
RESEARCH ARTICLE

Framing the Covid-19 Pandemic as a Force Majeure Clauses to Escape Debtor's Liability

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ABSTRACT

The COVID-19 pandemic severely caused great turmoil in Indonesian living memory. It affected public activities, specifically the business sector. Many businesses collapsed, and workers lost their jobs, causing unemployment. The accompanying government legal policies included the determination of the pandemic as a non-natural disaster and the large-scale public health orders. Business debtors are most likely attempts to escape their contractual obligations based on force majeure clauses. This paper analyzes whether the COVID-19 pandemic is a force majeure under Indonesian law that sought to escape debtors' liability. The study elaborates on a qualitative approach and focuses on obtaining data through in-depth analysis and case study research. The normative juridical approach further elaborates to refer to the applicable laws, regulations, and legal doctrines. The result of the study appraised the readers that force majeure defense escapes the debtors' liability against nonperformance claims by the creditors. Force majeure is a contractual provision that relieves performance obligations in case of a circumstance or event went beyond the control of a party and occurs subsequent to the contract coming into effect, rendering the obligations of such contracts impossible to perform. The debtors may stand on the ground that a default occurred due to an unexpected event, and it shall exempt a liability as there was no element of malice; it was unintentional due to force majeure.

KEYWORDS

Force majeure, default, contract, Covid-19 pandemic.

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1. Introduction

The World Health Organization (WHO) declared that the world is facing a new variant of concern: Severe Acute Respiratory Syndrome Coronavirus-2, known as COVID-19 (Yuliana, 2020). The COVID-19 pandemic significantly affects global society; Indonesia is one of the affected countries with severe economic loss due to the outbreak. The Indonesian Ministry of Social Affairs and WHO published the significant socio-economic fallout caused by the pandemic (Muhammad Syahri Ramadhan et al., 2020). The Indonesian government issued Presidential Decree No. 12 of 2020 on the Determination of the Non-natural Disaster of the Coronavirus Disease 2019 (COVID-19) outbreak as a National Disaster (hereinafter referred to as Presidential Decree No. 12 of 2020). The presidential edict referred to Law No.24 of 2007 on Disaster Management Article 1 (3) categorized the COVID-19 pandemic as a non-natural disaster, meaning a non-natural event such as a pandemic or epidemic. The outbreak impacted the businesses to maintain their operations and meet their existing contractual obligations. When the WHO declares a public health emergency and characterizes the outbreak as a pandemic, it is considered a force majeure to excuse the debtors' non-performance of their obligation in the creditors' lawsuit. Force majeure is a contractual provision that relieves performance obligations in case of a circumstance or event went beyond the control of a party and occurred subsequent to the contract coming into effect, rendering the obligations of such contracts impossible to perform.

The authors, through this paper, confirm his in-depth study analysis categorizing COVID-19 as a pandemic; therefore, it is a form of force majeure. This provides ground for debtors to recourse their defense against the creditors' claim. Force majeure defines as an unforeseen event that causes the debtor to be unable to meet their obligation that shall not be the responsibility of the debtor (*buiten zijn schuld*) following the contract entering into force. In the event of a debtor failing to perform their contract, a single Letter of Demand is enough to announce a breach of contract. Liability of a breach of contract is likely caused by the parties' fault or negligence. In response to the ongoing pandemic, the Indonesian government has adopted various public health orders to limit community engagement. Series of lockdown periods, social and physical distancing, including working from home, are taken into account (Pemaron & Atmadja, 2019). All these measures are further emphasized through Presidential Decree No. 12 of 2020 on Determining the Non-natural Disaster of COVID-19. The edict on public health emergency was followed by another determination under the criterion as regulated in Law No. 6 of 2018 on Health Quarantine; the government declares civil and military emergencies (Muhammad Yasin, n.d.)

The contract agreement is one of many economic activities affected by the outbreak. An agreement is a written commitment made by one party to another or by two parties to each other to perform on the agreed matter (I Ketut Oka Setiawan, 2018). The parties who agreed to bind each other on the said agreement shall perform their rights and obligation (Yuliana Yuli W et al., 2019). Once a party fulfills its performance, the other party must perform its responsibility as agreed. The subject of law may engage in an agreement with any other party according to their will, as in the freedom of contract principle (Hetharie, 2019). An agreement would be considered lawful when it has fulfilled the legal requirements stated in Article 1320 of the Indonesian Civil Code (hereinafter referred to as ICC), and under Article 1338 ICC, a valid agreement shall be kept as a binding law to its parties (Shinta Vinayanti Bumi & Anak Agung Sri Indrawati, 2013). An agreement is legally binding to its parties and enforceable similar to the power of legislation. The rights and obligations of the agreement must be able to perform by its parties (Aminah, 2020). An agreement refers to a meeting of the minds of two or more parties further conducted under the set of norms to draft terms and conditions be binding and enforceable by law (Erniwati, 2020). An agreement requires a certain performance of the party would be based on the specific account. A breach of conduct shall result in liability, while the proper performance shall be granted the rights of reward (Agri Chairunisa Isradjuningias, 2015).

The determination of COVID-19 as a national disaster through the Presidential Decree No. 12 of 2020 directly affects the enforcement of every existing agreement. Many obligations under the agreements are unable to perform appropriately to what has been agreed upon. Parties to an agreement claim the current condition to excuse the nonperformance of obligations as stated in their agreement. Article 1243 ICC provides that in the event that a party to a legally bound agreement is proven to be negligent, causing the nonfulfillment of their obligation, they are subject to provide compensation and interest on the losses. In addition, there is a strong indication to categorize the COVID-19 pandemic as a force majeure event, an emergency status pronounced by the Indonesian National Disaster Management Agency (BNPb), Presidential Decree No. 12 of 2020, and WHO. A series of non-natural events, including technological failure, failure of modernization, epidemic, and disease outbreak, cause non-Natural Disasters. The pandemic meets the criteria as an unexpected event beyond the debtor's fault in the trade contract.

Debtors who fail to meet their obligations to creditors may claim they were prevented due to a force majeure, such as the COVID-19 pandemic. These include failure to achieve the agreement's results when the parties cannot perform obligations due to events beyond their control. Force majeure is an unexpected legal event (*buiten zijn schuld*) after the birth of a contract preventing the debtor from performing. The debtor might be declared in default through summons due to failure to fulfill the obligation by the due date. Breach of contract could be based on failure to deliver any of the agreed-upon terms to negligence. Force majeure is a legal term indicating that the performance as agreed cannot be carried out owing to unforeseen circumstances or events, and the parties involved cannot take action. Therefore, force majeure is a reason justified by law to release the debtor from the obligation to pay compensation based on default stated by the creditor (Subekti, 1987).

2. Literature Review

A distinct character of contract law placed itself as one branch of private law; it establishes rights and duties between individuals that differ from those of constitutional or political obligations which are based on public interest. A public legal entity may establish an agreement, but it does not subject itself to the obligation law (Atiyah, 2006). The contract law aims to rule agreement between parties, creating mutual obligations that are enforceable and mainly related to business transactions, supply chains, and services (Brownsword, 2000). An agreement forms a relationship between the parties applying legal rules; the parties are bound by rights and obligations agreed upon (Bayu Seto Hardjowahono, 2013). Legal relationships through agreements do not always conduct their objectives. Even though the agreement has been made, it does not guarantee that it is carried out correctly. The default can be in the form of not carrying out what has been agreed, what was approved but not correctly, and what was agreed but late. Furthermore, it can occur due to negligence or intentional mistakes, force majeure, and *rebus sic stantibus* (Niru Anita Sinaga, 2020).

The principles of the force majeure clause originated in French law known as the Napoleon Code or Civil Code. It was already regarded as an event to excuse parties' obligation to perform under their contract (Ezeldin & Abu Helw, 2018). The party's nonperformance of its contractual obligation raises the right to sue the other party to seek the fulfillment of its contractual rights. The law, however, provides a defense mechanism on the ground that the impossibility of contractual performance happened due to the force majeure clause. Then it comes naturally that parties of an agreement, in their draft, set out valid terms of the force majeure clause. The parties need to carefully foresee the possible risk that might take place upon the enforcement of their agreement (Bockstiegel, 1984). Force majeure is a legal concept derived from Roman law (*vis motor cui resisti non-potest*), adopted in various legal systems. The doctrine in common law interprets this as the inability to perform an achievement against a contract, which is analogous and unidentical to force majeure (Anonim, 2015).

The force majeure clause aims to prevent loss to parties of an agreement due to the nonperformance of the contract as a consequence of the act of God, such as those of natural disaster (flood, earthquake, storms, etc.), power outage, sabotage, war, invasion, *coup d'état*, revolution, terrorism, embargo, public strike and economic sanction (Thomas S. Bishoff & Jeffrey R. Miller, 2009). In general, there are three elements for an event to trigger a force majeure clause. First, unavoidable natural cause; Second, unforeseeable event; and Third, the event renders it impossible for the party to perform its contract obligation (Werner Melis, 1984). The force majeure doctrine is stated in Article 7.1.7 UNIDROIT Principles of International Commercial Contract 2010 (UPICC):

Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

Articles 7.1.7 (2) and (3) further explain that in the event of temporary impediments, prior to notifying the other party, the excuse for the performance of the contract shall have a reasonable time period. If the notice is failed to be given, the party fails to perform their obligations and will be liable for damages resulting from the absence of performance.

Mochtar Kusumaatmadja stated that force majeure or *vis major* could be accepted for not fulfilling the obligations due to the loss/disappearance of the object or purpose, which is the agreement subject. This situation is aimed at physical and legal implementation because of difficulties in carrying out obligations. Furthermore, Mieke Komar Kantaatmadja gave a similar view, namely (Harry Purwanto, 2011): (1) changes in a situation did not occur at the time the agreement was formed; (2) the amendment concerns a condition fundamental to the agreement; (3) the parties cannot foresee such changes; (4) the effect of the change should be radical, to change the scope of the obligations according to the agreement; and (5) this principle cannot be applied to border agreements and changes in circumstances due to violations committed by the party making a claim.

The concept of force majeure is regulated in Articles 1244 and 1245 ICC, referring to Articles 1444 and 1445 ICC. Based on these articles, force majeure is a condition that releases a person or a party expected to fulfill the concept under an engagement and fulfill their obligations from the responsibility to provide compensation, losses, fees, and interest. The elements of force majeure include 1) unexpected events, 2) cannot be accounted for by the debtor, 3) there is no bad faith from the debtor, 4) the existence of unintentional circumstances by the debtor, 5) the situation prevents outstanding debtors, 6) when the achievement is performed it will be subject to a ban, 7) circumstances beyond the fault of the debtor, 8) the debtor does not fail to perform, 9) the incident cannot be avoided by debtors and other parties, and 10) the debtor is not proven guilty or negligent. Nindyo Pramono believed that force majeure is a means of defending the debtor against default. After the agreement prevents performance, it is an unexpected legal event outside the debtor's fault (*buiten zijn schuld*). R. Subekti stated that unpredictable factors cause the non-performance of what was promised. The debtor cannot conduct anything on the circumstances or events beyond expectations. The circumstance in which the agreement is not implemented or its implementation is delayed is not the result of negligence. Debtors cannot be stated to be wrong or negligent, and people who are not guilty should not be subject to sanctions threatened for negligence (Soemadipradja, 2010; Subekti, 1992).

The jurisprudence of the Indonesia Supreme Court is not different in providing an understanding of force majeure based on the opinion of experts. The state of coercion is seen as a condition resulting from a catastrophe that the achiever cannot correctly prevent (Decision of the Indonesia Supreme Court Number 409 K/Sip/1983). Force majeure has closed other possibilities or alternatives for the party affected to fulfill the contract (Decision of the Indonesia Supreme Court Number 24 K/Sip/1958). The legal regime of *force majeure* can also be seen in the *Dutch Nieuwe Burgerlijk Wetboek* (Book of Civil Law Laws, which was updated – or abbreviated as NBW) in 1992 (Hesselink, 2006, Waras et al., 2021). Even though the concept does not explicitly state the meaning and term of force majeure, NBW will bear any failure to fulfill the debtor's contractual obligations (Andrianti et al., 2021). Nindyo Pramono described force majeure events under four theories. First is the Objective (Absolute) Theory, which is the value assigned to the notion when it becomes "impossible" for everyone in the position of a debtor to act responsibly. Second, the Subjective Theory (*Nisbi*) states that there is a state of coercion when the debtors cannot fulfill their achievements. Therefore, it is

limited and subjective to the debtor's personality. Third, Business Theory (*Inspanning*) reports that debtors can only submit *force majeure* when they have tried to fulfill the achievement but failed. Fourth, the *Gevaarzettings* theory states that the debtor has no fault (*schuld*) but should still be responsible for the losses because of the agreement or the teachings of *gevaarzetting*. For example, the employer should be responsible for the wrongdoing of their employee in the employment relationship, which is detrimental to third parties.

3. Methodology

This study employed doctrinal legal research focusing on legal provisions regarding the principle of force majeure in legislation and court decisions. At least four court decisions on the issue were analysed to picture judicial responses toward the Covid-19 pandemic as the legal basis for existing force majeure. This study also relied on secondary sources of books and scientific journals on force majeure and covid-19 pandemic.

4. Results and Discussion

The emergence of COVID-19 (Yuliana, 2020) has significantly impacted all aspects of human life aspects, including Indonesia. The virus has a widespread impact on the real economy sector, which raises various legal and public problems. Furthermore, the Indonesian government has issued a policy package due to the pandemic. Indonesia Presidential Decree No 12 of 2020 on the Determination of Non-Natural Disasters for the spread stipulates that this virus is a Non-Natural National Disaster. This policy refers to Law Number 24 of 2007 concerning Disaster Management because the virus has a systemic impact on all aspects of the nation and state. The government also issued Presidential Decree No. 12 of 2020 COVID-19 concerning the Determination of Non-Natural Disasters Spreading the virus as a National Disaster, emphasizing that the pandemic was a disaster emergency. Public Health Emergency, as regulated in Law No. 6 of 2018 on Quarantine, also stipulates civil and military emergencies (Muhammad Yasin, n.d.).

The COVID-19 phenomenon has resulted in many failures to fulfill achievements in agreements by the parties. In principle, the achievements should be obeyed and implemented because the agreement has fulfilled the legal requirements stated in Articles 1320 and 1338 ICC. However, the determination of the Non-Natural Disaster of COVID-19 as a National Disaster is a sign of an agreement. The pandemic has disrupted the continuity of fulfilling achievements in agreements, and obligations that the parties should fulfill are not appropriate. This condition resulted in pros and cons to implementing the parties' achievements, and the pandemic can be used to "deny" the agreement mutually agreed upon. Meanwhile, COVID-19 cannot be used as an excuse for not fulfilling the achievements of other parties. Below are the verdict indicating COVID-19 as a pandemic qualified as force majeure as an impossibility of contractual performance defense. The judges' side with the force majeure defense on the following merits:

No.	Case Register	Merits of Judgment	Dictum of Judgement
1.	166/Pdt.Sus- PHI/2020/PN.Sby	Termination of employment occurring due to the COVID-19 pandemic is accepted as unavoidable. A former employee is eligible for severance pay in accordance with Law No.13 of 2003 on Manpower.	Acknowledge the event of force majeure
2.	11/Pdt.G/2021/Pn.Mrt	a. The failure of investment resulting from the COVID-19 pandemic is taken as an unforeseen event; therefore, the Judge ruled the impossibility of performing the contract's obligation is a form of force majeure. Therefore, the failure to receive benefits from profit sharing is one of the risks of the outbreak and shall contribute no liability to its party. b. Considering the validity of the Equity Participation Agreement has met the conditions set in Article 1320 ICC, the Judges' order to accept a partial claim of the Plaintiff.	Declare the validity of the Equity Participation Agreement and Acknowledge the event of force majeure
3.	15/Pdt.G/2021/PN.Mrt	Considering the failure to provide the dividend happened due to the COVID-19 pandemic, Defendant is not subject to liability for breach of contract.	Declare the validity of the Equity Participation Agreement and Acknowledge the event of force majeure

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| 4. | 103/Pdt.Sus-
PHI/2020/PN.Sby juncto
866 K/Pdt.Sus-PHI/2021 | a. Considering the collapse of Defendant's business caused by the COVID-19 pandemic, as stated through Presidential Decree No 12 of 2020 and Supreme Court Decision No. 3389 K/Pdt/1984, the court order policy adopted by the government as an immediate response to an event is something unforeseen and fall under force majeure event.

b. The Judges express their opinion that employment between the parties was terminated due to a force majeure event. | Declare that employment between the parties was terminated due to a force majeure event. |
|----|--|--|--|

An agreement without objectives due to force majeure results when a party cannot perform the obligations due to events beyond the ability to avoid. Force majeure is an unexpected legal event outside the debtor's fault (*buiten zijn schuld*) after the birth of a contract that prevents performance. It is a debtor's defense to indicate that the performance as agreed is not carried out due to unpredictable factors, and the parties cannot act on events beyond expectations. Therefore, the concept is a reason justified by law to release the debtor from the obligation of paying compensation based on default stated by the creditor (Subekti, 1987).

The party sued for default because the responsibility to perform on time cannot be met and fought the claim based on many court rulings. The defense that the inaccuracy in completing the task was due to an impediment to functioning adequately is also presented. The default arises from unexpected and unintentional factors where there is no bad faith among the parties hindered in carrying out achievements. Besides declaring to be innocent, the party being sued for default also proves there is an event hindering achievement. Nindyo Pramono argued that force majeure is a problem related to risk and error. The error is related to the obstacles to performing well following the agreement. Furthermore, errors should be sought when the obstacle arises with consideration of the debtor. The risk problem is related to the consequences of these obstacles, which should bear the burden of losses due to force majeure. The debtor should be held accountable when an error is demonstrated. The force majeure teaching is about engagement, while the effect on creditor obligations is related to agreement theory.

The processes to differentiate the debtor's performance responsibilities when the creditor is prevented from enjoying accomplishments due to circumstances beyond their control should also be recognized. Under these conditions, a force majeure does not belong to the creditor, and Nindyo Pramono also believed that the positions of creditor and debtor are reciprocal. Achievement and counter-achievement are reciprocal, and the debtor can use force majeure as an argument to defend themselves due to default. The debtor should cover any ensuing damages when the creditor is incorrect. However, when the debtor is not at fault, force majeure can be used as a rebuttal or defense of the claim from the creditor. The burden of proof lies with the debtor when they cannot perform because of force majeure. The debtor is expected to prove their innocence and the hindrance to achievement. Furthermore, they have no fault (*schuld*) for the emergence of the obstacle where hindrances cannot be predicted when closing the agreement. Debtors who wish to raise COVID-19 as an excuse for noncompliance with a creditor's demands should provide evidence that the virus is a global pandemic through no fault of the debtor to prevent achievement because of its inherent unpredictability.

Ricardo believed that the event of force majeure led to a situation causing the party to be unable to prevent the event resulting in the impossibility of performing the contractual obligation despite the given effort. A far-reaching element of force majeure is that it has to be unforeseen; the parties are not part of contributory factors upon the temporary impediment. The authors share a common opinion with Nindyo dan Ricardo that the parties to an agreement failing to perform the contractual obligation render it impossible for the party to perform as there are unforeseeable impediments. According to Pitlo, the principle of propriety or decency argued that when the debtor is released from performance duties because of an act of God, the creditor should be similarly released. According to Article 1444 ICC, the agreement is null and void with no force or effect. COVID-19 is a subjective or relative force majeure; therefore, negotiations are open. The debtor can delay performance and be free to pay compensation. However, when the force majeure situation has recovered, the contractual obligations should still be fulfilled. Based on the freedom of contract principle, variations in dispute settlement are possible depending on the agreement of both parties.

5. Conclusion

The COVID-19 pandemic is regarded as falling under the force majeure clause, enabling a defense mechanism for parties failing to perform their contractual obligation being claimed to the court for breach of contract. The unforeseeable elements of the outbreak should constitute no liability to the failing party as the impossibility to perform is a non-form of malice but simply a force majeure event. In order to recourse their defense, the failing party must be able to prove that: first, COVID-19 is considered a pandemic; second, the pandemic is proven to be external to the parties of the contract; third, the COVID-19 pandemic causing the

impossibility to perform the contractual obligation; fourth, the event is unforeseeable following the contract enters into force. All these fourth elements have to be proven accumulatively to release the failing party from being liable for non-performing their obligation, the damages, and to have a reasonable time period to perform the contractual obligation. The limitation of this study is the absence of verdict comparison on those cases concerning the judges' merits in refusing to acknowledge natural disasters as the event of force majeure. The Judges believed that in the event of a natural disaster disregarded as force majeure, the parties have an alternate mechanism to perform their contractual obligation, but they failed to work on the available options; thus, given the fact the party is not exhausted their remedies.

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