

Covid-19 Pandemic as Force Majeure to Credit Agreements

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ABSTRACT

Agreements are closely related to human life, including improving the economy. An agreement is an agreement of the parties, including in running the economy, including credit agreements, carried out by customers with banks. The agreed agreement must be executed by the parties. However, sometimes, not all of the contents of the agreement can be implemented, including because of Force Majeure. The study uses normative and empirical legal research to determine whether the COVID-19 pandemic can be categorized as Force Majeure in Credit Agreements. The COVID-19 pandemic can be categorized as Force Majeure in a case study at PT. Bank Rakyat Indonesia (Persero) Tbk. Gombong Branch Office). Since the COVID-19 pandemic can be categorized as a Force Majeure, the credit agreement that has been agreed at the beginning can be restructured. Accordingly, no one has investigated this issue.

Keywords: Force Majeure, Credit Agreement, Covid – 19.

INTRODUCTION

At the end of 2019, the COVID-19 outbreak that emerged shocked and had a widespread impact on people in the world. The State of Indonesia is one of the countries affected by the COVID-19 pandemic, and the Indonesian government responded by issuing a policy in the form of a Presidential Decree of the Republic of Indonesia Number 12 of 2020 concerning the Determination of Non-natural Disasters for the Spread of Corona Virus Disease 2019 (Covid-19) as a National Disaster. The implementation of Large-Scale Social Restrictions (PSBB) or Physical Distancing began to be implemented to avoid the spread of the virus carried out by the Presidential Decree.

The issuance of Presidential Decree Number 12 of 2020 raises various opinions regarding the application of force majeure to agreements as stipulated in Article 1313 of the Civil Code, explaining that the definition of an agreement is an act where one or more people bind themselves to one or more other people.¹ In this case, it can also be referred to as a legal contract, especially in banking credit agreements, which is the implementation of the bank's main function, which is to collect and distribute funds to the public²

Presidential Decree Number 12 of 2020 is the entrance to the application of force majeure, as an incident beyond the affected party's reasonable control that renders the

fulfillment of their contractual duties impossible³). The parties to the agreement create the force majeure provision or force majeure to anticipate unanticipated situations⁴, in credit agreements so that the COVID-19 pandemic can be a reason to free themselves from the obligation to carry out achievements, even the reason for canceling bank credit agreements.

Presidential Decree Number 12 of 2020 is more of a notification of force majeure, so what can be done is to renegotiate or restructure legal agreements and contracts. In the contract, there is a general legal provision that is usually included: force majeure. To avoid default claims, debtors can use force majeure as a justification.⁵

The debate over whether the COVID-19 pandemic can be the reason for force majeure circumstances is very important to straighten out because it will impact the obligation to fulfill achievements in legal agreements, especially credit agreements. Before answering the debate above, you should first understand the basic concept of force majeure. It is a reason for defense from the debtor that the non-implementation of achievement is caused by unexpected things where the debtor cannot do anything about the circumstances or events that arise. With force majeure, the circumstances experienced by the debtor are not declared a default, making the debtor independent of payment of losses and sanctions.

Force majeure regulation can be seen in several laws and regulations in Indonesia, which are as follows.

1. Law Number 3 of 2020 concerning Amendments to

¹ Salim HS, *Hukum Kontrak, Perjanjian, Pinjaman, Dan Hibah* (Jakarta: Sinar Grafika, 2015).

² Farah Wulandari Thariq, Daffa At, Pangestuty, "DAMPAK PERPANJANGAN RELAKSASI KREDIT TERHADAP LIKUIDITAS PERBANKAN SAAT PAN- DEMI COVID-19" 1, no. 3 (2022): 423–36.

³ Bhuwana Fairuz Kusumawardhani, "Covid-19 Pandemic As Force Majeure: It'S Enforceability on the Failure To Fulfill Contractual Obligations and the Failure To Presents Complying Documents in Letter of Credit," *Yustisia Jurnal Hukum* 10, no. 1 (2021): 16, <https://doi.org/10.20961/yustisia.v10i1.46532>.

⁴ Pita Permatasari, "FORCE MAJEURE CLAUSULES DUE TO COVID-19 IN BANK CREDIT AGREEMENTS Pita Permatasari," *Angewandte Chemie International Edition*, 6(11), 951–952. 3, no. 1 (2018): 10–27, <https://medium.com/@arifwicaksanaa/pengertian-use-case-a7e576e1b6bf>.

⁵ Diman Ade Mulada Samudra, Wahyu, "PENERAPAN KLAUSUL FORCE MAJEURE DALAM KONTRAK BISNIS JASA EKSPEDISI DI MASA PANDEMI COVID-19B(STUDI PADA PT. POS INDONESIA CABANG SELONG)," *Jurnal Commerce Law INDONESIA* 2, no. 1 (2022).

Law Number 4 of 2009 concerning Mineral and Coal Mining.

Some things that are classified as force majeure are:

- a. War,
 - b. civil unrest,
 - c. Insurrection,
 - d. Epidemic,
 - e. Earthquake,
 - f. Flood,
 - g. Fire,
 - h. Natural or non-natural disasters beyond human capacity.
2. Presidential Regulation Number 16 of 2018 concerning Procurement of Government Goods/Services.
- This Presidential Regulation explained that the force majeure occurs against the will of the parties to the contract and cannot be foreseen, so the obligations specified in the contract cannot be fulfilled.
3. Regulation of the Minister of Energy and Mineral Resources Number 49 of 2017 concerning Amendments to the Regulation of the Minister of Energy and Mineral Resources Number 10 of 2017 concerning Principles in Power Purchase Agreements.
- In this Ministerial Regulation, if force majeure occurs, the parties can be released from their obligations to fulfill the performance in the contract. The force majeure in question is force majeure caused by natural disasters and changes in laws and regulations.
4. Circular Letter Number 15 of 2019 concerning the Implementation of Flights at Force Majeure
- Force majeure is an event that occurs beyond human capacity and cannot be avoided so that an activity cannot be carried out or cannot be carried out properly. Conditions classified as force majeure which is an external factor⁶ are:
- a. Natural disasters, among others: Floods, earthquakes, smoke due to forest fires and land. Typhoons, erupting mountains, tsunamis and landslides;
 - b. State of war;
 - c. Riots and riots.

Based on Article 1244 of the Civil Code, several details can be known on how force majeure can be applied. First, what makes force majeure occur must be caused by "something unexpected" by the parties or not be a basic assumption when the parties make an agreement. Second, referring to the phrase "which cannot be accounted to him," force majeure can occur if an existing event cannot be accounted for by the party who must perform the performance (debtor). Third, referring to the sentence "although there is no bad faith to him," an event that occurs does not occur because of the bad faith of the parties. In addition to Article 1244 of the Civil Code, Article 1245 of the Civil Code also explains how force

majeure is applied. In the event of force majeure, the parties cannot claim compensation. The burden of proving whether the default was caused by force majeure is left to the debtor. Based on various provisions regarding force majeure, it can be concluded that *force majeure* can be grouped into the following:⁷

1. Force majeure due to natural conditions is a state in which an event occurs due to natural factors that humans cannot predict and avoid because of their nature without any element of intentionality, for example, tsunami disasters, earthquakes, erupting mountains, landslides, etc.
2. Force majeure due to emergencies, when an event occurs due to unnatural special circumstances, occurs immediately and cannot be predicted in advance. For example, there are wars, invasions, disease outbreaks/pandemics, blockades, terrorism, mass riots, strikes, and so on.
3. Force majeure due to economic conditions, namely conditions that occur due to changes in the economic sector, resulting in monetary turmoil that causes an increase in the price of basic goods, bank fees, and so on, which causes non-fulfillment of performance.
4. Force majeure due to government policy, which is a situation arising from changes in government policy, removal, or issuance of new government policies that have an impact on ongoing activities. For example, prohibitions on carrying out import activities, policy changes in the tax sector, etc.
5. Force majeure due to unforeseen technical circumstances that occur due to damage or deterioration in the function of technical or operational equipment that is very important for the company's production process and cannot be predicted in advance, for example, the breakdown of the main machine causes the cessation of the production process of an enterprise.

Article 1244 jo Article 1245 of the Civil Code categorizes what circumstances can be categorized as force majeure. 3 (three) elements can determine whether an event can be used as a reason for applying force majeure. The three elements are identified to assess whether the COVID-19 pandemic outbreak can be classified as force majeure, which are as follows.

1. Unfulfilled achievements

An event can be categorized as force *majeure* if the circumstances prevent the debtor from fulfilling his performance. The Covid-19 pandemic has caused many sectors, especially in terms of human movement (mobility). Moreover, the government implements the Large-Scale Social Restrictions (PSBB) policy. A comprehensive approach is needed to assess whether the COVID-19 pandemic prevents debtors from fulfilling their achievements in bank credit agreements. In MSME credit agreements, for example, debtors who have businesses in medical devices and pharmacies will experience an increase in

⁶ Sri Rahmany, "INTERNAL CONTROL SYSTEM AND FINANCING RISK MANAGEMENT SYSTEM AT SHARIA BANK Sri," *Paper Knowledge . Toward a Media History of Documents*, 2014, 193–222.

⁷ R. S. S. Soemadipradja, *Penjelasan Hukum Tentang Keadaan Memaksa*, (Jakarta,: Nasional Legal Reform Program, 2010).

income, in contrast to debtors who have businesses in the food and beverage sector who experience a decrease in income. It is important to underline that it can be used as an indicator to assess whether credit customers can be declared to experience force majeure.

2. Causes beyond the control of the debtor

The sudden emergence of the COVID-19 pandemic outbreak is a condition that creditors and debtors cannot control. No one expected the emergence of the Covid-19 pandemic outbreak to occur. Therefore, banking credit customers as debtors cannot be held accountable if they cannot fulfill their achievements.

3. Because it cannot be predicted in advance

The COVID-19 pandemic outbreak is an event that comes suddenly, and no one can predict the emergence of the COVID-19 outbreak beforehand. The spread of the outbreak was so rapid that the World Health Organization (WHO) declared COVID-19 a global pandemic on March 9, 2020. As an affected country, Indonesia also responded by issuing Presidential Decree Number 12 of 2020 concerning the Determination of Non-Natural Disasters for the Spread of Coronavirus Disease 2019 (COVID-19) as a National Disaster. Therefore, the COVID-19 pandemic is unexpected, so banking credit customers as debtors cannot be blamed if they cannot fulfill their achievements.

Force majeure situation: If the condition meets the three elements above (points a, b, and c), then the condition is classified as absolute force majeure. Absolute force majeure, or impossibility, is a condition where achievements by the debtor are impossible to fulfill regardless of the circumstances. But if only points B and C are met from the three points above, the situation is classified as relative force majeure.

Relative force majeure, or impracticality, is a condition where the fulfillment of achievements cannot be carried out normally but can still be done in an abnormal way.

The state of the COVID-19 pandemic can generally be classified as relative force majeure. This is due to:

First, not all debtors have difficulty fulfilling credit agreement achievements during the COVID-19. Second, the Covid-19 pandemic has not caused the object of the agreement on the credit agreement to be destroyed or destroyed. Third, the COVID-19 pandemic will definitely end. Although it cannot be predicted when the COVID-19 pandemic outbreak will stop, when the situation gradually improves, debtors can fulfill their achievements back to normal.

Then, debtors who have difficulty fulfilling their obligations to bank credit agreements during the COVID-19 pandemic can fulfill their achievements in an unusual way by restructuring bank credit agreements as a form of relative force majeure circumstances. In the banking credit agreement itself, creditors have often carried out the term restructuring or renegotiating credit agreements to debtors who have difficulty fulfilling their obligations

so that bad loans do not occur.

Credit Restructuring as a Resolution of Credit Problems During the COVID-19 Pandemic in Credit Agreements Restructuring credit agreements is one way that debtors who experience difficulties in paying their obligations can be taken to avoid bad debts. Debtors experience difficulties fulfilling their achievements due to the decline in income due to the COVID-19 pandemic. The current pandemic phenomenon cannot absolve the parties' commitments under the agreement based on exemption from compensation due to force majeure⁸. Credit restructuring is a form of force majeure application that is relative in nature so that it can make a way out for debtors who have difficulty fulfilling their obligations, where this is between the customer and the debtor.

As one of the efforts to overcome these problems, the government, through the Financial Services Authority (OJK), issued Financial Services Authority Regulation (POJK) Number 11/POJK.03/2020 concerning National Economic Stimulus as a *Countercyclical Policy* for the Impact of the Spread of *Coronavirus Disease 2019* (Covid-19) issued on March 13, 2020. However, it did not last long. On December 1, 2020, the regulation was amended through the Financial Services Authority Regulation (POJK) Number 48/POJK.03/2020 concerning Amendments to the Financial Services Authority Regulation (POJK) Number 11/POJK.03/2020 concerning National Economic Stimulus as a *Countercyclical Policy* for the Impact of the Spread of *Coronavirus Disease 2019* (Covid-19). The regulation was then amended again through the Financial Services Authority Regulation (POJK) Number 17/POJK.03/2021 concerning the Second Amendment to the Financial Services Authority Regulation Number 11/POJK.03/2020 concerning National Economic Stimulus as a *Countercyclical Policy* for the Impact of the Spread of *Coronavirus Disease 2019*. The changes are intended to extend the regulation term until March 31, 2023.

RESULT AND DISCUSSION

Application of Credit Agreement Restructuring as a Form of Force Majeure

Broadly speaking, POJK Number 17 of 2021 indicates that banks can make efforts to restructure credit agreements for debtors who are having problems meeting their obligations as the consequence of their debts spread of the COVID-19 pandemic outbreak. In essence, credit agreement restructuring can be interpreted as a form of force majeure application or a form of relief by banks for debtors who experience difficulties paying obligations. Based on Article 2 paragraph (1) of POJK Number 48 of 2020, it is affirmed that "The Bank may implement policies that support economic growth stimulus against:

1. Debtors affected by the spread of coronavirus disease 2019 (COVID-19) include debtors of micro, small and medium enterprises; and

⁸ Putri and Mutia Kartika, "IMPLICATIONS OF THE COVID-19 PANDEMIC ON THE IMPLEMENTATION BUSINESS

CONTRACTS," *Indonesia Private Law Review*. 4, no. 1 (2023): 16, <https://doi.org/10.1108/JAAR-12-2021-0333>.



2. Conventional Commercial Banks, Sharia Commercial Banks, or Sharia Business Units as a result of the spread of coronavirus disease 2019 (COVID-19).

Implementation of risk management as stipulated in POJK Number 18/POJK.03/2016 concerning the Application of Risk Management for Commercial Banks. The application of risk management is also contained in Article 2, paragraph (4) of POJK Number 48 of 2020 as follows:

1. Have guidelines to determine debtors affected by the spread of coronavirus disease 2019 (COVID-19) that contain the least:
 - a. Criteria for debtors determined to be affected by coronavirus disease 2019 (COVID-19); and
 - b. Sectors affected by coronavirus disease 2019 (COVID-19).
2. Assessing debtors who are able to continue to survive the impact of coronavirus disease 2019 (COVID-19) and still have business prospects so that credit or financing restructuring can be provided in accordance with this Financial Services Authority Regulation;
3. Forming reserves for debtors who are considered no longer able to survive after credit or financing restructuring is carried out in accordance with this Financial Services Authority Regulation;
4. Considering capital resilience and taking into account additional reserve formation to anticipate potential deterioration in credit quality or restructured financing in the event that the Bank will distribute *dividends* and/or *tantiem* and
5. Conduct periodic stress tests on potential deterioration in credit quality or restructured financing and its effect on the Bank's liquidity and capital.

Before the work agreement was implemented, unforeseen circumstances arose due to Government Regulation Number 21 of 2020 concerning Large-Scale Social Restriction (PSBB), followed by Emergency Enforcement of Restrictions on Public Activities (PPKM), as an effort not to spread Corona Virus Disease 2019⁹. Construction service suppliers cite social isolation and working from home as the main excuses for failing to fulfill their duties.¹⁰

CONCLUSION

The COVID-19 pandemic is one of the reasons for Force Majeure To Credit Agreements, and it can be used as a justification for applying for restructuring in the payment of a credit in Banking.

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