mutually beneficial for both parties;
- b. It does not damage the excellent relationship that has been maintained between business partners during cooperation and supports a conducive business;
- c. Prevent prolonged conflict between the parties;
- d. Maintain trust between business partners with each other.

Include the results of the business agreement renegotiation between the parties in the addendum agreement regarding the amended provisions, including clauses that provide legal protection for both parties and the arrangements that follow the conditions of both parties. Eventually, renegotiation expects to change the contents of the agreement. Hopefully, it becomes balanced again, even with the cancellation of the contract by agreement of both parties, debtors, and creditors in good faith. This effort also provides balanced legal protection and certainty. Provide an opportunity to perfect things that the agreement prior to the COVID-19 pandemic did not regulate.<sup>57</sup>

## D. Conclusion

The Covid-19 pandemic is an event that occurred outside the power of the parties and beyond the fault of the parties. However, the application of perseverance in the event of failure to fulfill the achievements in the agreement is subjective and cannot be used as a general principle. Its application must be done by analyzing case by case, because not all debtors are affected by the Covid-19 pandemic which then causes debtors to be unable to fulfill their obligations under the agreement.

Hardship arrangements in the Indonesian legal system are needed, especially agreements that have a long period of time with a very high value where the goal is to overcome difficulties in applying the principle of failure to contract (frustration) so that with these provisions can be used as a basis for solving problems that arise.

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56 Ibid.

57 Arya Bambang Frisyudha, et. al., "Renegosiasi Sebagai Upaya Penyelesaian Wanprestasi dalam Kontrak Bisnis Selama Masa Pandemi Covid-19", *Jurnal Konstruksi Hukum*, Vol. 2 No. 2, Mei 2021, p. 345.

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