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Covid-19 Pandemic as an Event of Force Majeure in Agreements (Case Study of Indonesian Court Decisions)

Author (s):
Mochamad Lailul Fadlan
UIN Maulana Malik Ibrahim Malang, Indonesia
fadlanilul@gmail.com
Dwi Fidhayanti *
UIN Maulana Malik Ibrahim Malang, Indonesia
fidha13@syariah.uin-malang.ac.id

*Corresponding Author

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Abstract:
The legal uncertainty regarding the categorization of the regarding whether or not the Covid-19 pandemic Covid-19 pandemic as a force majeure condition has led to inconsistent interpretations for those directly impacted by the situation. Therefore, considerations can be accepted as a reason for force majeure in agreements need further analysis, both in terms of written law and judicial practice. The objective of this research is to determine the legitimacy of the Covid-19 pandemic as force majeure condition and to describe the basis of the court's reasoning in deciding whether the pandemic can be accepted as a valid reason for force majeure in contractual agreements. This research adopts a normative juridical methodology, utilizing a statue approach, case approach, and conceptual approach. The findings reveal that the Covid-19 pandemic may be considered as force majeure, provided that the debtor (in the contract) can demonstrate fulfillment of the force majeure criteria as stipulated in Article 1244-1245 of the Indonesian Civil Code, as well as the International Chamber of Commerce's Force Majeure and Hardship Clauses. In practice, in determining whether the Covid-19 pandemic qualifies as force majeure, the court evaluates whether the following elements are satisfied, the event is unexpected (i.e., the Covid-19 pandemic), the event is beyond the debtor's control, there is no element of negligence of intent, and there is good faith in the part of the debtor.

Introduction

The Covid-19 pandemic has spread to nearly all countries since the end of 2019, including Indonesia, which began to experience its impact in March 2020. The resulting economic effects have not only influenced the national economy but have also affected large companies, Small and Medium-sized Enterprises (SMEs), and individual economic (Risma & Zainuddin, 2021). The Indonesian government took serious measures by declaring the Covid-19 pandemic a national disaster and implementing various policies, including large-scale social restrictions, as outlined in Government Regulation (PP) Number 21 of 2020 concerning Large-Scale Social Restiction for the Acceleration of the Handling of Corona Virus Disease 2019 (Covid-19) (Andrianti et al., 2021).

Currently, under Presidentual Decree (Keppres) Number 17 of 2023 concerning the Termination of the Covid-19 Pandemic Condition in Indonesia, which came into effect on June 21, 2023, the Covid-19 pandemic condition in Indonesia has been officially declared over. Nevertheless, examining the use of force majeure conditions remains crucial, as government policies during the pandemic have had widespread effects on society and may potentially hinder the execution of existing agreements or contracts. An agreement, as a form of obligation based on Article 1313 of the Indonesian Civil Code (KUH Perdata), involves at least two parties who mutually agree to perform an obligation. The failure to perform an obligation in such an agreement is referred to as a breach of contract or default (Muljono & Sastradinata, 2021). Default is a condition in contract law where a party fails to fulfill their obligations as stipulated in the agreed-upon contract (Ramadhani, 2023).

A study has been conducted to explore force majeure as an uncertain event in agreements. Raysando investigate the legal basis for consumer financing agreements and the consequences of force majeure in the event of pandemic. Not only in sales, this condition also affects transportation agreements and consumer banking financing. Court in several jurisdictions have declared Covid-19 a force majeure event. Sahetapy categorizes force majeure in e-commerce transactions during the pandemic as an unexpected event that may lead to the cancellation or delay of achievements. Creditors save debtors from bad debts, among others by reducing, reconditioning, and restructuring, implementing guarantees through auctions, this is based on Bank Indonesia Regulations as a settlement of banking credit agreements due to force majeure to the Covid-19 pandemic.

In Indonesia law, force majeure is regulated under the Civil Code, making it essential to categorize the Covid-19 pandemic as a force majeure event. However, there is ambiguity in the legal interpretation of the Covid-19 pandemic's status as force

majeure. Various court decisions in Indonesia have shown differences in accepting or rejecting the use of the pandemic as a reason for force majeure. This study analyzes several Indonesia court rulings related to the use of the Covid-19 pandemic as a justification for force majeure and to describe the legal basis considered by judges when deciding whether the Covid-19 pandemic is acceptable as a reason for force majeure in agreements.

Methodology

The methodology applied in this study is normative judicial method. The research employs three distinct approaches: (1) Statutory approach, this approach is implemented through an examination of legislation and regulations relevant to the legal issue under study; (2) Case approach, this approach is emppoyed due to the necessity of analyzing cases related to the discussed issue, which have already been adjudicated in court (Muhaimin, 2020); (3) Conceptual approach this is based on and focuses on existing doctrines or perspective within the development of legal science related to the classification of Covid-19 as a force majeure event. These approachs are undertaken by analyzing norms, concpets, principles, and judicial decisions related to the Covid-19 pandemic as a force majeure condition in contractual agreements.

The primary legal materials utilized include, the Indonesian Civil Code (KUH Perdata), the Compilation of Islamic Economic Law (KHES), Presidential Decree Number 12 of 2020 concerning the Declaration of the Non-Natural Disaster of the Spread of Corona Virus Disease 2019 as a National Disaster, and the International Chamber of Commerce Force Majeure and Hardship Clauses. The secondary legal materials include legal books, legal journals, doctrines or expert opinions, and judicial considerations from court decisions pertinent to the research topic. The data collection method used is library research. The collected legal materials are then analyzed through a systematic legal interpretation method to interpret the classification of the Covid-19 pandemic as force majeure in contractual agreements based on the relevant statutory provisions.

Results and Discussion

Legitimacy of the Covid-19 Pandemic as a Force Majeure Justification in Agreements

Various regulations enacted by the government to address the Covid-19 pandemic have impacted various aspects, both directly and indirectly. One of the regulations with a significant impact is the classification of the Covid-19 pandemic as a non-natural disaster on a national scale. This classification is crucial because the enactment of such a regulation implies that it will affect activities carried out by

society, particularly impacting the performance of contractual agreements that were entered into before the pandemic and continued during the pandemic. The classification of the Covid-19 pandemic as a national disaster is stipulated in Presidential Decree Number 12 of 2020 (Adam & Djajaputra, 2022).

Some parties assert that Presidential Decree Number 12 of 2020 can be regarded as legitimization that the Covid-19 pandemic may be classified as a force majeure, which could serve as a legal basis for the termination of the contractual agreement. One proponent of this view is Ricardo Simanjuntak, a legal practitioner. Ricardo argues that the Covid-19 pandemic meets the criteria for an impediment that falls under the category of force majeure.

Ricardo Simanjutak notes that Covid-19 was recognized as a global pandemic by the World Health Organization on March 11, 2020, subsequently declared a national disaster emergency by the president of the Republic of Indonesia through Presidential Decree Number 12 of 2020 on April 13, 2020, and further regulated by the Government through Government Regulation Number 21 of 2020 concerning Guidelines for Large-Scale Social Restrictions (PSBB) on March 31, 2020. According to him, the WHO's stance and the Presidential Decree recognizing the status of the Covid-19 non-natural disaster emergency as the basis for implementing PSBB constitute sufficient evidence to classify Covid-19 as a force majeure impediment that arose unpredictably, both in terms of its impact and timing (Andrianti et al., 2021).

Prof. Mahfud MD presents a differing view regarding government regulation in response to Covid-19. He emphasizes that Presidential Decree Number 12 of 2020 cannot be considered a basis for invoking the concept of "*force majeure*" to terminate contracts. According to him, such agreements remain binding as stipulated under Article 1339 of the Indonesian Civil Code (KUH Perdata), with flexibility subject to regulations of the Indonesian Financial Services Authority (OJK) (Rizqo, 2020). Prof. Mahfud MD stresses that while Covid-19 is acknowledged as a national non-natural disaster in Indonesia, Presidential Decree Number 12 of 2020 was not intended to directly serve as the basis for force majeure to terminate contracts. He contends that the government does intervene in such matters.

In agreement with Prof. Mahfud MD, Prof. Moch Isnaeni explained that Presidential Decree Number 12 of 2020 cannot be directly used as a basis to invoke force majeure. According to his opinion, there are several provisions that must be considered in determining force majeure. Force majeure can refer to the provisions of the Civil Code (KUH Perdata), particularly Article 1244 to 1245 and Articles 1444 to 1445, albeit only briefly mentioned (Rizki, 2020).

As stated by Prof. Otto Hasibuan, a legal practitioner referenced in the background, he opined that the Covid-19 pandemic itself cannot automatically be considered and designed as force majeure. However, if a person unable to fulfill their obligations due to factors beyond their control, such as administrative factors or natural and non-natural disasters, and thus fails to fulfill their obligations, this situation may qualify as force majeure. He further emphasized that the authority to determine whether the Covid-19 pandemic constitutes force majeure rests with the judiciary, not the government (Petang, 2020).

The impact of Covid-19 was felt by the public following the issuance of Government Regulation Number 21 of 2020 on Large-Scale Restrictions (PSBB) for the Acceleration of Covid-19 Handling. The issuance of Presidential Decree Number 12 of 2020 on the Declaration of Non-Natural Disaster of Covid-19 Spread as a National Disaster, implemented through PSBB and social distancing policies, can create obstacles for parties engaged in agreements. Consequently, this situation can be used as a defense against breach of contract claims by invoking force majeure (Andrianti et al., 2021).

Force majeure is an event or condition beyond the control of the parties that prevents them from fulfilling their obligations. According to Black's Law Dictionary, force majeure refers to an event or effect that cannot be anticipated or controlled. It involves events that may occur due to natural causes as floods and hurricanes or human actions such as riots, strikes, and wars (Dinar & Budiartha, 2020). In the Compilation of Sharia Economic Law (KHES), Fifth Section on "*Keadaan Memaksa*" (force majeure), Article 40 explains that force majeure refers to situations where one party to a contract is hindered from performing its obligations due to external circumstances.

Sri Soedewi Masjchoen Sofwan, quoting Dr. H.F.A. Vollmar, defines overmatcht as a condition in which the debtor is either entirely unable to perform their obligations (absolute overmacht) or can still perform but only with disproportionate sacrifice or extraordinary effort, resulting in significant losses (relative overmacht) (Sinaga, 2020). In such cases, the party cannot be held liable or considered negligent and should not be subjected to sanctions imposed as a consequence of breach of contract (Sinaga, 2020).

Exception to the principle that a party failing to fulfill an obligation must be held accountable for the resulting damages, as outlined in Article 1244 of the Civil Code, is made in force majeure cases. The debtor is not required to pay compensation for non-performance due to unforeseen and unavoidable circumstances. However, the debtor must still provide reasons and evidence supporting the legitimacy of their actions.

Article 1245 of the Civil Code further stipulates that a debtor is exempt from compensation if they are hindered by force majeure or an unforeseen event from delivering something or refraining (Setiawan, 2016). According to legal provisions, several conditions must be met for a force majeure situation, namely failure to fullfill obligations, the existence of reasons beyond the debtor's responsibility, the cause of the event was not anticipated beforehand, and cannot be attributed to the debtor (Badrulzaman, 1993).

The conditions for a state of force majeure are regulated in Article 41 of the Compilation of Islamic Economic Law, which includes events that cause the accurrence cannot be predicted by the parties, the event cannot be held accountable to the party that should fulfill the obligation, the event causing the emergency is beyond the responsibility of the party that should fulfill that must fulfill the performance, and the party that should fulfill the performance is not in bad faith (Kompilasi Hukum Ekonomi Syariah (KHES), n.d.).

Regarding the debtor who can invoke a state of force majeure, it is established that the impediment to fulfilling a particular obligation must be beyond their fault. This is explained through the following points.

First, there must be an impediment to fulfilling the obligation concerning the performance. An obstacle cannot be recognized if the agreement can be fulfilled in more than one way, and the impediment only affects one of those methods. For example, if the debtor is unable to perform due to illness, but the obligation could be fulfilled by another person, in this case, the impediment cannot be acknowledged. From this explanation, it can be concluded that the obstacle to fulfilling an agreement arises only when it applies to all means of performance, preventing the debtor from fulfilling the terms of the agreement, despite their efforts in various ways to do so, resulting in no success (Setiawan, 2016).

Second, the impediment must arise after the obligation has been created. According to jurisprudence, force majeure only occurs if the impediment emerges after the agreement has been formed.

Third, the impediment is not caused by a risk borne by the debtor. Since the impediment cannot be predicted, it is required that the obstacle is not a risk borne by the debtor to invoke force majeure. The impediment or obstacle to fulfilling the agreement must be beyond the debtor's fault. For example, if a manufacturer cannot deliver goods requested by a consumer because the goods were damaged due to flooding, the manufacturer can invoke and prove the existence of force majeure, thereby absolving them of responsibility for the damage to the consumer's requested goods. However, it is still necessary to assess whether the producer could have

prevented the loss of goods in that situation. If the producer has taken preventive measures against the damage but the goods are still damaged due to flooding, this could be categorized as force majeure, as it was indeed beyond the control of the producer, who attempted to prevent or resolve the issue but was unsuccessful. Conversely, if the damage occurred due to the producer's negligence in failing to properly store the ordered goods, leading to damage from flooding, this would be considered negligence.

Fourth, inability is not the debtor's risk. According to the Inspaning Theory, force majeure occurs when the debtor has made sufficient efforts but is still obstructed from performing, and this circumstance is beyond the debtor's control. This doctrine emphasizes that the inability to provide performance is outside the debtor's fault. On the other hand, there is a differing opinion with the Risico Theory, which asserts that this is not always the case. Even if the debtor has made every possible effort, if the inability is caused by a certain reason, the debtor must still bear the risk (Setiawan, 2016).

Thus, even if the debtor is not at fault and has exerted maximum effort, there still exist situations where the debtor cannot absolve themselves due to force majeure. For example, a debtor remains liable for mistakes made by individuals they employ to fulfill the agreement. A workshop manager, for instance, is responsible for errors caused by their mechanics to consumers.

Articles 1244 and 1245 of the Indonesian Civil Code indicate that there are mitigating circumstances or extenuating reasons for mistakes caused by certain conditions, such as force majeure. Both articles are in line with the legal principle which states:

المَشَقَةُ تَجْلِيْبُ التَيْسِيْر

"*Difficulty brings ease*" (Darmawan, 2020).

Based on these provisions, it means that the debtor cannot be required to compensate for costs, damages, and interest to the creditor, even if the debtor has failed to fulfill their obligations under a principal agreement, as long as the impediment was caused by force majeure or an unforeseen circumstance. The legal basis for this is (Widjaja, 2007). Article 1244 of the Civil Code on extenuating circumstances states: (1) There is an unforeseen event at the time the agreement was formed; (2) The unforeseen event is something that is beyond the debtor's responsibility or control; (3) The debtor did not intentionally or negligently fail to fulfill the obligations imposed upon them by the agreement with the creditor (no bad faith) (Widjaja, 2007). Article 1245 of the Civil Code provides justification that there is

no compensation for costs, damages, and interest when: (1) Force majeure occurs, or (2) An unintended event occurs, which causes the debtor to be unable to provide or act in a way that is required, or perform an act that is prohibited to them (Widjaja, 2007).

Based on this understanding, if any of the above events occur, the debtor is released from the obligation to compensate for costs, damages, and interest, even if the debtor does not fulfill the obligation as previously agreed (Muljadi & Widjaja, 2004).

The regulations concerning force majeure are also governed by other legal sources applicable in Indonesia, namely treaties. A treaty is an agreement reached between two or more states in the realm of civil law, particularly in the context of contracts, and is closely related to international agreements (H.S, 2019). The legal source for force majeure is stipulated in one of the clauses of the International Chamber of Commerce (ICC). The International Chamber of Commerce (ICC) is a global business organization that assists businesses of all sizes and in all countries to operate internationally and responsibly ("International Chamber of Commerce," 2020).

Indonesia is a member of the ICC. In March 2020, the ICC updated its product titled "*ICC Force Majeure and Hardship Clauses*". The concept of force majeure is recognized by most legal systems, however, the principles developed in national laws may differ. To assist parties in drafting and negotiating force majeure clauses, the ICC created this clause. Furthermore, the ICC Force Majeure Clause serves to address questions regarding what constitutes force majeure on an international scale.

The ICC clause defines force majeure as an event or circumstance (Force Majeure Event) that prevents or hinders a party from performing one or more of its contractual obligations under a contract, provided that the affected party proves: (a) That the impediment is beyond its reasonable control; and (b) That the event could not reasonably have been foreseen at the time of contract conclusion; and (c) That the consequences of the impediment could not reasonably have been avoided or overcome by the affected party ("International Chamber of Commerce," 2020).

Within the ICC, there are provisions regarding "*Alleged Force Majeure Events*". Generally, Alleged Force Majeure Events meet the criteria for force majeure. Consequently, it is assumed that the presence of one or more such events satisfies the requirements of force majeure, and the affected party need not prove the conditions of (a) and (b) in this clause. However, the party invoking force majeure must nonetheless prove the condition in (c), namely that the effects of the impediment could not reasonably be avoided or overcome.

In the absence of contrary evidence, the following events affecting one party are deemed to meet the criteria of (a) and (b) according to paragraph 1 of this clause, and

the affected party only needs to clearly demonstrate condition (c) of that paragraph. Such events include: (a) War (declared or not), hostilities, invasion, acts of foreign enemies, large-scale military mobilization; (b) Civil war, riots, rebellion and revolution, military coup, insurgency, acts of terrorism, sabotage or piracy; (c) Currency and trade restrictions, embargoes, sanctions; (d) Actions by authorities, whether lawful or unlawful, compliance with laws or government orders, expropriation, confiscation of works, nationalization; (e) Epidemics, pandemics, natural disasters, or extreme natural events; (f) Explosions, fires, equipment failure, prolonged damage to transportation, telecommunications, information systems, or energy; (g) General labor disturbances such as boycotts, strikes, business closures, slowdowns, occupation of factories and buildings ("International Chamber of Commerce," 2020).

The International Chamber of Commerce Clause on Force Majeure and Hardship stipulates that "*(e) Epidemics, pandemics, natural disasters, or extreme natural events*" is included as one of the "*Alleged Force Majeure Events*". Covid-19, being an epidemic, falls within this category. Based on this, the epidemic has satisfied the conditions of force majeure, meaning that the affected party does not need to prove the requirements of (a) and (b) of paragraph 1 of this clause (that the event was beyond their control and could not be foreseen).

In this context, the affected party must still prove the condition in point (c), namely that the impact of the impediment could not be avoided or overcome ("International Chamber of Commerce," 2020). Based on these elements, the Covid-19 pandemic can be classified as force majeure under certain conditions. This is due to the fact that the pandemic occurred beyond the control of the parties, could not be anticipated, and resulted in the inability of the parties to fulfill their contractual obligations. However, a case-by-case approach must be taken to determine whether the pandemic indeed obstructed the debtor from fulfilling their obligations.

In reality, the pandemic did not affect all business sectors uniformly and comprehensively. Therefore, the assessment of whether a pandemic situation can be considered force majeure must take into account all aspects related to the impediment to fulfilling contractual obligations. If the Covid-19 pandemic has implications for business contracts, then determining its force majeure status may be considereda (Giyono, 2021).

The emergence of the Covid-19 pandemic does not automatically grant the debtor the right to invoke force majeure as a reason for non-fulfillment or delay of their obligations. The invocation of force majeure requires proof that the elements of force majeure have been satisfied. According to Articles 1244 and 1245 of the Indonesian

Civil Code, an event or circumstance may be considered force majeure if it meets the elements that must be proven, namely: (1) There is no act of negligence or intent; (2) An unforeseen event arises, causing the party to be unable to perform its obligations; (3) Liability cannot be demanded from the party unable to fulfill its obligations; and (4) There is good faith (Muljono & Sastradinata, 2021).

Considering the definition of impediments and events triggering the force majeure clause in legal instruments, it is important to note that the Covid-19 pandemic can be accepted as an "*impediment*" in terms of force majeure (Kiraz & Üstün, 2021). According to Munir Fuady, from the perspective of the feasibility of fulfilling contractual obligations, force majeure can be classified into two types, *first*, absolute force majeure categorized as absolute if the performance arising from the contract can no longer be performed indefinitely. For instance, if the object of the contract has been destroyed by fire beyond the debtor's control. *Second*, relative force majeure categorized as relative when normal performance is currently impossible, although it may still be feasible under compulsion. For example, in import-export contracts where, after the contract is made, an import ban on the goods arises. In this case, the goods can no longer be delivered (imported), although they could still be sent through smuggling routes. Another term often used for this is "*impracticality*" (Andrianti et al., 2021). Another example is when the object of the agreement is not directly affected, but other circumstances such as a pandemic occur, hindering the performance of the agreement until the pandemic or its impacts subside, after which the debtor can resume performance.

In the context of the Covid-19 pandemic, it can be argued that the object of the agreement was not directly affected, such as lost, thus making performance of the agreement impossible. Regarding the circumstances of force majeure, the Covid-19 pandemic can be categorized as a relative force majeure situation, meaning the agreement cannot be voided or deemed void. In this case, the debtor may only be granted the leeway to postpone the fulfillment of their obligations (Muljono & Sastradinata, 2021). Relative force majeure is interpreted as a compulsion that does not result in an absolute effect that directly nullifies the agreement.

Regarding relative force majeure, the debtor can still fulfill the agreement with significant sacrifice or effort. In this context, the state of emergency temporarily prevents the debtor from fulfilling the agreement, and once the state of emergency ends, the debtor must resume performance. Nevertheless, exemptions for costs, damages, and interest can still be obtained by the party facing a relative force majeure situation, but this does not extend to the cancellation of the business contract. In relative force majeure, the exemption is temporary and applicable for the duration of

the force majeure impeding the debtor's performance. After the state of force majeure ends, the creditor has the right to demand performance again (Muljono & Sastradinata, 2021).

The state of emergency causes the obligation to be non-functional, although the obligation itself remains. In this context: (1) The creditor cannot demand performance of the obligation; (2) The debtor cannot be deemed negligent, hence cannot be held liable for damages; (3) The creditor is not entitled to request termination of the agreement; (4) In reciprocal agreements, the obligation to provide counterperformance becomes non-applicable. Thus, essentially, the obligation remains, and only its function is lost. The obligation remains particularly during a temporary state of emergency. It resumes functioning once the emergency state concludes.

Classifying the Covid-19 pandemic as a relative force majeure serves to protect the parties due to their inability to meet performance obligations arising from circumstances beyond the debtor's fault or negligence. The primary consequence of successfully establishing relative force majeure is that the affected party is granted relief, such as an extension of the due date for obligations or leniency regarding damages like interest and others from the date of the event (provided that the other party has been notified in a timely manner), until the impediment ceases so that performance or the obligations of that party can be resumed.

The relief provided aligns with the principle of *fiqh*, namely the rule:

مَا أُبِيْحَ لِلضَّرُوْرَةِ يُقَدَّرُ بِقَدْرُهَا

"*Something permitted due to an emergency must be adjusted according to the extent of that emergency*" (Darmawan, 2020).

When connected to the concept of force majeure, this principle aligns with the consequences arising from both absolute and relative force majeure events. This is due to the varying impacts of these two types of force majeure within agreements, which depend on the nature and conditions of the events, thereby necessitating that the consequences imposed be adjusted according to the specific circumstances or severity of the situation.

The government has issued policies to address non-performing loans in financial institutions as a response to the impacts caused by the Covid-19 pandemic and to alleviate the burden on the community, particularly on debtors such as Micro, Small, and Medium Enterprises (MSMEs) affected by Covid-19. One of the measures taken is through credit restructuring.

This policy is regulated by the Financial Services Authority Regulation Number 48/POJK.03/2020 concerning Amendments to the Financial Services Authority

Regulation Number 11/POJK.03/2020 regarding the National Economic Stimulus as a Countercyclical Policy in Response to the Spread of Coronavirus Disease 2019 (Dewi, n.d.). This regulation provides guidelines for banks to implement policies that support economic growth stimulus for debtors, particularly for creditors and debtors impacted by the spread of Covid-19, including MSME debtors. The guidelines continue to consider the principle of prudence (Lubis, 2022).

Overall, there exists guidance for banks (as creditors) which encompasses criteria for debtors and sectors affected by the spread of Covid-19, as well as necessary credit restructuring schemes, such as: (1) MSME debtors who are experiencing difficulties in fulfilling their obligations due to direct or indirect impacts of the Covid-19 outbreak; (2) Debtors who possess positive business prospects and demonstrate good faith to cooperate in the credit restructuring process.

Restructuring does not equate to the elimination of debtor obligations, rather, it involves new adjustments in debt instalment payments or the settlement of agreements due to circumstances that create obstacles. Various restructuring scheme options include interest rate reductions, extensions of repayment terms, reductions in principal arrears, reductions in interest arrears, additions of credit or financing facilities, and conversion of loans or financing into temporary equity (Lubis, 2022).

In Islam, there are also recommendations regarding solutions and steps to be taken if one party experiences difficulties in repaying debts or in fulfilling its obligations due to obstacles, as stated in Al-Qur'an *surah* Al-Baqarah verse 280, which reads:

وَاِنْ كَانَ ذُوْ عُسْرَةٍ فَنَظِرَةٌ اِلٰى مَيْسَرَةٍۗ وَاَنْ تَصَدَّقُوْا خَيْرٌ لَّكُمْ اِنْ كُنْتُمْ تَعْلَمُوْنَ

"*If the debtor is in difficulty, grant him a respite until it is easy for him. And if you remit it by way of charity, that is best for you if you only knew*" (Yayasan Penyelenggara Penterjamah/Pentafsir Al Qur'an, 1961).

This is also found in the Hadith of Bukhari, Number 2077, which states:

تَلَقَّتِ الْمَلاَئِكَةُ رُوحَ رَجُلٍ مِمَّنْ كَانَ قَبْلَكُمْ قَالُوا أَعَمِلْتَ مِنَ الْخَيْرِ شَيْئًا قَالَ كُنْتُ آمُرُ فِتْيَانِي أَنْ يُنْظِرُوا وَيَتَجَاوَزُوا عَنِ الْمُوسِرِ قَالَ قَالَ فَتَجَاوَزُوا عَنْهُ

"*The angels encountered the soul of a man from among those before you. They asked, "Did you do any good deeds?" He replied, "I used to instruct my servants to grant a respite and to forgive the debt for those who were in ease". Thus, Allah forgave him*". (Muhammad bin Ismail Al-Bukhari, 1992).

In light of this, parties affected by the economic consequences of the Covid-19 pandemic may be granted relief, one of which can be achieved through restructuring

schemes. In this context, debtors can fulfill their obligations such as debt repayments by extending the maturity period, and creditors do not incur losses due to the inability of debtors to meet their obligations.

Judicial Considerations Regarding the Acceptance of the Covid-19 Pandemic as a Force Majeure Defense

To ascertain the judicial basis for the acceptance of the Covid-19 pandemic as a force majeure reason in Indonesia, this study analyzes five decisions from the District Courts regarding cases of default in agreements that contain force majeure clauses. The decisions in question are, Decision Number 4/Pdt.G.S/2021/PN Tjs., Decision Number 11/Pdt.G.S/2021/PN Arm., Decision Number 11/Pdt.G/2021/PN Mrt., Decision Number 64/Pdt.G/2021/PN Son., and Decision Number 629/Pdt.G/2020/PN Jkt.Sel.

Decision Number 4/Pdt.G.S/2021/PN Tjs. concerns a simplified case regarding default in a debt agreement. Decision Number 11/Pdt.G.S/2021/PN Arm. relates to a lawsuit concerning default in a multi-purpose financing agreement. Decision Number 11/Pdt.G/2021/PN Mrt. addresses a lawsuit regarding default on the return of cooperative capital contributions. Decision Number 64/Pdt.G.S/2021/PN Son. pertains to a simplified case involving default in a land lease agreement. Decision Number 629/Pdt.G/2020/PN Jkt.Sel. involves a dispute over a sales agreement between a producer and an entrepreneur.

In each case, including the five decisions analyzed, the debtor was granted the opportunity to present a defense, which served as a basis for the judges considerations in rendering their decisions. One of the defenses raised by the debtors across these five decisions involved the assertion of force majeure due to government-imposed restrictions enacted in response to the Covid-19 pandemic.

Regarding the invocation of the Covid-19 pandemic as a force majeure event, there is a commonality across the five decisions, the judges uniformly opined that the Covid-19 pandemic can be considered as a force majeure event, assessing the evidence presented concerning each party's activities and assertions within the agreements while adhering to the provisions of the Civil Code and expert opinions.

In Decision Number 64/Pdt.G.S/2021/PN Son., the judges cited an expert opinion stating that the Covid-19 pandemic cannot be classified as force majeure because it is an event that could have been anticipated and did not occur suddenly like other disasters. However, the judges subsequently evaluated the validity of the force majeure claim based on the impacts of the Covid-19 pandemic. Thus, there are no disparities among the five decisions in terms of the consideration of the force majeure claim. The Covid-19 pandemic continues to be regarded as a force majeure event,

though the acceptance or rejection of the force majeure claim is contingent upon an assessment of the criteria and conditions that characterize force majeure.

Concerning the classification of the Covid-19 pandemic as force majeure based on its nature, three decisions analyzed, namely, Decision Number 4/Pdt.G.S/2021/PN Tjs., Decision Number 11/Pdt.G/2021/PN Mrt., and Decision Number 64/Pdt.G/2021/PN Son. provide explanations regarding this classification based on expert opinions that categorize it into two types, absolute and relative force majeure. However, after including such explanations, it is not discernible how the judges classified the Covid-19 pandemic as force majeure, and consequently, it remains unclear whether the pandemic falls within absolute or relative force majeure.

Among the five decisions mentioned, there is a distinction concerning the acceptance or rejection of the Covid-19 pandemic as a force majeure event. One decision stated that the invocation of force majeure due to the impacts of the Covid-19 pandemic is acceptable, specifically in Decision Number 11/Pdt.G/2021/PN Mrt., while the other four decisions concluded that the force majeure claim was inadmissible and therefore rejected. The variance regarding the acceptance or rejection of the Covid-19 pandemic as a force majeure event is based on the evidence presented during the hearings. In adjudicating the admissibility of force majeure, the judges considered each piece of evidence and testimony in each case based on Articles 1244 and 1245 of the Civil Code as well as expert opinions.

The judges in Decision Number 11/Pdt.G/2021/PN Mrt. ultimately concluded that the agreement's provisions could not be fulfilled by the debtor due to the existence of a force majeure situation. In addition to meeting the elements stipulated in the Civil Code, the force majeure circumstances in this case were incorporated into the Agreement between the Plaintiff and the Defendant, as outlined in Article XV (evidence T-5 through T-7), which states that the impacts of events beyond the control and desires of both parties, such as natural disasters, demonstrations, strikes, and investment failures, are not limited to the criteria of force majeure.

In resolving the dispute in this case, the judges determined that the force majeure situation affecting the agreement was a non-natural disaster, namely the unforeseen and unpredictable Covid-19 pandemic. Therefore, the debtor could not be held liable for consequences arising from factors beyond their control and capability. This pandemic has had a significant impact on the economic situation, both nationally and on the business units operated by the Neo Mitra Usaha Cooperative (the Defendant). The Defendant also made efforts to communicate with cooperative members by convening a Special Members' Meeting, during which it was agreed that profits

(profit-sharing) would continue to be transferred to an e-wallet, though they could not yet be withdrawn.

This has been substantiated by evidence T-8, Article 3 of the Special Regulations of the Management of the Neo Mitra Usaha Cooperative Number 159/KOP.KNMU/V/2020, amending the Special Regulations of the Management of the Neo Mitra Usaha Cooperative Number 158/KOP.KNMU/V/2020 concerning financial management policies in response to national disaster threats and notifications to cooperative members via the WhatsApp application.

The judges' explanation of the elements constituting force majeure includes the following: (1) The occurrence of an unforeseeable event; (2) The event cannot be held accountable to the debtor; (3) No bad faith exists on the part of the affected party; (4) The situation is not due to intentional acts; (5) Due to this situation, the debtor is hindered from performing their obligations; (6) If the obligation were to be fulfilled, it would result in undue sacrifice.

In this case, the Defendant demonstrated that the Covid-19 situation affected the cooperative's operations. The Defendant acted in good faith by attempting to communicate with cooperative members during the Special Members' Meeting, wherein it was agreed that profits (profit-sharing) would continue to be deposited into an e-wallet but could not be withdrawn. Based on these considerations, the invocation of force majeure as a defense by the debtor was acceptable. Conversely, the four other decisions denied the invocation of force majeure based on the Plaintiffs claims that their businesses or activities were impeded due to the Covid-19 pandemic. The judges reasoning for rejecting the force majeure claims varied, depending on the cases, the evidence, and the debtor's good faith.

In Decision Number 4/Pdt.G.S/2021/PN Tjs., the judges stated that, under the category of force majeure, the debtor must prove that the Large-Scale Social Restrictions due to Covid-19 personally hindered them from fulfilling their obligations, thus placing the debtor in a state of force majeure. To substantiate their claims, the debtor was expected to present suitable evidence. In this case, the debtor did not submit supporting evidence for the force majeure claim asserted. In the second decision, Decision Number 11/Pdt.G.S/2021/PN Arm., the judge examined evidence T-2, which comprised payment history, revealing that for the ninth installment, due on June 21, 2019, the debtor was late in making payment on August 23, 2019. This tardiness continued with the nineteenth installment, which was due on April 21, 2020, but paid only on July 21, 2020. Based on these facts, the judge determined that the debtor's inability to timely fulfill their payment obligations had, in fact, arisen prior to the pandemic, as evidenced by Presidential Decree Number 12 of 2020 on the

Declaration of a Non-Natural Disaster of the Spread of the Coronavirus Disease 2019 (Covid-19) relating to the ninth installment.

The debtor also claimed to have endeavored to fulfill their obligations by attempting to make payments, however, the creditor refused to accept payments by blocking transfers. According to the judge, the debtor should have initially made payments using online banking or other methods. Based on the foregoing, it can be concluded that the debtor's inability to pay their installments, citing the Covid-19 pandemic as justification, does not constitute force majeure that would absolve the debtor of liability for their delayed performance, especially since the debtor had already breached their contract even before the onset of the Covid-19 pandemic.

In Decision Number 64/Pdt.G/2021/PN Son., regarding force majeure, the judges asserted that it must be substantiated by evidence of the debtor's financial condition, demonstrating that they could no longer make payments due to government policy closing entertainment venues temporarily. However, based on the trial facts, the debtor could not prove this. In fact, the debtor's business continued operating until July 3, 2021, and it was only on July 28, 2021, that the local government prohibited the operation of that business. Therefore, from April 2020 to April 2021, the debtor should have been able to meet their rental payment obligations before that date. Moreover, on May 10, 2021, the debtor still managed to fulfill the loan agreement by making a payment.

In the final case, Decision Number 629/Pdt.G/2020/PN Jkt.Sel., the judges noted that the creditor (the Plaintiff) had fulfilled their obligations and therefore should not suffer losses resulting from the pandemic. The debtor claimed that they had tried to continue making payments during the pandemic, but they could not provide adequate evidence of their circumstances that justified non-performance.

Based on the judicial considerations in these cases, the judges have consistently addressed the issue of force majeure. Although the Covid-19 pandemic has generally been recognized as a force majeure event, the acceptance of this defense is contingent upon the debtor's ability to demonstrate that the pandemic has directly affected their contractual obligations, and the judges have shown a tendency to reject the force majeure claims where debtors could not substantiate their assertions or demonstrate the existence of a genuine hindrance.

Conclusion

Based on the results of the research, it is evident that the classification of the Covid-19 pandemic as a force majeure can serve as a valid defense against claims of default (*wanprestasi*) in contractual agreements. Although there are differing opinions among legal scholars, there is a consensus supporting the notion that the Covid-19 pandemic constitutes an obstacle that can be categorized as force majeure, particularly considering that this pandemic occurred beyond the control of the parties involved and could not have been anticipated prior to its emergence. It has resulted in the impediment of the parties ability to fulfill their obligations under the contracts in question. However, the impact of the pandemic has not been uniform across all sectors of business, therefore, careful consideration of the force majeure aspect is essential when assessing a situation as force majeure. Further research is needed to explore the factors influencing judges decisions to accept or reject the Covid-19 pandemic as force majeure in cases of default. The considerations made by judges and the evidence presented by the parties during the proceedings, as well as external factors affecting government policy related to the pandemic, can serve as supporting elements in judicial decision-making. Consequently, a profound understanding of the application of force majeure in the context of the Covid-19 pandemic can be effectively applied in legal practice in Indonesia.

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